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DEFINITIONS

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# TABLE OF ABBREVIATIONS.

## A

Abb. Adm.....Abbott's Admiralty (U. S.)  
 Abb. Dec.....Abbott's Decisions (N. Y.)  
 Abb. N. C.....Abbott's New Cases (N. Y.)  
 Abbott's Law Dict..Abbott's Law Dictionary.  
 Abb. Prac.....Abbott's Practice (N. Y.)  
 Abb. Prac. (N. S.)..Abbott's Practice, New Series (N. Y.)  
 Abb. Shipp.....Abbott on Shipping.  
 Abb. (U. S.).....Abbott's United States.  
 Abr. ....Abridgment.  
 Adams .....Adams (N. H.)  
 Adams, Eq.....Adams' Equity.  
 Add .....Addams' Ecclesiastical Reports.  
 Add. ....Addison (Pa.)  
 Add. Cont. ....Addison on Contracts.  
 Add. Ecc.....Addams' Ecclesiastical Reports.  
 Add. Torts .....Addison on Torts.  
 Adol. & E.....Adolphus and Ellis' English King's Bench Reports.  
 Adol. & E. (N. S.)..Adolphus and Ellis' English Queen's Bench Reports, New Series.  
 Aik Dig.....Aikin's Digest of Laws (Ala.)  
 Aikens .....Aikens (Vt.)  
 A. K. Marsh.....A. K. Marshall (Ky.)  
 Ala. ....Alabama.  
 Alb. Law J.....Albany Law Journal.  
 Alger's Law Promoters & Prom.  
 Corp. ....Alger's Law in Relation to Promoters and Promotion of Corporations.  
 Allen .....Allen (Mass.)  
 Allison's Am. Dict..Allison's American Dictionary.  
 Amb. ....Ambler's English Chancery Reports.  
 Am. Bankr. Reg....National Bankruptcy Register (U. S.)  
 Am. Bankr. Rep....American Bankruptcy Reports.  
 Am. Dec.....American Decisions.  
 Am. Ed.....American Edition.  
 Am. Enc. Dict.....American Encyclopedic Dictionary.  
 Amend. ....Amendment.  
 Am. Eng. Enc. Law..American and English Encyclopedia of Law.  
 Am. Ins.....Arnold on Marine Insurance.  
 Am. Law J.....American Law Journal.  
 Am. Law Rec.....American Law Record (Cin.)  
 Am. Law Reg. (N. S.) .....American Law Register, New Series.  
 Am. Law Reg. (O. S.) .....American Law Register, Old Series.  
 Am. Law Rev.....American Law Review.  
 Am. Law T. Rep....American Law Times Reports.  
 Am. Lead. Cas....American Leading Cases (Hare & Wallace's).  
 Amos & F. Fixt...Amos and Ferard on Fixtures.  
 Am. Reg.....American Law Register.  
 Am. Rep.....American Reports.  
 Am. St. Rep.....American State Reports.

6 Wds. & P.

Am. & Eng. Dec. Eq..American and English Decisions in Equity.  
 Am. & Eng. Enc. Law .....American and English Encyclopedia of Law.  
 Am. & Eng. Ry. Cas..American and English Railway Cases.  
 Anc. Charters.....Ancient Charters (1692).  
 And. Law Dict.....Anderson's Law Dictionary.  
 Ang. Car.....Angell on Carriers.  
 Ang. Highw.....Angell & Durfee on Highways.  
 Ang. Ins.....Angell on Insurance.  
 Ang. Lim.....Angell on Limitation of Actions.  
 Ang. Tide Waters...Angell on Tide Waters.  
 Ang. Waters.....Angell on Tide Waters.  
 Ang. & A. Corp....Angell and Ames on Corporations.  
 Ann. ....Queen Anne (as 8 Ann. c. 19).  
 Ann. Code.....Annotated Code.  
 Ann. Codes & St...Bellinger and Cotton's Annotated Codes and Statutes (Or.)  
 Ann. St.....Annotated Statutes.  
 Ann. St. Ind. T....Annotated Statutes of Indian Territory.  
 Anstr. ....Anstruther's English Exchequer Reports.  
 Anth. N. P.....Anthon's Nisi Prius Reports (N. Y.)  
 App. ....Appleton (Me.)  
 App. Cas.....Appeal Cases, English Law Reports.  
 App. D. C.....Appeal Cases (D. C.)  
 App. Div.....Appellate Division (N. Y.)  
 Archb. Cr. Law....Archbold's Pleading and Evidence in Criminal Cases.  
 Archb. Cr. Prac. & Pl. ....Archbold's Pleading and Evidence in Criminal Cases.  
 Arch. Cr. Pl.....Archbold's Criminal Pleading.  
 Arch. N. P.....Archbold's Law of Nisi Prius.  
 Ariz. ....Arizona.  
 Ark. ....Arkansas.  
 Arn. Ins.....Arnold's Marine Insurance.  
 Ashm. ....Ashmead (Pa.)  
 Assem. ....Assembly (State Legislature).  
 Atk. ....Atkins' English Chancery Reports.  
 Atl. ....Atlantic Reporter.  
 Aust. Jur.....Austin's Jurisprudence.

## B

Bac. Abr. ....Bacon's Abridgment.  
 Bac. Ins.....Bacon on Benefit Societies and Life Insurance.  
 Bac. Max.....Bacon's Maxims of the Law.  
 Bacon, Ben. Soc....Bacon on Benefit Societies and Life Insurance.  
 Bail. ....Bailey (S. C.)  
 Bailey .....Bailey (S. C.)  
 Bailey, Dict.....Nathan Bailey's English Dictionary.  
 Bailey, Eq.....Bailey's Equity (S. C.)

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Bailey, Mast. Liab..	Bailey's Law of Master's Liability for Injuries to Servant.	Bigelow, Lead. Cas..	Bigelow's Leading Cases on Bills and Notes, Torts, or Wills.
Bainb. Mines.....	Bainbridge on Mines and Minerals.	Big. Torts.....	Bigelow on Torts.
Baldw. ....	Baldwin (U. S.)	Bin. ....	Binney (Pa.)
Ballinger's Ann.	Ballinger's Annotated Codes & St.....	Bing. ....	Bingham's English Common Pleas Reports.
Bankr. Act.....	Bankruptcy Act.	Bing. N. C.....	Bingham's New Cases, English Common Pleas.
Bankr. Form.....	Bankruptcy Forms.	Bish. Cont.....	Bishop on Contracts.
Ban. & A.....	Banning & Arden's Patent Cases (U. S.)	Bish. Cr. Law.....	Bishop on Criminal Law.
Barb. ....	Barbour (N. Y.)	Bish. Cr. Proc.....	Bishop on Criminal Procedure.
Barb. (Ark.).....	Barber (Ark.)	Bish. Eq.....	Bispham's Principles of Equity.
Barb. Ch.....	Barbour's Chancery (N. Y.)	Bish. Mar., Div. & Sep. ....	Bishop on Marriage, Divorce, and Separation.
Barb. Ch. Pr.....	Barbour's Chancery Practice.	Bish. Mar. & Div...	Bishop on Marriage and Divorce.
Barb. Cr. Law....	Barbour's Criminal Law.	Bish. New Cr. Law..	Bishop's New Criminal Law.
Barn. & Adol.....	Barnewall and Adolphus' English King's Bench Reports.	Bish. New Cr. Prac..	Bishop's New Criminal Procedure.
Barn. & Ald.....	Barnewall and Alderson's English King's Bench Reports.	Bish. Non-Cont. Law .....	Bishop's on Non-Contract Law, Rights and Torts.
Barn. & C.....	Barnewall and Cresswell's English King's Bench Reports.	Bish. St. Crimes....	Bishop on Statutory Crimes.
Barb. & C. Ky. St.	Barbour and Carroll's Kentucky Statutes.	Bisp. Eq.....	Bispham's Principles of Equity.
Barn. & S.....	Best and Smith's English Queen's Bench Reports.	Biss. ....	Bissell (U. S.)
Barr .....	Barr (Pa.)	Bissett, Est.....	Bisset on Estates for Life.
Bates' Ann. St....	Bates' Annotated Revised Statutes (Ohio).	Bl. ....	Henry Blackstone's English Common Pleas Reports.
Bates, Partnership..	Bates' Law of Partnership.	Black .....	Black (U. S.)
Bat. Rev. St.....	Battle's Revisal of the Public Statutes of North Carolina.	Blackb. Sales.....	Blackburn on Sales.
Battle's Revisal....	Battle's Revisal of the Public Statutes of North Carolina.	Black. Com.....	Blackstone's Commentaries on the Laws of England.
Batts' Ann. Civ. St. }	Batts' Annotated Revised Statutes (Tex.)	Black, Const. Law..	Black on Constitutional Law.
Batts' Rev. St. }	Baxter (Tenn.)	Black. Dict.....	Black's Law Dictionary.
Bart. ....	Bay (S. C.)	Blackf. ....	Blackford (Ind.)
Bay .....	Bayley on Bills.	Black, Interp. Laws..	Black on the Construction and Interpretation of Laws.
Bayley, Bills.....	Bayley on Bills.	Black, Judg. ....	Black on Judgments.
Baylies, Sur.....	Baylies on Sureties and Guarantors.	Black, Law Dict....	Black's Law Dictionary.
Beach, Contrib. Neg..	Beach on Contributory Negligence.	Bland .....	Bland (Md.)
Beach, Inj.....	Beach on Injunctions.	Blatchf. ....	Blatchford (U. S.)
Beach, Mod. Eq. Jur..	Beach's Commentaries on Modern Equity Jurisprudence.	Blatchf. Prize Cas..	Blatchford's Prize Cases (U. S.)
Beach, Priv. Corp...	Beach on Private Corporations.	Blatchf. & H.....	Blatchford & Howland (U. S.)
Beach, Pub. Corp...	Beach on Public Corporations.	Bl. Comm.....	Blackstone's Commentaries on the Laws of England.
Beasl. ....	Beasley (N. J.)	Bliss, Code Pl....	Bliss on Code Pleading.
Beav. ....	Beavan's English Rolls Court Reports.	Bliss, Ins.....	Bliss on Life Insurance.
Beavan, Ch.....	Beavan's English Rolls Court Reports.	B. Mon.....	B. Monroe (Ky.)
Beck, Med. Jur.....	Beck's Medical Jurisprudence.	Bond .....	Bond (U. S.)
Bee .....	Bee (U. S.)	Bosw. ....	Bosworth (N. Y.)
Bell, Comm.....	Bell's Commentaries on the Law of Scotland.	Bos. & P.....	Bosanquet and Puller's English Common Pleas Reports.
Ben. ....	Benedict (U. S.)	Bos. & P. (N. R.)..	Bosanquet and Puller's New Reports, English Common Pleas.
Benj. Sales.....	Benjamin on Sales.	Bouv. Inst.....	Bouvier's Institutes of American Law.
Benn. ....	Bennett (Cal.)	Bouv. Law Dict....	Bouvier's Law Dictionary.
Benth. Jud. Ev....	Bentham's Judicial Evidence.	Bradf. Sur. ....	Bradford's Surrogate (N. Y.)
Best, Ev.....	Best on Evidence.	Bradw. ....	Bradwell (Ill.)
Best, Presumptions..	Best on Presumptions of Law and Fact.	Branch .....	Branch (Fla.)
Best & S.....	Best and Smith's English Queen's Bench Reports.	Brandt, Sur.....	Brandt on Suretyship and Guaranty.
Bibb .....	Bibb (Ky.)	Brayt. ....	Brayton (Vt.)
Bid. Ins.....	Biddle on Insurance.	Breese .....	Breese (Ill.)
Bid. War. Sale Chat..	Biddle on Warranties in Sale of Chattels.	Brev. ....	Brevard (S. C.)
Big. ....	Bignell's Reports (India).	Brev. Dig.....	Brevard's Digest of the Public Statute Law (S. C.)
Bigelow, Estop....	Bigelow on Estoppel.	Brewst. ....	Brewster (Pa.)
		Brick. Dig.....	Brickell's Digest (Ala.)
		Brightly, Dig.....	Brightly's Analytical Digest of the Laws of the United States.

Brightly, <b>Elect. Cas.</b> .....	Brightly's Leading Election Cases (Pa.)	Cal. ....	California.
Brightly, <b>N. P.</b> .....	Brightly's Nisi Prius Reports (Pa.)	Call ....	Call (Va.)
Bro. <b>C. C.</b> .....	Brown's English Chancery Cases or Reports.	Calvin, <b>Lex.</b> .....	Calvin's <b>Lexicon Juridicum</b> .
Bro. <b>Civ. Law</b> .....	Browne's Civil and Admiralty Law.	Calv. <b>Parties</b> .....	Calvert's <b>Parties to Suits in Equity</b> .
Brock. ....	Brockenbrough (U. S.)	Camp. ....	Campbell's English Nisi Prius Reports.
Brock. & <b>H.</b> .....	Brockenbrough & Holmes (Va.)	Cam. & <b>N.</b> .....	Cameron & Norwood's Conference (N. C.)
Brod. & <b>B.</b> .....	Broderip & Bingham's English Common Pleas Reports.	Car. ....	Carolus (as 22 & 23 Car. II.)
Brooke, <b>Abr.</b> .....	Brooke's Abridgment.	Car. <b>Law Repos.</b> ...	Carolina Law Repository (N. C.)
Broom, <b>Leg. Max.</b> ...	Broom's Legal Maxims.	Carr. & <b>M.</b> .....	Carrington and Marshman's English Nisi Prius Reports.
Broom's <b>Com. Law.</b> ...	Broom's Commentaries on the Common Law.	Cart. ....	Carter (Ind.)
Broom & <b>Hadley's</b>		Carth. ....	Carthew's English King's Bench Reports.
Comm. ....	Broom and Hadley's Commentaries on the Laws of England.	Carv. <b>Carr.</b> .....	Carver's Treatise on the Law Relating to the Carriage of Goods by Sea.
Brown, <b>Adm.</b> .....	Brown's Admiralty (U. S.)	<b>Car. &amp; K.</b> .....	Carrington and Kirwan's English Nisi Prius Reports.
Brown, <b>Ch.</b> .....	Brown's English Chancery Reports.	<b>Car. &amp; P.</b> .....	Carrington & Payne's English Nisi Prius Reports.
Brown, <b>Civ. Law</b> ...	Browne's Civil and Admiralty Law.	Casey ....	Casey (Pa.)
Browne ....	Browne (Pa.)	Ca. <b>temp. Hard.</b> ....	Cases temp. Hardwicke by Lee and Hardwicke.
Browne, <b>Jud. Interp.</b> ...	Browne's Judicial Interpretation of Common Words and Phrases.	<b>C. B.</b> ....	English Common Bench Reports (Manning, Granger & Scott).
Browne's <b>Roman</b>		<b>C. B. (N. S.)</b> .....	English Common Bench Reports, New Series, by John Scott.
<b>Law</b> .....	Brown's Epitome and Analysis of Saligny's Treatise on Obligations in Roman Law.	<b>C. C. A.</b> .....	Circuit Court of Appeals (U. S.)
Browne, <b>St. Frauds.</b> ...	Browne on Statute of Frauds.	<b>C. E. Green</b> .....	C. E. Green (N. J.)
Brownl. & <b>G.</b> .....	Brownlow and Goldsborough, English Common Pleas Reports.	<b>Cent. Dict.</b> .....	Century Dictionary.
Brunner, <b>Col. Cas.</b> ...	Brunner's Collected Cases (U. S.)	<b>Cent. Law J.</b> .....	Central Law Journal, St. Louis, Mo.
Bull. <b>N. P.</b> .....	Buller's Law of Nisi Prius.	Chambers' <b>Cyclopæ-</b>	
Bulst. ....	Bulstrode's English King's Bench Reports.	dia .....	Ephraim Chambers' English Cyclopædia.
Bump. <b>Fraud. Conv.</b> ...	Bump on Fraudulent Conveyances.	Chand. ....	Chandler (Wis.)
Burge, <b>Sur.</b> .....	Burge on Suretyship.	Chan. <b>Sentinel</b> ....	Chancery Sentinel (N. Y.)
Burn. ....	Burnett (Wis.)	Ch. <b>App.</b> .....	Chancery Appeal Cases—English Law Reports.
Burn, <b>J. P.</b> .....	Burn's Justice of the Peace.	Charlt., <b>R. M.</b> .....	R. M. Charlton (Ga.)
Burns' <b>Ann. St.</b> ....	Burns' Annotated Statutes (Ind.)	Charlt., <b>T. U. P.</b> ...	T. U. P. Charlton (Ga.)
Burns' <b>Rev. St.</b> ....	Burns' Annotated Statutes (Ind.)	Chase ....	Chase (U. S.)
Burr. ....	Burrows' English King's Bench Reports.	Chase, <b>Steph. Dig.</b>	
Burrill, <b>Assignm.</b> ...	Burrill on Assignments.	Ev. ....	Chase on Stephens' Digest of Evidence.
Burrill, <b>Circ. Ev.</b> ...	Burrill on Circumstantial Evidence.	Ch. <b>Cas.</b> .....	English Cases in Chancery.
Burr. <b>L. Dict.</b> .....	Burrill's Law Dictionary.	Ch. <b>Div.</b> .....	Chancery Division, English Law Reports.
Burr. <b>Pr.</b> .....	Burrill's New York Practice.	Chest. <b>Co. Rep.</b> ....	Chæster County Reports (Pa.)
Burt. <b>Real Prop.</b> ...	Burton on Real Property.	Cheves ....	Cheves (S. C.)
Busb. ....	Busbee (N. C.)	Cheves, <b>Eq.</b> .....	Cheves' Equity (S. C.)
Busb. <b>Eq.</b> .....	Busbee's Equity (N. C.)	Chi. <b>Leg. N.</b> .....	Chicago Legal News (Ill.)
Bush ....	Bush (Ky.)	Chip., <b>D.</b> .....	D. Chipman (Vt.)
<b>B. &amp; Ald.</b> .....	Barnewall and Alderson's English King's Bench Reports.	Chip., <b>N.</b> .....	N. Chipman (Vt.)
<b>B. &amp; C.</b> .....	Barnewall and Cresswell's English King's Bench Reports.	Chit. <b>Bills</b> .....	Chitty on Bills.
<b>B. &amp; C. Comp.</b> ....	Bellinger and Cotton's Annotated Codes and Statutes (Or.)	Chit. <b>Bl. Comm.</b> ....	Chitty's Edition of Blackstone's Commentaries.
<b>B. &amp; P.</b> .....	Bosanquet & Puller's English Common Pleas Reports.	Chit. <b>Cont.</b> .....	Chitty on Contracts.
		Chit. <b>Cr. Law</b> ....	Chitty's Criminal Law.
		Chit. <b>Gen. Pr.</b> .....	Chitty's General Practice.
		Chit. <b>Pl.</b> .....	Chitty on Pleading.
		Chit. <b>Pr.</b> .....	Chitty's General Practice.
		Chitty ....	Chitty on Bills.
		Chitty, <b>Bl. Comm.</b> ...	Chitty's Edition of Blackstone's Commentaries.
		Ch. <b>Pl.</b> .....	Chitty on Pleading.
		Cin. <b>R.</b> .....	Cincinnati Superior Court Reports (Ohio)
		Cin. <b>Super. Ct.</b>	
		Rep'r .....	Cincinnati Superior Court Reporter (Ohio)
<b>Cab. &amp; El.</b> .....	Cababé and Ellis' Queen's Bench Reports.	Cir. <b>Ct. Dec.</b> .....	Circuit Decisions (Ohio)
Caines ....	Caines (N. Y.)	Cir. <b>Ct. R.</b> .....	Circuit Court Reports (Ohio)
Caines, <b>Cas.</b> .....	Caines' Cases (N. Y.)	City <b>Ct. R.</b> .....	City Court Reports (N. Y.)

## C

City Ct. R. Supp...	City Court Reports, Supplement (N. Y.)	Const. Amend.....	Amendment to Constitution.
City H. Rec.....	City Hall Recorder (N. Y.)	Const. U. S. Amend.	Amendment to the Constitution of the United States.
Civ. Code.....	Civil Code.	Con. Sur.....	Connolly's Surrogate (N. Y.)
Civ. Code Practice...	Civil Code of Practice.	Cooke .....	Cooke (Tenn.)
Civ. Prac. Act.....	Civil Practice Act.	Cooke, Ins.....	Cooke on Life Insurance.
Civ. Proc. R.....	Civil Procedure Reports (N. Y.)	Cook's Pen. Code...	Cook's Penal Code (N. Y.)
C. L.....	English Common Law Reports (American Reprint).	Cook, Stock, Stockh. & Corp. Law.....	Cook on Stock, Stockholders, and General Corporation Law.
Clancy, Husb. & W. }	Clancy's Treatise of the Rights, Duties, and Liabilities of Husband and Wife.	Cooley, Bl. Comm...	Cooley's Edition of Blackstone's Commentaries.
Clark .....	Clark (Pa.)	Cooley, Const. Law...	Cooley's Constitutional Law.
Clarke .....	Clarke (Iowa)	Cooley, Const. Lim.	Cooley's Constitutional Limitations.
Clarke, Ch.....	Clarke's Chancery (N. Y.)	Cooley, Tax'n .....	Cooley on Taxation.
Clark's Code.....	Clark's Annotated Code of Civil Procedure (N. C.)	Cooley, Torts.....	Cooley on Torts.
Clark & F.....	Clark and Fennelly's House of Lords Reports.	Coop. Eq. Pl.....	Cooper's Equity Pleading.
Clay's Dig.....	Clay's Digest of Laws of Alabama.	Copp, Pub. Land Laws .....	Copp's United States Public Land Laws.
Cleve. Law Rec....	Cleveland Law Recorder (Ohio)	Co. Rep.....	Coke's English King's Bench Reports.
Cleve. Law Rep....	Cleveland Law Reporter (Ohio)	Corn. Deeds .....	Cornish on Purchase Deeds.
Clev. Insan.....	Clevenger's Medical Jurisprudence of Insanity.	Cornish, Purch. Deeds .....	Cornish on Purchase Deeds.
Cliff. ....	Clifford (U. S.)	Cow. ....	Cowen (N. Y.)
Co. ....	Coke's English King's Bench Reports.	Cow. Cr. Rep.....	Cowen's Criminal Reports (N. Y.)
Cobb, Dig.....	Cobb's Digest of Statute Laws (Ga.)	Cowell .....	Cowell's Law Dictionary.
Cobbey, Repl.....	Cobbey's Practical Treatise on the Law of Replevin.	Cowp. ....	Cowper's English King's Bench Reports.
Cobbey's Ann. St..	Cobbey's Annotated Statutes (Neb.)	Cox .....	Cox (Ark.)
Code Civ. Proc....	Code of Civil Procedure.	Cox .....	Cox's English Chancery Cases.
Code Cr. Proc.....	Code of Criminal Procedure.	Cox, C. C.....	Cox's English Criminal Cases.
Code Gen. Laws....	Code of General Laws.	Cox, Cr. Cas.....	Cox's English Criminal Cases.
Code Prac.....	Code of Practice.	Coxe .....	Coxe (N. J.)
Code Proc. ....	Code of Procedure.	C. P. Div.....	Common Pleas Division, English Law Reports.
Code Pub. Gen. Laws .....	Code of Public General Laws.	C. P. Rep.....	Common Pleas Reporter (Pa.)
Code Pub. Loc. Laws .....	Code of Public Local Laws.	Crabbe .....	Crabbe (U. S.)
Code R. (N. S.)....	Code Reports, New Series (N. Y.)	Crabb, Eng. Synonyms .....	Crabb's English Synonyms.
Code Rep.....	Code Reporter (N. Y.)	Crabb, Real Prop...	Crabb on Real Property.
Code Supp.....	Supplement to the Code.	Cr. Act.....	Criminal Act.
Co. Inst.....	Coke's Institutes.	Craig, Dict.....	Craig's Etymological, Technical, and Pronouncing Dictionary.
Coke .....	Coke's English King's Bench Reports.	Craig & P.....	Craig and Phillips' English Chancery Reports.
Cold. ....	Coldwell (Tenn.)	Cranch .....	Cranch (U. S.)
Colem. Cas.....	Coleman's Cases (N. Y.)	Cranch, C. O.....	Cranch's Circuit Court (U. S.)
Colem. & C. Cas...	Coleman & Caines' Cases (N. Y.)	Cranch, Pat. Dec...	Cranch's Patent Decisions (U. S.)
Co. Litt.....	Coke on Littleton.	Cr. Cir. Comp.....	Crown Circuit Companion (Irish).
Colly. ....	Collyer's English Chancery Cases.	Cr. Code.....	Criminal Code.
Colly. Partn.....	Collyer on Partnership.	Cr. Law Mag.....	Criminal Law Magazine (N. J.)
Colo. ....	Colorado.	C. Rob. Adm.....	Charles Robinson's English Admiralty Reports.
Colo. App.....	Colorado Appeals Reports.	Cro. Car.....	Croke's English King's Bench Reports temp. Charles I (3 Cro.)
Colo. Law Rep....	Colorado Law Reporter.	Cro. Cas.....	Croke's English King's Bench Reports temp. Charles I (3 Cro.)
Colq. Rom. Civ. Law .....	Colquhoun's Roman Civil Law.	Cro. Eliz.....	Croke's English King's Bench Reports, temp. Elizabeth (1 Cro.)
Com. Dig.....	Comyn's Digest of the Laws of England.	Cro. Jac.....	Croke's English King's Bench Reports temp. James (Jacobus) I (2 Cro.)
Comm. ....	Commentaries.	Cromp. Just.....	Crompton's Office of Justice of the Peace.
Com. on Con.....	Comyn's Law of Contracts.		
Comp. Laws.....	Compiled Laws.		
Comp. St.....	Compiled Statutes.		
Comst. ....	Comstock (N. Y.)		
Comyn .....	Comyns' English King's Bench Reports.		
Comyn, Usury.....	Comyn on Usury.		
Conf. R.....	Conference Reports (N. C.)		
Cong. ....	Congress.		
Conn. ....	Connecticut.		
Con. St.....	Consolidated Statutes.		
Const. ....	Constitution.		

Crompt., M. & R....	Crompton, Meeson, and Roscoe's English Exchequer Reports.	Desana. ....	Desaussure's Equity (S. C.)
Crompt. ....	Star Chamber Cases by Crompton.	Desty, Tax'n.....	Desty on Taxation.
Crompt. & J.....	Crompton & Jervis' English Exchequer Reports.	Dev. ....	Devereux (N. C.)
Cr. Prac. Act.....	Criminal Practice Act.	Dev. Ct. CL.....	Devereux's Court of Claims (U. S.)
Cr. Proc. Act.....	Criminal Procedure Act.	Dev. Eq.....	Devereux's Equity (N. C.)
Cr. St.....	Criminal Statutes.	Devl. Deeds.....	Devlin on Deeds.
Cruise's Dig.....	Cruise's Digest of the Law of Real Property.	Dev. & B.....	Devereux & Battle (N. C.)
Ct. Cl.....	Court of Claims (U. S.)	Dev. & B. Eq.....	Devereux & Battle's Equity (N. C.)
Curt. ....	Curtis (U. S.)	Dicey, Confl. Laws..	Dicey on Conflict of Laws.
Curt. Ecc.....	Curteis English Ecclesiastical Reports.	Dicey, Dom.....	Dicey's Law of Domicil.
Curt. Pat.....	Curtis on Patents.	Dick. ....	Dickinson (N. J.)
Cush. ....	Cushing (Mass.)	Dickens ....	Dickens' English Chancery Reports.
Cush. Law & Prac.		Dict. ....	Dictionary.
Leg. Assem.....	Cushing's Law and Practice of Legislative Assemblies.	Dict. Droit Civil...	Dictionnaire Droit Civil.
Cushm. ....	Cushman (Miss.)	Dig. ....	Digest.
Cyc. ....	Cyclopedia of Law and Procedure.	Dig. ....	English's Digest of the Statutes (Ark.)
Cyc. Law & Proc...	Cyclopedia of Law and Procedure.	Dig. ....	Compiled Public Laws (U. S.)
Cyclop. Dict.....	Shumaker & Longsdorf's Cyclopedic Dictionary.	Dig. Fla.....	Thompson's Digest of Laws (Fla.)
C. & K.....	Carrington and Kirwan's English Nisi Prius Reports.	Dig. ....	Littell and Swigert's Digest of Statute Law (Ky.)
C. & P.....	Carrington and Payne's English Nisi Prius Reports.	Dig. St.....	English's Digest of the Statutes (Ark.)
<b>D</b>		Dill. ....	Dillon (U. S.)
Dak. ....	Dakota.	Dill. Laws Eng. & Am. ....	Dillon's Laws and Jurisprudence of England and America.
Dall. (Pa.).....	Dallas (Pa.)	Dill. Mun. Corp....	Dillon on Municipal Corporations.
Dall. (U. S.).....	Dallas (U. S.)	Disn. ....	Disney (Ohio)
Dall. Dig.....	Dallam's Digest and Opinions (Tex.)	Doct. & Stud. Dial..	Doctor and Student; or, Dialogues between a Doctor of Divinity and a Student in the Laws of England by C. St. Germain.
Dall. Laws.....	Dallas' Laws (Pa.)	Dom. Civ. Law....	Domat's Civil Law.
Daly ....	Daly (N. Y.)	Doug. ....	Douglas' English King's Bench Reports.
Dana. ....	Dana (Ky.)	Doug. ....	Douglass (Mich.)
Dane's Abr.....	Dane's Abridgment of American Law.	Dowl. ....	Dowling's English Bail Court Cases.
Daniell, Ch. Pl. & Prac. ....	Daniell's Chancery Pleading and Practice.	Dowl. & L.....	Dowling & Lowndes' English Bail Court Reports.
Daniell, Ch. Prac...	Daniell's Chancery Pleading and Practice.	Dowl. & R.....	Dowling and Ryland's English King's Bench Reports.
Daniel, Neg. Inst...	Daniel's Negotiable Instruments.	Drake, Attachm....	Drake on Attachment.
Davis, Cr. Law....	Davis' Criminal Law.	Dud. ....	Dudley (Ga.)
Dawson's Code....	Dawson's Code of Civil Procedure (Colo.)	Dud. Eq.....	Dudley's Equity (S. C.)
Day ....	Day (Conn.)	Dud. Law.....	Dudley's Law (S. C.)
D. C.....	District of Columbia.	Duer ....	Duer's Superior Court (N. Y.)
D. Chip.....	D. Chipman (Vt.)	Dup. Jur.....	Duponceau on Jurisdiction of United States Courts.
Deac. Cr. Law....	Deacon on Criminal Law of England.	Durn. & E.....	Durnford and East's English King's Bench Reports (Term Reports).
Deady ....	Deady (U. S.)	Dutch. ....	Dutcher (N. J.)
Deara. & B. Crown Cas. ....	Dearsly and Bell's English Crown Cases.	Duv. ....	Duvall (Ky.)
De Gex, F. & J....	De Gex, Fisher & Jones' English Chancery Reports.	Dyche & P. Dict...	Dyche and Pardon's Dictionary.
De Gex, J. & S.....	De Gex, Jones, and Smith's English Chancery Reports.	Dyer ....	Dyer's English King's Bench Reports.
De Gex, M. & G....	De Gex, Macnaghten, and Gordon's English Chancery Reports.	<b>E</b>	
Del. ....	Delaware.	East ....	East's English King's Bench Reports.
Del. Ch.....	Delaware Chancery.	East, P. C.....	East's Pleas of the Crown.
Del. Co. R.....	Delaware County Reports (Pa.)	Eccl. R.....	English Ecclesiastical Reports.
Del. Term R.....	Delaware Term Reports.	E. C. L.....	English Common Law Reports (American Reprint).
Dem. Sur.....	Demarest's Surrogate (N. Y.)	Ed. ....	Edition.
Denio ....	Denio (N. Y.)	Eden, Pen. Law....	Eden's Principles of Penal Law.
Denison, Cr. Cas....	Denison's English Crown Cases.		

Eden's Prin. P. L...Eden's Principles of Penal Law.  
 Edmonds' St. at Large .....Edmonds' Statutes at Large (N. Y.)  
 Edm. Sel. Cas.....Edmonds' Select Cases (N. Y.)  
 E. D. Smith.....E. D. Smith (N. Y.)  
 Edw. ....King Edward (as 4 Edw. I.)  
 Edw. Bailm.....Edwards on the Law of Bailments.  
 Edw. Bills & N.....Edwards on Bills and Notes.  
 Edw. Brok. & F....Edwards on Factors and Brokers.  
 Edw. Ch.....Edwards' Chancery (N. Y.)  
 El., Bl. & El.....Ellis, Blackburn, and Ellis' English Queen's Bench Reports.  
 Eliz. ....Queen Elizabeth (as 13 Eliz.).  
 Elliot, Deb.....Elliot's Debates on the Federal Constitution.  
 Elliott, Supp.....Elliott Supplement to the Indiana Revised Statutes.  
 Elliott, Roads & S..Elliott on Roads and Streets.  
 Elliott, R. R.....Elliott on Railroads.  
 Ellis & B.....Ellis and Blackburn's English Queen's Bench Reports.  
 Elm. Dig.....Elmer's Digest of Laws (N. J.)  
 Elph. Interp. Deeds..Elphinstone's Rules for Interpretation of Deeds.  
 El. & Bl.....Ellis and Blackburn's English Queen's Bench Reports.  
 E. L. & Eq.....English Law and Equity (American Reprint).  
 Emerig. Ins.....Emerigon on Insurance.  
 Enc. Amer.....Encyclopædia Americana.  
 Enc. Brit.....Encyclopædia Britannica.  
 Enc. Dict.....Encyclopædic Dictionary, Edited by Robert Hunter 1879-1888.  
 Enc. Ins. U. S.....Insurance Year-Book.  
 Enc. Law.....American and English Encyclopædia of Law.  
 Enc. Pl. & Prac...Encyclopædia of Pleading and Practice.  
 End. Interp. St....Endlich's Commentaries on the Interpretation of Statutes.  
 End. Bldg. Ass'na...Endlich on Building Associations.  
 Eng. ....English (Ark.)  
 Eng. C. L.....English Common Law Reports (American Reprint).  
 Eng. Ecc. R.....English Ecclesiastical Reports (American Reprint).  
 Eng. Law & Eq....English Law and Equity Reports (American Reprint).  
 Eq. ....Equity.  
 Eq. Cas. Abr.....English Equity Cases Abridged.  
 Ersk. Inst.....Erskine's Institutes of the Law of Scotland.  
 Ersk. Speeches.....Erskine's Speeches.  
 Escriche, Dict.....Escriche's Dictionary of Jurisprudence.  
 Esp. ....Espinasse's English Nisi Prius Reports.  
 Ev. ....Evidence.  
 Ex. ....English Exchequer Reports (Welsby, Hurlstone & Gordon).  
 Exch. ....English Exchequer Reports (Welsby, Hurlstone & Gordon).  
 Ex. Sess. ....Extra Session.  
 E. & B.....Ellis and Blackburn's English Queen's Bench Reports.

## F

Fairf. ....Fairfield (Me.)  
 Falc. Marine Dict...Falconer's Marine Dictionary.  
 Fearne, Rem.....Fearne on Contingent Remainders.  
 Fed. ....Federal Reporter (U. S.)  
 Fed. Cas.....Federal Cases (U. S.)  
 Fernald, Eng. Synonyms .....Fernald's English Synonyms.  
 Fett. Carr.....Fetter's Treatise on Carriers of Passengers.  
 Field, Corp.....Field on Corporations.  
 Finch, Law.....Finch, Sir Henry; a Discourse of Law (1759).  
 Fish. Dig.....Fisher's English Common Law Digest.  
 Fish. Pat. Cas....Fisher's Patent Cases (U. S.)  
 Fish. Pat. Rep....Fisher's Patent Reports (U. S.)  
 Fish. Prize Cas....Fisher's Prize Cases (U. S.)  
 Fitz. Abridg.....Fitzherbert's Abridgment.  
 Fla. ....Florida.  
 Flipp. ....Flippin (U. S.)  
 Fost. ....Foster (N. H.)  
 Foster .....Foster's English Crown Law or Crown Cases.  
 Fost. & F.....Foster and Finlason's English Nisi Prius Reports.  
 Fras. Dom. Rel....Fraser on Personal and Domestic Relations, Scotland.  
 Freem. ....Freeman (Ill.)  
 Freem. Ch.....Freeman's Chancery (Miss.)  
 Freem. Judgm.....Freeman on Judgments.

## G

G. ....King George (as 15 Geo. II).  
 Ga. ....Georgia.  
 Gabb. Cr. Law.....Gabbett's Criminal Law.  
 Ga. Dec.....Georgia Decisions.  
 Gale & Whatley Easem. ....Gale and Whatley (afterwards Gale) on Easements.  
 Gall. ....Gallison (U. S.)  
 Gantt's Dig.....Gantt's (& Caldwell's) Digest of Statutes (Ark.)  
 Gav. & H. Rev. St...Gavin and Hord's Revised Statutes (Ind.)  
 Gen. Assem.....General Assembly.  
 Gen. Laws.....General Laws.  
 Gen. St.....General Statutes.  
 Geo. ....King George (as 15 Geo. II).  
 George .....George (Miss.)  
 Gibbon .....Gibbon on Nuisances.  
 Gil. ....Gilfillan (Minn.)  
 Gilbert, Ev.....Gilbert's Law of Evidence.  
 Gilbert, Tenures...Gilbert on Tenures.  
 Gilbert, Uses (by Sugd.) .....Gilbert's Uses and Trusts by Sugden.  
 Gild. ....Gildersleeve Reports (N. M.)  
 Gill .....Gill (Md.)  
 Gillet, Cr. Law....Gillett's Treatise on Criminal Law and Procedure in Criminal Cases.  
 Gill & J.....Gill & Johnson (Md.)  
 Gilman .....Gilman (Ill.)  
 Gilmer .....Gilmer (Va.)  
 Gilp. ....Gilpin (U. S.)  
 Godd. Easem.....Goddard on Easements.  
 Gould, Pl.....Gould on the Principles of Pleading in Civil Actions.  
 Gould's Dig.....Gould's Digest of Laws (Ark.)  
 Gould, Wat.....Gould on Waters.

<b>Grah. &amp; W. New Trials</b> .....	Graham and Waterman on New Trials.	<b>Hats.</b> .....	Hatsell's Parliamentary Precedents.
<b>Grant, Cas.</b> .....	Grant's Cases (Pa.)	<b>Haw.</b> .....	Hawaiian Reports.
<b>Grant's Dig.</b> .....	Gant's (& Caldwell's) Digest of Statutes (Ark.)	<b>Hawes, Jur.</b> .....	Hawes on Jurisdiction of Courts.
<b>Grat</b> .....	Grattan (Va.)	<b>Hawk.</b> .....	Hawkins' Pleas of the Crown.
<b>Gray</b> .....	Gray (Mass.)	<b>Hawkins' Wills</b> .....	Hawkins' Construction of Wills.
<b>Green, C. E.</b> .....	C. E. Green (N. J.)	<b>Hawk. P. C.</b> .....	Hawkins' Pleas of the Crown.
<b>Green, Cr. Law R.</b> .....	Green's Criminal Law Reports (N. Y.)	<b>Hawks</b> .....	Hawks (N. C.)
<b>Greene, G.</b> .....	G. Greene (Iowa)	<b>Hayes</b> .....	Hayes' Irish Exchequer Reports.
<b>Greenh. Pub. Pol.</b> .....	Greenhood's Doctrine of Public Policy in the Law of Contracts.	<b>Hayw. (N. C.)</b> .....	Haywood (N. C.)
<b>Green, H. W.</b> .....	H. W. Green (N. J.)	<b>Hayw. (Tenn.)</b> .....	Haywood (Tenn.)
<b>Green, J. S.</b> .....	J. S. Green (N. J.)	<b>Hayw. &amp; H.</b> .....	Hayward & Hazelton (U. S.)
<b>Greenl.</b> .....	Greenleaf (Me.)	<b>Haz. Reg.</b> .....	Hazard's Register (Pa.)
<b>Greenl. Cruise, Real Prop.</b> .....	Greenleaf's Edition of Cruise's Digest of Real Property.	<b>H. Bl.</b> .....	Henry Blackstone's English Common Pleas Reports.
<b>Greenl. Ev.</b> .....	Greenleaf on Evidence.	<b>Head</b> .....	Head (Tenn.)
<b>Green's Brice, Ultra Vires</b> .....	Green's Edition of Brice's Ultra Vires.	<b>Heard's Shortt, Extr. Rem.</b> .....	Heard's Edition of Shortt on Extraordinary Legal Remedies.
<b>Gross, St.</b> .....	Gross' Illinois Compiled Laws (or Statutes).	<b>Heisk.</b> .....	Heiskell (Tenn.)
<b>Grotius</b> .....	Grotius' Latin Law.	<b>Hemp.</b> .....	Hempstead (U. S.)
<b>H</b>		<b>Hen.</b> .....	King Henry (as 8 Hen. VI.)
		<b>Hen. St.</b> .....	Hening's Statutes (Va.)
<b>Hagg. Adm.</b> .....	Haggard's English Admiralty Reports.	<b>Hen. &amp; M.</b> .....	Hening & Munford (Va.)
<b>Hagg. Cons.</b> .....	Haggard's English Consistory Reports.	<b>Herm. Chat. Mortg.</b> .....	Herman on Chattel Mortgages.
<b>Hagg. Ecc.</b> .....	Haggard's English Ecclesiastical Reports.	<b>Herm. Estop.</b> .....	Herman's Law of Estoppel.
<b>Hale, Com. Law</b> .....	Hale's History of the Common Law.	<b>High, Extr. Rem.</b> .....	High on Extraordinary Legal Remedies.
<b>Hale, De Jure Mar.</b> .....	Hale's De Jure Maris [Appendix to Hall on the Sea Shore].	<b>High, Inj.</b> .....	High on Injunctions.
<b>Hale, P. C.</b> .....	Hale's Pleas of the Crown.	<b>High, Rec.</b> .....	High on Receivers.
<b>Hale, Torts</b> .....	Hale on Torts.	<b>Hil. Abr.</b> .....	Hilliard's American Law.
<b>Hall</b> .....	Hall's Superior Court (N. Y.)	<b>Hill</b> .....	Hill (N. Y.)
<b>Halleck, Int. Law</b> .....	Halleck's International Law.	<b>Hill, Cont.</b> .....	Hilliard on Contracts.
<b>Hall, Mex. Law</b> .....	Hall's Mexican Law.	<b>Hill, Elem. Law</b> .....	Hilliard's Elements of Law.
<b>Halst.</b> .....	Halsted (N. J.)	<b>Hill, Eq.</b> .....	Hill's Equity (S. C.)
<b>Halst. Ch.</b> .....	Halsted's Chancery (N. J.)	<b>Hilliard, R. R.</b> .....	Hilliard on Real Property.
<b>Ham.</b> .....	Hammond (Ohio)	<b>Hill, Law</b> .....	Hill's Law (S. C.)
<b>Ham. Cont.</b> .....	Hammon on Contracts.	<b>Hill's Ann. Codes &amp; Laws</b> .....	Hill's Annotated Codes and General Laws (Or.)
<b>Hand</b> .....	Hand (N. Y.)	<b>Hill's Ann. St. &amp; Codes</b> .....	Hill's Annotated General Statutes and Codes (Wash.)
<b>Handy</b> .....	Handy (Ohio)	<b>Hill's Code</b> .....	Hill's Annotated Codes and General Laws (Or.)
<b>Har. (Del.)</b> .....	Harrington (Del.)	<b>Hill's Code</b> .....	Hill's Annotated General Statutes and Codes (Wash.)
<b>Har. (Mich.)</b> .....	Harrington (Mich.)	<b>Hill &amp; D. Supp.</b> .....	Hill & Denio, Lalor's Supplement (N. Y.)
<b>Har. (N. J.)</b> .....	Harrison (N. J.)	<b>Hilt.</b> .....	Hilton (N. Y.)
<b>Hardin</b> .....	Hardin (Ky.)	<b>Hil. Term 4, Will.</b> .....	Hilary Term 4, William IV.
<b>Hardw. Cas. Temp.</b> .....	Cases temp. Hardwicke, by Lee and Hardwicke.	<b>Hil. Torts</b> .....	Hilliard on the Law of Torts.
<b>Hare</b> .....	Hare's English Vice Chancellors' Reports.	<b>Hittell's Laws</b> .....	Hittell's General Laws (Cal.)
<b>Hare, Const. Law</b> .....	Hare's American Constitutional Law.	<b>H. L. Cas.</b> .....	House of Lords' Cases, English.
<b>Harg. Co. Litt.</b> .....	Hargrave's Notes to Coke on Littleton.	<b>Hobart</b> .....	Hobart's English King's Bench Reports.
<b>Hargrave &amp; Butler's Notes on Co. Litt.</b> .....	Hargrave and Butler's Notes on Coke on Littleton.	<b>Hodge, Presb. Law</b> .....	Hodge on Presbyterian Law.
<b>Harp.</b> .....	Harper (S. C.)	<b>Hoff. Ch.</b> .....	Hoffman's Chancery (N. Y.)
<b>Harp. Eq.</b> .....	Harper's Equity (S. C.)	<b>Hoff. Land Cas.</b> .....	Hoffman's Land Cases (U. S.)
<b>Harris</b> .....	Harris (Pa.)	<b>Holl. Jur.</b> .....	Holland's Elements of Jurisprudence.
<b>Harrison, Ch.</b> .....	Harrison's Chancery Practice.	<b>Holmes</b> .....	Holmes (U. S.)
<b>Hart Dig.</b> .....	Hartley's Digest of Laws, (Tex.)	<b>Holt</b> .....	Holt's English King's Bench Reports.
<b>Har. &amp; G.</b> .....	Harris & Gill (Md.)	<b>Holt, N. P.</b> .....	Holt's English Nisi Prius Reports.
<b>Har. &amp; J.</b> .....	Harris & Johnson (Md.)		
<b>Har. &amp; Mich.</b> .....	Harris & McHenry (Md.)		
<b>Hash.</b> .....	Hashbrouck's Reports (Idaho)		
<b>Hask.</b> .....	Haskell (U. S.)		

Holt, Shipp.....Holt on Shipping.  
Hopk. Ch.....Hopkins' Chancery (N. Y.)  
Horner's Ann. St...Horner's Annotated Revised Statutes (Ind.)  
Horner's Rev. St....Horner's Annotated Revised Statutes (Ind.)  
Horr & B. Mun. Ord. ....Horr and Bemis' Treatise on Municipal Police Ordinances.  
Horr. & T. Cas. Self-Def. ....Horrigan and Thompson's Cases on Self-Defence.  
Houst. ....Houston (Del.)  
Houst. Cr. Cas....Houston's Criminal Cases (Del.)  
How. (Miss.).....Howard (Miss.)  
How. ....Howard (U. S.)  
How. Ann. St....Howell's Annotated Statutes (Mich.)  
Howell, N. P.....Howell's Nisi Prius Reports (Mich.)  
Howell, St. Tr....Howell's English State Trials.  
How. Prac.....Howard's Practice (N. Y.)  
How. Prac. (N. S.)..Howard's Practice, New Series (N. Y.)  
How. St.....Howell's Annotated Statutes (Mich.)  
How. & H. St....Howard and Hutchinson's Statutes (Miss.)  
Hughes (Ky.).....Hughes (Ky.)  
Hughes ....Hughes (U. S.)  
Hume's Hist. Eng..Hume's History of England.  
Humph. ....Humphrey (Tenn.)  
Hun ....Hun (N. Y.)  
Hurd's Rev. St....Hurd's Revised Statutes (Ill.)  
Hurl. Bonds.....Hurlstone on Bonds.  
Hurl. & C.....Hurlstone & Coltman's English Exchequer Reports.  
Hurl. & G.....Hurlstone and Gordon's Reports (10, 11, English Exchequer Reports).  
Hurl. & N.....Hurlstone and Norman's English Exchequer Reports.  
Hutch. Carr.....Hutchinson on Carriers.  
Hutch. Code.....Hutchinson's Code (Miss.)  
Hutch. Dig. St....Hutchinson's Code (Miss.)

I

Idaho .....Idaho.  
Ill. ....Illinois.  
Ill. App.....Illinois Appellate Court Reports.  
Imp. Dict.....Imperial Dictionary.  
Ind. ....Indiana.  
Ind. App.....Indiana Appellate Court Reports.  
Ind. T. ....Indian Territory.  
Ins. Law J.....Insurance Law Journal (Pa.)  
Inst. ....Coke's Institutes.  
Internat. Dict. ....Webster's International Dictionary.  
Interst. Com. R....Interstate Commerce Reports.  
Iowa .....Iowa.  
Ired. ....Iredell's Law (N. O.)  
Ired. Eq. ....Iredell's Equity (N. C.)  
Irwin's Code.....Clark, Cobb and Irwin's Code (Ga.)

J

Jac. ....King James (as 21 Jac. I.)  
Jac. Law Dict....Jacob's Law Dictionary.  
Jagg. Torts.....Jaggard on Torts.  
Jarm. Wills.....Jarman on Wills.  
Jeff. ....Jefferson (Va.)

Jellett, Cr. Law....Gillett's Treatise on Criminal Law and Procedure in Criminal Cases.  
Jeremy, Eq.....Jeremy's Equity Jurisdiction.  
J. J. Marsh. ....J. J. Marshall (Ky.)  
John. ....Johnson (N. M.)  
John. Dict.....Johnson's English Dictionary.  
John. Eng. Ch.....Johnson's English Vice-Chancellors' Reports.  
Johns. ....Johnson (N. Y.)  
Johns. Cas. ....Johnson's Cases (N. Y.)  
Johns. Ch. ....Johnson's Chancery (N. Y.)  
Johnson's Quarto Dict. ....Johnson's Quarto Dictionary.  
Jones ....Jones (Pa.)  
Jones, Bailm.....Jones on Bailments.  
Jones, Chat. Mortg..Jones on Chattel Mortgages.  
Jones, Easem.....Jones' Treatise on Easements.  
Jones, Eq.....Jones' Equity (N. C.)  
Jones, Law.....Jones' Law (N. C.)  
Jones, Liens.....Jones on Liens.  
Jones, Mortg.....Jones on Mortgages.  
Jones, Pledges.....Jones on Pledges and Collateral Securities.  
Jones, Securities....Jones on Railroad Securities.  
Jones & S.....Jones & Spencer (N. Y.)  
Jour. Juris.....Journal of Jurisprudence.  
Joyce, Ins.....Joyce on Insurance.  
J. P.....The Justice of the Peace. London (periodical).  
J. P. Smith.....J. P. Smith's English King's Bench Reports.  
J. Scott (N. S.)....English Common Bench Reports, New Series by John Scott.  
Jud. Repos. ....Judicial Repository (N. Y.)  
Jur. ....The Jurist, London.  
Jur. (N. S.).....The Jurist, New Series. London.  
Just. Inst.....Institutes of Justinian.

K

Kan. ....Kansas.  
Kan. App.....Kansas Appeals.  
Kay & J.....Kay and Johnson's English Vice Chancellors' Reports.  
Keb. ....Kebble's English King's Bench Reports.  
Keen ....Keen's English Rolls Court Reports.  
Keene, Ch.....Keen's English Rolls Court Reports.  
Keener, Quasi Cont..Keener on Quasi Contracts.  
Kel. ....Sir John Kelyng's English Crown Cases.  
Kelly ....Kelly (Ga.)  
Kent, Comm. ....Kent's Commentaries on American Law.  
Kern. ....Kernan (N. Y.)  
Kerr, Inj.....Kerr on Injunctions.  
Kersey Dict.....John Kersey's English Dictionary, 1708.  
Keyes ....Keyes (N. Y.)  
Kielway ....Kelway's English King's Bench Reports.  
Kinney, Law Dict. & Glos.....Kinney's Law Dictionary and Glossary.  
Kirby ....Kirby (Conn.)  
Knight, Mech. Dict..Knight's American Mechanical Dictionary.  
Kulp ....Kulp (Pa.)  
Ky. ....Kentucky.  
Kyd ....Kyd on Bills of Exchange.  
Kyd, Corp.....Kyd on Corporations.  
Ky. Dec.....Kentucky Decisions.  
Ky. Law Rep. ....Kentucky Law Reporter.

**Ky. St. Law**.....Morehead and Brown Digest of Statute Laws (Ky.)  
**K. & R.**.....Kent and Radcliff's Law of New York (Revision of 1801).

## L

**La.**.....Louisiana.  
**La. Ann.**.....Louisiana Annual.  
**Lack. Jur.**.....Lackawanna Jurist (Pa.)  
**Lack. Leg. N.**.....Lackawanna Legal News (Pa.)  
**Lalor, Supp.**.....Lalor's Supplement to Hill & Denio's Reports (N. Y.)  
**Lamb. Eir.**.....Lambard's Eiranarcha.  
**Lanc. Bar**.....Lancaster Bar.  
**Lanc. Law Rev.**.....Lancaster Law Review.  
**Lans.**.....Lansing (N. Y.)  
**Lans. Ch.**.....Lansing's Chancery (N. Y.)  
**Law J. Ch.**.....Law Journal, New Series, Chancery.  
**Law J. Q. B.**.....Law Journal, New Series, Queen's Bench (English).  
**Law of Trusts (Tiff. & Bul.)**.....Tiffany and Bullard on Trusts and Trustees.  
**Law Rep.**.....Monthly Law Reporter, Boston, Mass.  
**Law Rep. Ex.**.....English Law Reports, Exchequer.  
**Lawson, Exp. Ev.**.....Lawson on Expert and Opinion Evidence.  
**Lawson, Pres. Ev.**.....Lawson on Presumptive Evidence.  
**Lawson, Rights, Rem. & Pr.**.....Lawson on Rights, Remedies and Practice.  
**Law T.**.....English Law Times Reports.  
**Law T. (N. S.)**.....English Law Times Reports, New Series.  
**Ld. Raym.**.....Lord Raymond's English King's Bench Reports.  
**Lea**.....Lea (Tenn.)  
**Leach, Cr. Cas.**.....Leach's English Crown Cases.  
**Leach's C. L.**.....Leach's Club Cases, London.  
**Leam. & Spic.**.....Leaming and Spicer's Laws, Grants, Concessions and Original Constitutions (N. J.)  
**L. Ed.**.....Lawyers' Edition Supreme Court Reports.  
**Lee**.....Lee (Cal.)  
**Leg.**.....Acts of the Legislature.  
**Leg. Chron.**.....Legal Chronicle.  
**Leg. Gaz.**.....Legal Gazette (Pa.)  
**Leg. Gaz. R.**.....Legal Gazette Reports (Pa.)  
**Leg. Int.**.....Legal Intelligencer (Pa.)  
**Leg. News.**.....Legal News, Chicago.  
**Leg. Op.**.....Legal Opinions.  
**Leg. Rec. Rep.**.....Legal Record Reports.  
**Leg. Rep.**.....Legal Reporter (Tenn.)  
**Leg. & Ins. Rep.**.....Legal & Insurance Reporter.  
**Lehigh Val. Law Rep.**.....Lehigh Valley Law Reporter.  
**Leigh**.....Leigh (Va.)  
**Leigh & C.**.....Leigh and Cave's English Crown Cases.  
**Leon.**.....Leonard's English King's Bench Reports.  
**Lev.**.....Levin's English King's Bench Reports.  
**Lewin, Cr. Cas.**.....Lewin's English Crown Cases Reserved.  
**Lewis, Em. Dom.**.....Lewis on Eminent Domain.  
**Lewis, Perp.**.....Lewis' Law of Perpetuity.  
**Lex Mercatoria Americana**.....An Enquiry into the Law Merchant of the United States by George Caines.

**Lieb. Herm.**.....Lieber's Hermeneutica.  
**Lil. Conv.**.....Lilly's Conveyancer.  
**Lilly, Abr.**.....Lilly's Abridgment, or Practical Register.  
**Lindl. Copartn.**.....Lindley on Partnership.  
**Lindl. Partn.**.....Lindley's Law of Partnership.  
**Litt.**.....Coke on Littleton.  
**Litt.**.....Littell (Ky.)  
**Litt. Comp. Laws.**.....Littell's Statute Law (Ky.)  
**Litt. Sel. Cas.**.....Littell's Select Cases (Ky.)  
**Litt. & S. St. Law.**.....Littell and Swigert's Digest of Statute Law (Ky.)  
**Liv. Law Mag.**.....Livingston's Law Magazine (N. Y.)  
**L. J. Ch.**.....Law Journal, New Series, Chancery, English.  
**L. J. M. Cas.**.....Law Journal, New Series, Magistrates' Cases.  
**Loc. Acts.**.....Local Acts.  
**Loc. Laws.**.....Local Laws.  
**Lofft**.....Lofft's English King's Bench Reports.  
**Lomax, Ex'rs.**.....Lomax on Executors.  
**Lom. Dig.**.....Lomax's Digest of Real Property.  
**Long, Irr.**.....Long on Irrigation.  
**Low.**.....Lowell (U. S.)  
**Lower Ct. Dec.**.....Lower Court Decisions (Ohio)  
**L. R. A.**.....Lawyers' Reports Annotated.  
**L. R. App. Cas.**.....English Law Reports, Appeal Cases, House of Lords.  
**L. R. C. P.**.....English Law Reports, Common Pleas.  
**L. R. Eq.**.....English Law Reports, Equity.  
**L. R. Ex. Cas.**.....English Law Reports, Exchequer.  
**L. R. Exch.**.....English Law Reports, Exchequer.  
**L. R. H. L.**.....English Law Reports, English and Irish Appeal Cases.  
**L. R. H. L. Sc.**.....English Law Reports, Scotch and Divorce Appeal Cases.  
**L. R. Prob. & Div.**.....English Law Reports, Probate and Divorce.  
**L. R. Prov. & Div.**.....See L. R. Prob. & Div.  
**L. R. Q. B.**.....English Law Reports, Queen's Bench.  
**Lut.**.....Lutwyche's English Common Pleas Reports.  
**Luz. Law T.**.....Luzerne Law Times (Pa.)  
**Luz. Leg. Obs.**.....Luzerne Legal Observer (Pa.)  
**Luz. Leg. Reg.**.....Luzerne Legal Register (Pa.)

## M

**McAdam, Landl. & T.**.....McAdam on Landlord and Tenant.  
**McAll.**.....McAllister (U. S.)  
**MacArthur**.....MacArthur (D. C.)  
**MacArthur, Pat. Cas.**.....MacArthur's Patent Cases (U. S.)  
**MacArthur & M.**.....MacArthur & Mackey (D. C.)  
**Macaulay, Hist. Eng.**.....Macaulay's History of England.  
**McCahon**.....McCahon (Kan.)  
**McCart.**.....McCarter (N. J.)  
**McCarty, Civ. Proc.**.....McCarty's Civil Procedure Reports (N. Y.)  
**McClain, Cr. Law.**.....McClain's Criminal Law.  
**McClain's Code.**.....McClain's Annotated Code and Statutes (Iowa)  
**McClel. Dig.**.....McClellan's Digest of Laws (Fla.)  
**McCord**.....McCord's Law (S. C.)  
**McCord, Eq.**.....McCord's Equity (S. C.)  
**McCrary**.....McCrary (U. S.)



McCul. Dict. ....	McCulloch's Commercial Dictionary.	Mills, Em. Dom....	Mills on Eminent Domain.
McGloin .....	McGloin (La.)	Mill. & V. Code....	Milliken & Vertrees' Code (Tenn.)
McKelvey, Ev. ....	McKelvey on Evidence.	Minn. ....	Minnesota.
Mackey .....	Mackey (D. C.)	Minor .....	Minor (Ala.)
McLean .....	McLean (U. S.)	Minor, Inst. ....	Minor's Institutes of Common and Statute Law.
McMull. ....	McMullan (S. C.)	Misc. Laws.....	Miscellaneous Laws (Or.)
McMull. Eq. ....	McMullan's Equity (S. C.)	Misc. Rep. ....	Miscellaneous Reports (N. Y.)
Macn. & G.....	Macnaghten and Gordon's English Chancery Reports.	Miss. ....	Mississippi.
Macq. ....	Macqueen's Scotch Appeal Cases.	Mitch. Mod. Geog...	Mitchell's Modern Geography.
Madd. ....	Maddock's Reports, English Chancery.	Mitt. Eq. Pl.....	Mitford's Equity Pleading.
Maine, Anc. Law...	Maine's Ancient Law.	Mo. ....	Missouri.
Man. ....	Manning (Mich.)	Moak, Eng. R.....	Moak's English Reports.
Man., G. & S.....	Manning, Granger, and Scott's English Common Pleas Reports.	Mo. App. ....	Missouri Appeal Reports.
Manef. Dig.....	Mansfield's Digest of Statutes (Ark.)	Mo. App. Rep'r ...	Missouri Appellate Reporter.
Manson, Bankr. Cas..	Manson's Bankruptcy and Winding-Up Cases.	Mod. ....	Modern Reports, English King's Bench.
Man. Unrep. Cas..	Manning's Unreported Cases (La.)	Monag. ....	Monaghan (Pa.)
Man. & G.....	Manning & Granger's English Common Pleas Reports.	Mon., B. ....	B. Monroe (Ky.)
Man. & R.....	Manning & Ryland's English Magistrates' Cases.	Mon., T. B.....	T. B. Monroe (Ky.)
Marsh. ....	Marshall's English Common Pleas Reports.	Mont. ....	Montana.
Marsh., A. K.....	A. K. Marshall (Ky.)	Montg. Co. Law	Montgomery County Law
Marsh. Ins.....	Marshall on Marine Insurance.	Rep'r .....	Reporter (Pa.)
Marsh., J. J.....	J. J. Marshall (Ky.)	Month. Law Bul...	Monthly Law Bulletin (N. Y.)
Martin, Dict.....	Edward Martin's English Dictionary.	Mont. & B.....	Montagu & Bligh's English Bankruptcy Reports.
Mart. (N. C.).....	Martin (N. C.)	Mont. & M.....	Montagu and MacArthur's English Bankruptcy Reports.
Mart. (N. S.).....	Martin's New Series (La.)	Moody, Cr. Cas....	Moody's Crown Cases, English Courts.
Mart. (O. S.).....	Martin's Old Series (La.)	Moody & M.....	Moody and Malkin's English Nisi Prius Reports.
Mart. & Y. ....	Martin & Yerger (Tenn.)	Moody & R.....	Moody and Robinson's English Nisi Prius Reports.
Marv. ....	Marvel's Reports (Del.)	Moore .....	Moore (Ark.)
Mason .....	Mason (U. S.)	Moore .....	Sir Francis Moore's English King's Bench Reports.
Mass. ....	Massachusetts.	Moore, Cr. Law....	Moore's Criminal Law and Procedure.
Math. Pres. Ev.....	Mathews on Presumptive Evidence.	Moore, P. C.....	Moore's Privy Council Reports.
Maule & S.....	Maule and Selwyn's English King's Bench Reports.	Moore, Presb. Dig.	Moore's Presbyterian Digest.
Maxw. Adv. Gram...	W. H. Maxwell's Advanced Lessons in English Grammar.	Mor. Corp.....	Morawetz on Private Corporations.
Maxw. Cr. Proc....	Maxwell's Treatise on Criminal Procedure.	Moreau & Carleton's	Partidas .....
May, Ins.....	May on Insurance.	Partidas .....	Moreau-Lislet and Carleton's Laws of Las Sièté Partidas in force in Louisiana.
Md. ....	Maryland.	Mor. Priv. Corp....	Morawetz on Private Corporations.
Md. Ch. ....	Maryland Chancery.	Morrell, Bankr. Cas..	Morrell's English Bankruptcy Cases.
Me. ....	Maine.	Morris .....	Morris (Iowa)
Mechem, Ag.....	Mechem on Agency.	Morse, Banks .....	Morse on the Law of Banks and Banking.
Mechem, Pub. Off...	Mechem on Public Offices and Officers.	Mos. ....	Mosely's English Chancery Reports.
Mees. & W.....	Meeson and Welsby's English Exchequer Reports.	Mun. Code.....	Municipal Code.
Meigs .....	Meigs (Tenn.)	Munf. ....	Munford (Va.)
Meigs, Dig.....	Meigs' Digest of Decisions of the Courts of Tennessee.	Murfree, Off. Bonds..	Murfree on Official Bonds.
Mer. ....	Merivale's English Chancery Reports.	Murph. ....	Murphy (N. C.)
Merl. Repert.....	Merlin, Répertoire de Jurisprudence.	Murray's Eng. Dict..	Murray's English Dictionary.
• Metc. (Ky.) .....	Metcalf (Ky.)	Myl. & C.....	Myne & Craig's English Chancery Reports.
Metc. (Mass.) .....	Metcalf (Mass.)	Myl. & K.....	Myne and Keen's English Chancery Reports.
Mich. ....	Michigan.	Myr. Prob. ....	Myrick's Probate Court Reports (Cal.)
Mich. N. P.....	Michigan Nisi Prius.	M. & C. Partidas...	Moreau-Lislet and Carleton's Laws of Las Sièté Partidas in force in Louisiana.
Miles .....	Miles (Pa.)	M. & W.....	Meeson and Welsby's English Exchequer Reports.
Mill, Const. ....	Mill's Constitutional Reports (S. C.)		
Miller, Const. ....	Miller on the Constitution of the United States.		
Miller's Code.....	Miller's Revised and Annotated Code (Iowa)		
Mills' Ann. St.....	Mills' Annotated Statutes (Colo.)		

## N

Nat. Bankr. Law.	National Bankruptcy Law.
Nat. Bankr. R.	National Bankruptcy Register (U. S.)
N. B. R.	National Bankruptcy Register (U. S.)
N. C.	North Carolina.
N. C. Term R.	North Carolina Term Reports.
N. Chip.	N. Chipman (Vt.)
N. D.	North Dakota.
N. E.	Northeastern Reporter.
Neb.	Nebraska.
Nev.	Nevada.
Nev. & M.	Neville and Manning's English King's Bench Reports.
Newb. Adm.	Newberry's Admiralty (U. S.)
Newell, Defam.	Newell on Defamation, Slander and Libel.
Newell, Eject.	Newell's Treatise on the Action of Ejectment.
Newell, Mal. Pros.	Newell's Treatise on Malicious Prosecution.
N. H.	New Hampshire.
Nisi Prius & Gen. T. Rep.	Nisi Prius & General Term Reports (Ohio)
Nix. Dig.	Nixon's Digest of Laws (N. J.)
N. J. Eq.	New Jersey Equity.
N. J. Law	New Jersey Law.
N. J. Law J.	New Jersey Law Journal.
N. M.	New Mexico.
Norris	Norris (Pa.)
Northam. Law Rep.	Northampton County Law Reporter (Pa.)
Northumb. Co. Leg.	Northumberland County Legal News (Pa.)
N.	Nott & McCord (S. C.)
Nott & McC.	Nott & McCord (S. C.)
N. R. L.	Revised Laws 1813 (N. Y.)
N. S.	New Series.
N. W.	Northwestern Reporter.
N. Y.	New York.
N. Y. Ann. Cas.	New York Annotated Cases.
N. Y. Cr. R.	New York Criminal Reports.
N. Y. Daily Reg.	New York Daily Register.
N. Y. Law J.	New York Law Journal.
N. Y. Leg. Obs.	New York Legal Observer.
N. Y. St. Rep.	New York State Reporter.
N. Y. Super. Ct.	New York Superior Court.
N. Y. Supp.	New York Supplement.

## O

O. C. D.	Ohio Circuit Decisions.
Odgers, L. & Sland.	Odgers on Libel and Slander.
Odgers, Sland. & L.	der.
Ohio	Ohio.
Ohio Cir. Ct. B.	Ohio Circuit Court Reports.
Ohio Dec.	Ohio Decisions.
Ohio Law J.	Ohio Law Journal.
Ohio Leg. N.	Ohio Legal News.
Ohio N. P.	Ohio Nisi Prius.
Ohio St.	Ohio State.
Ohio S. & C. P.	Ohio Superior and Common Pleas Decisions.
Dec.	Ohio State.
Okl.	Oklahoma.
Olcott	Olcott (U. S.)
O. L. D.	Ohio Lower Court Decisions.
Ont.	Ontario Reports.
Op. Attys. Gen.	Opinions of the United States Attorneys General.
Or.	Oregon.
O. S.	Old Series.
Outerbridge	Outerbridge (Pa.)

Overt.	Overton (Tenn.)
Owen	Owen's English Bench Reports.

## P

Pa.	Pennsylvania State.
Pac.	Pacific Reporter.
Pa. Co. Ct. R.	Pennsylvania County Court Reports.
Pa. Com. Pl.	Pennsylvania Common Pleas Reporter.
Pa. Dist. R.	Pennsylvania District Reports.
Paige	Paige's Chancery (N. Y.)
Paine	Paine (U. S.)
Paine, Elect.	Paine on Elections.
Pa. Law J.	Pennsylvania Law Journal.
Paley, Ag.	Paley on Principal and Agent (or Agency).
Paley, Mor. Ph.	Wm. Paley's Moral Philosophy—English.
Pamphl. Laws.	Pamphlet Laws (Acts).
Park, Ins.	Park on Marine Insurance.
Parker, Cr. R.	Parker's Criminal Reports (N. Y.)
Paras. Bills & N.	Parsons on Bills and Notes.
Paras. Cont.	Parsons on Contracts.
Paras. Eq. Cas.	Parsons' Select Equity Cases (Pa.)
Paras. Mar. Law.	Parsons on Maritime Law.
Paras. Merc. Law.	Parsons on Mercantile Law.
Paras. Shipp. & Adm.	Parsons on Shipping and Admiralty.
Partidas	Moreau-Lislet and Carleton's Laws of Las Sièges Partidas in force in Louisiana.
Paschal's Ann.	Paschal's United States Constitution, Annotated.
Const.	Paschal's Texas Digest of Decisions.
Pasch. Dig.	Paschal's Texas Digest of Decisions.
Pa. Super. Ct.	Pennsylvania Superior Court Reports.
Pat.	Paterson's Laws.
Pat. & H.	Patton & Heath (Va.)
Pears.	Pearson (Pa.)
Peck (Ill.)	Peck (Ill.)
Peck (Tenn.)	Peck (Tenn.)
Pen. Code.	Penal Code.
Pen. Laws.	Penal Laws.
Pennewill	Pennewill Reports (Del.)
Penning.	Pennington (N. J.)
Penny.	Pennypacker (Pa.)
Pen. & W.	Penrose & Watts (Pa.)
Pepper & L. Dig.	Pepper and Lewis' Digest of Laws (Pa.)
Laws	Pepper and Lewis' Digest of Laws (Pa.)
Perry, Trusts.	Perry on Trusts.
Pet.	Peters (U. S.)
Pet. Ab.	Petersdorff's Abridgment.
Pet. Adm.	Peters' Admiralty (U. S.)
Pet. C. C.	Peters' Circuit Court (U. S.)
Petersd. Ab.	Petersdorff's Abridgment.
P. F. Smith	P. F. Smith (Pa.)
Phil.	Phillips' Treatise on Insurance.
Phila.	Philadelphia (Pa.)
Phil.	Phillips' Law (N. C.)
Phil. Ch.	Phillips' English Chancery Reports.
Phil. Eq.	Phillips' Equity (N. C.)
Phil. Ev.	Phillips on Evidence.
Phil. Ins.	Phillips' Law of Insurance.
Phillim. Int. Law.	Phillimore's International Law.
Phil. Mech. Liens.	Phillips on Mechanics' Liens.
Pick.	Pickering (Mass.)
Pickle	Pickle (Tenn.)
Pierce, R. R.	Pierce on Railroad Law.

Pierce & King's Re- visory Legislation.	Pierce, Taylor and King's Revised Statutes (La.)	Rand. Em. Dom. ....	Randolph on Eminent Do- main.
Pike .....	Pike (Ark.)	Rap. Contempt ....	Rapalje on Contempt.
Pin. ....	Pinney (Wis.)	Rap. Wit. ....	Rapalje's Treatise on Wit- nesses.
Pittsb. Leg. J. ....	Pittsburgh Legal Journal (Pa.)	Rap. & L. Law Dict. ....	Rapalje and Lawrence Law Dictionary.
Pittsb. R. ....	Pittsburgh Reports (Pa.)	Rawle .....	Rawle (Pa.)
P. L. ....	Public Laws.	Rawle, Const. U. S. ....	Rawle on the Constitution of the United States.
Platt, Leas. ....	Platt on Leases.	Rawle, Cov. ....	Rawle on Covenants for Title.
Ploud. ....	Plowden's English King's Bench Reports.	Raym. ....	Lord Raymond's English King's Bench Reports.
Plow. ....	Plowden's English King's Bench Reports.	Ray, Med. Jur. ....	Ray's Medical Jurispru- dence of Insanity.
Poe, Pl. ....	Poe on Pleading and Prac- tice.	R. C. ....	Revised Statutes 1855 (Mo.)
Pol. Code .....	Political Code.	Redf. Carr. ....	Redfield on Carriers and Bailments.
Pol. Cont. ....	Pollock on Principles of Contract at Law and Equity.	Redf. Railways. ....	Redfield on Railways.
Pom. Eq. Jur. ....	Pomeroy's Equity Juris- prudence.	Redf. Sur. ....	Redfield's Surrogate (N. Y.)
Pom. Rem. ....	Pomeroy on Civil Remed- ies.	Redf. Wills. ....	Redfield on the Law of Wills.
Pom. Rem. & Rem. Rights .....	Pomeroy on Civil Remed- ies & Remedial Rights.	Rees' Cyclopaedia. ....	Abraham Rees' English Cyclopedia.
Pom. Spec. Perf. ....	Pomeroy on Specific Per- formance of Contracts.	Reeves, Dom. Rel. ....	Reeve on Domestic Rela- tions.
Poph. ....	Popham's English King's Bench Reports.	Reeves, Eng. Law. ....	Reeves' History of the Eng- lish Law.
Port. (Ala.) ....	Porter (Ala.)	Rep. ....	Coke's English King's Bench Reports.
Posey, Unrep. Cas. ....	Posey's Unreported Cases (Tex.)	Reports .....	The Reports, English.
Poth. Oblig. ....	Pothier on Obligations.	Rev. ....	Revision of the Statutes.
Pow. App. Proc. ....	Powell's Law of Appellate Proceedings.	Rev. Civ. Code. ....	Revised Civil Code.
Pow. Cont. ....	Powell on Contracts.	Rev. Civ. St. ....	Revised Civil Statutes.
Prac. Act. ....	Practice Act.	Rev. Code. ....	Revised Code.
Pr. Ch. ....	Precedents in Chancery, by Finch.	Rev. Code Cr. Proc. ....	Revised Code of Criminal Procedure.
Prest. Est. ....	Preston on Estates.	Rev. Laws. ....	Revised Laws.
Priv. Laws. ....	Private Laws.	Rev. Mun. Code. ....	Revised Municipal Code.
Priv. St. ....	Private Statutes.	Rev. Ord. ....	Revised Ordinances.
Prob. ....	English Probate and Admi- ralty Reports for year cited.	Rev. Pen. Code. ....	Revised Penal Code.
Prob. Div. ....	Probate Division, Eng- lish Law Reports.	Rev. Pol. Code. ....	Revised Political Code.
Prob. Pr. Act. ....	Probate Practice Act.	Rev. St. ....	Revised Statutes.
Prob. R. ....	Probate Reports (Ohio)	Reynolds' Land Laws .....	Reynolds' Spanish and Mexican Land Laws.
Prov. St. ....	Statutes (Laws) of the Province of Massachu- setts.	R. I. ....	Rhode Island.
Pub. Acts .....	Public Acts.	Rice .....	Rice's Law (S. C.)
Pub. Gen. Laws. ....	Public General Laws.	Rice, Eq. ....	Rice's Equity (S. C.)
Pub. Laws. ....	Public Laws.	Rice's Code. ....	Rice's Code of Practice (Colo.)
Pub. Loc. Laws. ....	Public Local Laws.	Rich. Dict. ....	Richardson's New Diction- ary of the English Lan- guage.
Pub. St. ....	Public Statutes.	Rich. Eq. ....	Richardson's Equity (S. C.)
Pub. & Loc. Laws. ....	Public and Local Laws.	Rich. Eq. Cas. ....	Richardson's Equity Cases (S. C.)
Puffendorf ....	Pufendorf's Law of Nature and Nations.	Rich. Law. ....	Richardson's Law (S. C.)
Purd. Dig. Laws. ....	Purdon's Digest of Laws (Pa.)	Rich. (S. C.) ....	Richardson (S. C.)
Purple's St. ....	Purple's Statutes, Scates' Compilation.	Riddle's Lex. ....	Riddle's Lexicon.
P. Wms. ....	Peere Williams' English Chancery Reports.	Riley .....	Riley's Law (S. C.)
P. & L. Dig. Laws. ....	Pepper & Lewis' Digest of Laws (Pa.)	Riley, Eq. ....	Riley's Equity (S. C.)
<b>Q</b>		R. L. ....	Revised Laws.
		R. M. Charl't. ....	R. M. Charlton (Ga.)
Q. B. ....	Queen's Bench Reports, Adolphus & Ellis, N. S. (English)	Rob. ....	Charles Robinson's English Admiralty Reports.
Q. B. Div. ....	Queen's Bench Division (English Law Reports)	Rob. (N. Y.) ....	Robertson (N. Y.)
Quincy .....	Quincy (Mass.)	Rob. (La.) ....	Robinson (La.)
<b>R</b>		Rob. (Va.) ....	Robinson (Va.)
		Robb, Pat. Cas. ....	Robb's Patent Cases (U. S.)
Rand. ....	Randolph (Va.)	Rob. Pat. ....	Robinson on Patents.
Rand. Com. Paper. ....	Randolph on Commercial Paper.	Rolle .....	Rolle's English King's Bench Reports.
		Rolle, Abr. ....	Rolle's Abridgment of the Common Law.
		Roll. Rep. ....	Rolle's English King's Bench Reports.
		Root .....	Root (Conn.)
		Roper, Leg. ....	Roper on Legacies.
		Rorer, Jud. Sales. ....	Rorer on Void Judicial Sales.
		Rorer, R. R. ....	Rorer on Railways.

Roscoe, Cr. Ev....Roscoe on Criminal Evi-  
dence.  
R. S.....Revised Statutes.  
R. S. Comp.....Statutes of Connecticut,  
Compilation of 1854.  
Russa.....Russell's English Chancery  
Reports.  
Russa. Crimes.....Russell on Crimes and Mis-  
demaneors.  
Russa. Fact.....Russell on Factors and  
Brokers.  
Russa. & M.....Russell and Mylne's Eng-  
lish Chancery Reports.  
Russa. & R. Cr. Cas. Russell and Ryan's English  
Crown Cases Reserved.  
Ruth. Inst.....Rutherford's Institutes of  
Natural Law.  
Ry. & Corp. Law J.. Railway and Corporation  
Law Journal.  
Ry. & M.....Ryan and Moody's English  
Nisi Prius Reports.  
R. & Ry. C. C.....Russell and Ryan's English  
Crown Cases.

## S

Salk.....Salkeld's English King's  
Bench Reports.  
Sanb. & B. Ann. St. Sanborn and Berryman's  
Annotated Statutes (Wis.)  
Sanders, Pl. & Ev...Saunders' Pleading and  
Evidence.  
Sandf. ....Sandford (N. Y.)  
Sandf. Ch. ....Sandford's Chancery (N.  
Y.)  
Sand. Inst. Just. In-  
tro. ....Sandars' Edition of Jus-  
tinian's Institutes.  
Sand. & H. Dig....Sandels and Hill's Digest  
of Statutes (Ark.)  
Saund. ....Saunders' English King's  
Bench Reports.  
Saund. Pl. & Ev...Saunders' Pleading and  
Evidence.  
Sawy. ....Sawyer (U. S.)  
Saxt. Ch. ....Saxton's Chancery (N. J.)  
Sayles' Ann. Civ.  
St. ....Sayles' Annotated Civil  
Statutes (Tex.)  
Sayles' Civ. St....Sayles' Revised Civil Stat-  
utes (Tex.)  
Sayles' Rev. Civ. St. Sayles' Revised Civil Stat-  
utes (Tex.)  
Sayles' St. ....Sayles' Revised Civil Stat-  
utes (Tex.)  
Sayles' Supp.....Supplement to Sayles' An-  
notated Civil Statutes  
(Tex.)  
S. C. ....South Carolina.  
Scam. ....Scammon (Ill.)  
Scates' Comp. St...Treat, Scates & Blackwell  
Compiled Statutes (Ill.)  
Schmidt, Civ. Law.. Schmidt on the Civil Law  
of Spain and Mexico.  
Schoales & L.....Schoales and Lefroy's Irish  
Chancery Reports.  
Schouler, Bailm...Schouler on Bailments.  
Schouler, Pera.  
Prop. ....Schouler on the Law of  
Personal Property.  
S. D.....South Dakota.  
S. E.....Southeastern Reporter.  
Sedg. St. & Const.  
Law ....Sedgwick on Statutory and  
Constitutional Law.  
Sedg. & W. Tr. Ti-  
tle Land.....Sedgwick and Wait on the  
Trial of Title to Land.  
Seld. ....Selden (N. Y.)  
Seld. Notes.....Selden's Notes (N. Y.)  
Serg. & R.....Sergeant & Rawle (Pa.)  
Sess. ....Session.  
Sess. Acts.....Session Acts.  
Sess. Laws.....Session Laws.  
Shan. Cas.....Shannon's Tennessee Cas-  
es.

Shankland's St....Shankland's Public Stat-  
utes (Tenn.)  
Shannon's Code....Shannon's Annotated Code  
(Tenn.)  
Shars. Bl. Comm...Sharswood's Edition of  
Blackstone's Commenta-  
ries.  
Shars. & B. Lead.  
Cas. Real Prop....Sharswood and Budd's  
Leading Cases of Real  
Property.  
Shear. & R. Neg...Shearman and Redfield on  
Negligence.  
Sheld. ....Sheldon (N. Y.)  
Shep. ....Shepley (Me.)  
Shep. Abr. ....Sheppard's Abridgment.  
Shep. Touch. ....Sheppard's Touchstone of  
Common Assurances.  
Show. ....Shower's English King's  
Bench Reports.  
Sid. ....Siderfin's English King's  
Bench Reports.  
Silvernail ....Silvernail (N. Y.)  
Sim. ....Simons' English Vice Chan-  
cery Reports.  
Sim. (N. S.).....Simon's English Vice Chan-  
cery Reports, New Series.  
Sim. & S.....Simons & Stuart's Eng-  
lish Vice Chancery Re-  
ports.  
Skin. ....Skinner's English King's  
Bench Reports.  
Slade's St.....Slade's Laws (Vt.)  
Smedes & M.....Smedes & Marshall (Miss.)  
Smedes & M. Ch...Smedes & Marshall's  
Chancery (Miss.)  
Smith, Com. Law...Smith's Manual of Com-  
mon Law.  
Smith, Cont. ....Smith on Contracts.  
Smith, E. D.....E. D. Smith (N. Y.)  
Smith (Ind.).....Smith (Ind.)  
Smith, J. P.....J. P. Smith's English  
King's Bench Reports.  
Smith, Man. Eq.  
Jur. ....Smith's Manual of Equity  
Jurisprudence.  
Smith, Merc. Law..Smith on Mercantile Law.  
Smith (N. H.).....Smith (N. H.)  
Smith (N. Y.).....Smith (N. Y.)  
Smith, P. F.....P. F. Smith (Pa.)  
Smith's Comm. on  
Stat. ....Smith's Commentaries on  
Statutes and Constitu-  
tional Law and Statu-  
tory and Constitutional  
Constructions.  
Smith's Laws.....Smith's Laws (Pa.)  
Smith's Lead. Cas..Smith's Leading Cases.  
Sneed .....Sneed (Tenn.)  
Snyder, Mines....Snyder on Mines and Min-  
ing.  
Sol. J.....Solicitors' Journal, London.  
Soule, Syn.....Soule's Dictionary of Eng-  
lish Synonymes.  
South. ....Southern Reporter.  
Southard .....Southard (N. J.)  
Sp. Acts.....Special Acts.  
Speers .....Speers' Law (S. C.)  
Speers, Eq. ....Speers' Equity (S. C.)  
Spell. Extr. Rel....Spelling in Extraordinary  
Relief in Equity and in  
Law.  
Spell. Extr. Rem...Spelling's Treatise on In-  
junctions and Other Ex-  
traordinary Remedies.  
Spence, Eq. Jur....Spence's Equitable Juris-  
diction of the Court of  
Chancery.  
Spencer .....Spencer (N. J.)  
Spinks, Prize Cas...Spinks' Admiralty Prize  
Cases.  
Sp. Laws.....Special Laws.  
Spr. ....Sprague (U. S.)  
Sp. Sess. ....Special Session.  
Sp. St.....Private and Special Laws.  
St. ....Laws or Acts (in some  
states).



Thornt. & Bl. Bldg. & Loan Ass'ns.... Thornton and Blackledge's Law Relating to Building and Loan Associations.  
 Tidd, Prac..... Tidd's Practice.  
 Tied. Lim. Police Power ..... Tiedeman's Treatise on the Limitations of Police Power in the United States.  
 Tiedman, Real Prop.. Tiedeman on Real Property.  
 Tied. Mun. Corp.... Tiedeman's Treatise on Municipal Corporations.  
 Tiffany ..... Tiffany (N. Y.)  
 Times L. Rep..... Times Law Reports.  
 Toller ..... Toller on Executors.  
 Toml. Law Dict.... Tomlins' Law Dictionary.  
 Townsh. Sland. & L. Townshend on Slander and Libel.  
 T. R..... Term Reports, English King's Bench (Durnford and East's Reports).  
 T. Raym..... Sir Thomas Raymond's English King's Bench Reports.  
 Tread. Const..... Treadway's Constitutional Reports (S. C.)  
 Troub. & H. Prac... Troubat & Haly's Practice (Pa.)  
 T. T..... Trinity Term.  
 Tuck. .... Tucker's Surrogate (N. Y.)  
 Tucker's Blackstone.. Tucker's Blackstone's Commentaries.  
 T. U. P. Charl't.... T. U. P. Charlton (Ga.)  
 Turn. .... Turner (Ark.)  
 Turn. & R. Ch.... Turner and Russell's English Chancery Reports.  
 Tyler ..... Tyler (Vt.)  
 Tyler, Ej..... Tyler on Ejectment and Adverse Enjoyment.  
 Tyler, Steph. Pl.... Tyler's Edition of Stephen on Principles of Pleading.  
 T. & H. Prac..... Troubat and Haly's Pennsylvania Practice.

## U

Underhill, Ev..... Underhill on Evidence.  
 Unof. .... Unofficial (Reports).  
 U. S..... United States.  
 U. S. App. .... United States Appeals.  
 U. S. Comp. St. 1901.. United States Compiled Statutes 1901.  
 U. S. Comp. St. Supp. 1903..... Supplement 1903 to the United States Compiled Statutes of 1901.  
 U. S. Law Mag.... United States Law Magazine (N. Y.)  
 U. S. Month. Law Mag. .... United States Monthly Law Magazine.  
 Utah ..... Utah.

## V

Va. .... Virginia.  
 Va. Cas. .... Virginia Cases.  
 Va. Law J..... Virginia Law Journal, Richmond.  
 Van Fleet, Coll. Attack ..... Van Fleet on Collateral Attack.  
 Van Ness, Prize Cas.. Van Ness' Prize Cases (U. S.)  
 Vattel, Law Nat... Vattel's Law of Nations.  
 Vent. .... Ventris' English Common Pleas Reports.  
 Vern. .... Vernon's English Chancery Reports.  
 Ves. .... Vesey, Junior, English Chancery Reports.

Ves. Jr..... Vesey, Junior, English Chancery Reports.  
 Ves. Sr..... Vesey, Senior, English Chancery Reports.  
 Ves. & B..... Vesey and Beames' English Chancery Reports.  
 Vict. .... Queen Victoria (as 5 & 6 Vict.)  
 Vin. Abr..... Viner's Abridgment.  
 Vroom ..... Vroom (N. J.)  
 V. S..... Vermont Statutes.  
 Vt. .... Vermont.

## W

W. .... William (as Wm. IV).  
 Wade, Am. Mining Law ..... Wade on American Mining Law.  
 Wade, Attachm.... Wade on Attachment and Garnishment.  
 Wag. St. .... Wagner's Statutes (Mo.)  
 Wait, Act. & Def.. Wait's Actions and Defenses.  
 Wait's Prac..... Wait's New York Practice.  
 Walk. .... Walker (Miss.)  
 Walk. Am. Law.... Walker's American Law.  
 Walk. Ch..... Walker's Chancery (Mich.)  
 Walk. (Pa.) ..... Walker (Pa.)  
 Walk. Pat. .... Walker on Patents.  
 Wall. .... Wallace (U. S.)  
 Wall. Jr..... Wallace, Junior (U. S.)  
 Wall. Sr. .... Wallace, Senior (U. S.)  
 Ware ..... Ware (U. S.)  
 Warv. Abst..... Warvelle on Abstracts of Title.  
 Wash. .... Washington.  
 Wash. (Va.)..... Washington (Va.)  
 Washb. Easem.... Washburn on Easements and Servitudes.  
 Washb. Real Estate.. Washburn on Real Property.  
 Washb. Real Prop.. Washburn on Real Property.  
 Wash. C. C..... Washington Circuit Court (U. S.)  
 Wash. Law Rep.... Washington Law Reporter (D. C.)  
 Wash. T. .... Washington Territory.  
 Watts ..... Watts (Pa.)  
 Watts & S..... Watts & Sergeant (Pa.)  
 W. Bl. .... Sir William Blackstone's English King's Bench Reports.  
 Webster, Dict..... Webster's Dictionary.  
 Webster in Sen. Doc. .... Webster in Senate Documents.  
 Webster, Int. Dict... Webster's International Dictionary.  
 Wedgw. Dict. Eng. Etymology ..... Wedgwood's Dictionary of English Etymology.  
 Welsb., Hurl. & G.. Welsby, Hurlstone, and Gordon's Reports (1-9 English Exchequer Reports).  
 Wend. .... Wendell (N. Y.)  
 West Coast Rep.... West Coast Reporter.  
 West. Law J..... Western Law Journal, Cincinnati (Ohio)  
 West. Law Month.. Western Law Monthly (Ohio)  
 West. L. M..... Western Law Monthly (Ohio)  
 Whart. .... Wharton (Pa.)  
 Whart. Ag..... Wharton on Agency.  
 Whart. Am. Cr. Law.. Wharton's American Criminal Law.  
 Whart. Conf. Laws.. Wharton's Conflict of Laws.  
 Whart. Cr. Ev.... Wharton on Criminal Evidence.  
 Whart. Cr. Law.... Wharton's American Criminal Law.

Whart. Cr. Pl. & Prac. ....	Wharton's Criminal Pleading & Practice.	Witthaus & Becker's Med. Jur. ....	Witthaus and Becker's Medical Jurisprudence.
Whart. Ev. ....	Wharton on Evidence in Civil Issues.	Wkly. Dig. ....	Weekly Digest (N. Y.)
Whart. Law Dict. ....	Wharton's Law Dictionary (or Law Lexicon).	Wkly. Law Bul. ....	Weekly Law Bulletin (Ohio)
Whart. Law Lexicon ....	Wharton's Law Dictionary (or Law Lexicon).	Wkly. Law Gaz. ....	Weekly Law Gazette (Ohio)
Whart. Neg. ....	Wharton on Negligence.	Wkly. Notes Cas. ....	Weekly Notes Cases (Pa.)
Whart. St. Tr. ....	Wharton's State Trials (U. S.)	Wkly. Rep. ....	Weekly Reporter, London (English).
Whart. & S. Med. Jur. ....	Wharton and Stille's Medical Jurisprudence.	Wm. ....	William (as 9 Wm. III).
Wheat. ....	Wheaton (U. S.)	Wm. Bl. ....	Sir William Blackstone's English King's Bench Reports.
Wheat. Int. Law. ....	Wheaton's International Law.	Wm. Rob. Adm. ....	William Robinson's English Admiralty Reports.
Wheeler, Am. Cr. Law ....	Wheeler's Abridgment of American Common Law Cases.	Wms. Ex'rs ....	Williams on Executors.
Wheeler, Cr. Cas. ....	Wheeler's Criminal Cases (N. Y.)	Wm. & Mary. ....	William and Mary (as 2 Wm. & Mary. c. 1).
White's Recop. ....	White's Recopilacion (Laws of Spain and Mexico).	Woerner, Adm'n. ....	Woerner's Treatise on the American Law of Administration.
White & T. Lead. Cas. Eq. ....	White and Tudor's Leading Cases in Equity.	Woodb. & M. ....	Woodbury & Minot (U. S.)
White & W. Civ. Cas. Ct. App. ....	White & Willson's Civil Cases Court of Appeals (Tex.)	Wood, Ins. ....	Wood on Fire Insurance.
Wig. Wills. ....	Wigram on Wills.	Wood, Inst. ....	Wood's Institutes of the (Common) Laws of England.
Wilcox. ....	Wilcox (Pa.)	Wood, Landl. & Ten. ....	Wood on Landlord and Tenant.
Will. ....	William (as 1 Will. IV).	Wood, Lim. ....	Wood on Limitation of Actions.
Will. Eq. Jur. ....	Willard's Equity Jurisprudence.	Wood, Nuis. ....	Wood on Nuisances.
Willes ....	Willes' English Common Pleas Reports.	Wood, Ry. Law. ....	Wood's Law of Railroads.
Williams (Vt.) ....	Williams (Vt.)	Woods ....	Woods (U. S.)
Williams, Ex'rs ...	Williams on Executors.	Wood's Civ. Law. ....	Wood's Institutes of the Civil Law of England.
Williams, Real Prop. ....	Williams on Real Property.	Woodw. Dec. ....	Woodward's Decisions (Pa.)
Wills, Cir. Ev. ....	Wills on Circumstantial Evidence.	Woolr. Waters. ....	Woolrych's Law of Waters.
Willson, Civ. Cas. Ct. App. ....	Willson's Civil Cases Court of Appeals (Tex.)	Woolw. ....	Woolworth (U. S.)
Willson, Tex. Cr. Law ....	Willson's Revised Penal Code, Code of Criminal Procedure, and Penal Laws of Texas.	Worcest. Dict. ....	Worcester's Dictionary.
Wils. ....	Wilson (Ind.)	Wor. Dict. ....	Worcester's Dictionary.
Wils. ....	Wilson's English Common Pleas Reports.	Works, Courts ....	Works on Courts and Their Jurisdiction.
Winch ....	Winch's English Common Pleas Reports.	Works, Pr. ....	Works' Practice, Pleading, and Forms.
Winch ....	Winch's Entries.	Wright ....	Wright (Ohio)
Winfield, Words & Phrases ....	Winfield's Adjudged Words and Phrases, with Notes.	Wright (Pa.) ....	Wright (Pa.)
Winst. ....	Winston (N. C.)	W. Rob. ....	W. Robinson's English Admiralty Reports.
Winst. Eq. ....	Winston's Equity (N. C.)	W. S. ....	Wagner's Statutes (Mo.)
Wis. ....	Wisconsin.	W. Va. ....	West Virginia.
		Wyo. ....	Wyoming.
		Wythe ....	Wythe's Chancery (Va.)

## Y

Yeates ....	Yeates (Pa.)
Yerg. ....	Yerger (Tenn.)
York. Leg. Rec. ....	York Legal Record (Pa.)
Younge & C. Ch. ....	Younge & Collyer's English Chancery Reports.

## Z

Zab. ....	Zabriskie (N. J.)
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# JUDICIAL AND STATUTORY DEFINITIONS

## OF

# WORDS AND PHRASES.

### VOLUME 6.

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#### OBED.

A condition to obey and perform the judgments of the court, in a bond conditioned so to do in case the principal obligee is not arrested by plaintiff, is sufficient to require the payment of the judgments. *Claffin v. Ball*, 43 N. Y. 481, 484.

#### OBITER DICTUM.

See "Dictum."

#### OBJECT.

See "Natural Object."  
Other object, see "Other."

Act Cong. July 13, 1866, amending Act March 10, 1866, declaring it to be the duty of all persons required to make returns or lists of income, articles, or objects charged with an internal tax, to declare, etc., should be construed comprehensively, and to include the gross receipts of express companies and the gross receipts of stage proprietors. The words "objects charged with an internal tax" are used in a general sense, as equivalent to "subjects of taxation." The word "objects" will not be regarded as having reference only to something tangible or having an existence in form. In this statute "lists of income" has a meaning distinct from gross receipts. "Articles" might be deemed to apply to enumerated goods in use or on sale, or produced by manufacture, and the word "objects" should be construed as a more general term, which includes what was not embraced in either of the others. *Wells v. Shook* (U. S.) 25 Fed. Cas. 679.

The word "object," in Code 1871, § 1378, providing that boards of supervisors shall not appropriate money in the treasuries of

their respective counties to any object not authorized by law, and in section 1386, making members liable personally for any such sum of money as the boards shall appropriate to any object not authorized by law, signifies the thing aimed at—the thing sought to be accomplished. The objects to which money in the county treasury may be appropriated are designated by law, and it is not legally appropriable to any other purpose. It is for a diversion of money from legitimate objects, and not for appropriation to a proper object, although in an irregular and unauthorized manner, that liability is imposed on members personally. It is what the money is appropriated to and not how it is applied that furnishes the test of personal liability under it. *Paxton v. Baum*, 59 Miss. 531, 536.

#### Of action.

The "object of an action" is the thing sought to be attained by the action. *Scarborough v. Smith*, 18 Kan. 399, 406.

The "object of the action" is not the cause of action or the subject of the action. The object of the action is brought into existence by the commencement of the action, which is long after the subject of action and the causes of action have had an existence. The object of the action is the thing sought to be obtained by the action. It is the remedy demanded and the relief prayed for, and is no part of the subject of action or the cause of action. *Scarborough v. Smith*, 18 Kan. 399, 406.

#### Of contract.

The object of a contract is the thing which it is agreed on the part of the party receiving the consideration to do or not to do. *Civ. Code Cal.* 1903, § 1595. The object of a contract must be lawful when the



contract is made, and possible and ascertainable by the time the contract is to be performed. Rev. Codes N. D. 1899, §§ 3866, 3867; Civ. Code S. D. 1903, §§ 1219, 1220.

#### Of statute or ordinance.

The object of a statute is the aim or purpose of the enactment. Allopathic State Board of Medical Examiners v. Fowler, 24 South. 809, 813, 50 La. Ann. 1358; State v. De Hart, 33 South. 605, 606, 109 La. 570. While the subject is the matter to which it relates and with which it deals. McNeeley v. South. Penn Oil Co., 44 S. E. 508, 518, 52 W. Va. 616 (citing State v. Ferguson, 104 La. 249, 28 South. 917, 81 Am. St. Rep. 123). The word "object" is so used in the clause of the Constitution providing that every law enacted by the General Assembly shall embrace but one object, and that shall be explained in the title. State v. Ferguson, 28 South. 917, 918, 104 La. 249, 81 Am. St. Rep. 123.

In the Constitution, requiring that the object of all laws shall be stated in the title, the word "object" means more nearly the same as "end" or "purpose" than does the word "subject." Day Land & Cattle Co. v. State, 4 S. W. 865, 872, 68 Tex. 542.

The object of legislation is to be determined by its natural and reasonable effect, and not by what may be supposed to have been the motives upon which the legislators acted. People v. Roberts, 19 Sup. Ct. 70, 76, 171 U. S. 658, 43 L. Ed. 823

The word "object," as used in a provision of a city charter that every ordinance shall contain but one object, expressed in the title, was not used in the sense of "number" or "variety"; nor was it intended to require a distinct legislative act for each particular matter legislated upon. It was intended to prevent the union in one act of diverse, incongruous, and disconnected matters having no relation to or connection with each other, but was not intended to prevent the law-making power from enacting under a general title provisions affecting a variety of matters, so long as there is a natural connection between the several matters and the object named in the title. City of Seattle v. Barto, 71 Pac. 735, 31 Wash. 141.

#### Same—As subject.

Instead of the word "subject" in Const. art. 5, § 21, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, the Constitutions of some of the states have, in like provisions, the word "object." Some states, as Texas and New York, give to "subject" a less restricted meaning than "object." Others, like Michigan, regard these words as substantially synonymous. In re House Bill, 39 Pac. 1096, 1098, 21 Colo. 46.

The word "object," as used in Const. art. 5, § 17, providing that "no law shall embrace more than one object, which shall be expressed in its title," means the same and has the same signification as the word "subject." Ingles v. Straus, 21 S. E. 490, 492, 91 Va. 209.

The word "object" is not synonymous with "subject," as used in Const. art. 3, § 21, providing that no law shall embrace more than one subject, which shall be expressed in its title; for the object is the aim or purpose of the enactment, while the subject of a statute is the matter of public or private concern for which the law is enacted. State v. Morgan, 48 N. W. 314, 317, 2 S. D. 32.

"Object," as used in the organic act of Washington Territory, providing that every law shall embrace but one "object," and that shall be expressed in the title, is for all practical purposes synonymous with "subject." If any distinction is to be made between "subject" and "object," in the connection used, "object" is obviously of broader significance than the word "subject." "Object" may be used as having the sense of "effect," the thing intended to be accomplished, not the means by which it is to be accomplished, which is properly the subject. For instance, the object of an act is to confer the elective franchise on females. Its subject is the subject-matter on which, in accomplishing that object, the legislative will operated, namely the section of the Code defining the qualification of electors. Harland v. Territory, 13 Pac. 453, 457, 3 Wash. T. 131.

#### Of tax.

The word "object," as used in Const. art. 7, § 13, requiring every law which imposes, continues, or revises a tax to distinctly state the tax and the object to which it is to be applied, should not be construed so narrowly as to restrict its meaning to a particular person or a particular appropriation. Its use is to require the Legislature, in imposing taxes, to specify one or another of the classes of expenditure which they are obliged or allowed to incur. It may be a wholly contingent or discretionary class, and yet be one of the objects to which the revenues of the state may be applied. The term is to be construed as intended to require the Legislature to indicate the general design with which a tax is laid, and for which it is to be used, and not to specify either a person or thing on which it is to be expended. The object of a tax is sufficiently stated where it is required to be paid into the treasury of the state to the credit of the general fund. People v. Orange County Sup'rs (N. Y.) 27 Barb. 557, 582.

In considering the provision of Const. art. 9, § 4, "that no tax shall be levied, except

in pursuance of a law which distinctly states the object of the same, to which object such tax shall be applied," the court said: "It is very clear that what constitutes the object, in the sense of the Constitution, is some legal occasion that calls for the expenditure of money; that is, some obligation, present or prospective, created by law. Clearly the Constitution did not intend that the money raised under a special tax shall be applied toward the purposes cited in such tax law, independent of there being any law constituting an appropriation for its disbursement. Suppose, for instance, that money is raised to erect a public building, and no act for the erection of such building was passed during the fiscal year for which it was raised. Clearly there was no authority to be gathered from that provision of the Constitution that could warrant the disbursement of such a fund toward such purpose without such a law. This shows clearly that the object intended by the Constitution is that which is created by some law, or, in other words, some obligation, present or prospective, created and sanctioned by law." *State v. Leaphart*, 11 S. C. 458, 470.

## OBJECTION.

See "General Objection."

Exception synonymous, see "Exception."

The word "objection," in a statement by an attorney that he desires to renew his objection to the findings of fact, was equivalent to the word "exception"; and hence an objection that no specified exception was taken to the findings of fact was groundless. *Ranahan v. Gibbons*, 62 Pac. 773, 775, 23 Wash. 255.

An "objection to the admissibility of evidence" in any cause can only be properly founded on the hypothesis that such testimony violates the law of evidence, in this: that the law prohibits the proof in the manner proposed of the particular fact, or of its irrelevancy to the subject-matter of inquiry. *Gibbs v. Gale*, 7 Md. 76, 86.

An objection to a pleading is not equivalent to a defense to an action, but is construed as relating to some formal defect. *Elfrank v. Seiler*, 54 Mo. 134, 136.

As used in a will devising a copyhold to testator's daughter-in-law for life, remainder in fee to her son A., on an express condition that A. should convey certain property severally to his sisters, but, in case he should "object or refuse" to make such conveyances, then the devise to him was void, the words "object or refuse" did not necessarily express a positive act, but the testator assumed that the grandson would convey if he did not object, and the words did not imply or make necessary a request by the sisters for the

conveyance. *Osborn v. Crisp*, 8 Adol. & E. 779.

## OBJECTIONABLE PURPOSE.

The conversion of a private dwelling into a public boarding house is using it for a "public or objectionable purpose," within the meaning of a lease providing that the lessor had a right to insist that the house should be occupied as a residence, and used strictly as a private dwelling, and not for any "public or objectionable purpose." *Gannett v. Albree*, 103 Mass. 872, 874.

## OBJECTIONABLE THING.

"Objectionable thing," as used in an instruction in an action for damages for the taking of land by a railway for a right of way, charging that if the jury find, from a preponderance of the evidence, that the value of plaintiff's land not actually appropriated by defendant had been decreased by the existence of any stagnant pools, floods, or objectionable thing, necessarily caused by the improvement of said right of way, the jury should add such decrease in value to their verdict for the plaintiff; but, if such pool, flood, or objectionable thing be caused by the faulty and negligent construction of such right of way, then any decrease in value of the land must be disregarded—to some extent rendered the instruction too broad and not sufficiently specific. The court should have enlarged on the instruction in its statement, and enumerated the different elements of damages, instead of grouping them as it did under the head of "objectionable thing"; but, inasmuch as by the last clause of the instruction the jury were limited to damages shown by the evidence, the objection and generality of the instruction was harmless. *Fremont, E. & M. V. R. Co. v. Bates*, 58 N. W. 959, 961, 40 Neb. 381.

## OBLIGATE

"Obligated" means strictly, and in common parlance, to be bound. *Wachter v. Famachon*, 22 N. W. 160, 161, 62 Wis. 117.

The term "obligated," in Laws 1891, c. 4022, § 2, providing that it shall not be lawful to take, by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay, a greater sum than the actual principal sum received, together with interest at the rate of 10 per cent. per annum, is a participle from "obligate," and has the same root as the noun "obligation." In Webster's Unabridged Dictionary "obligation" in law is a bond with a condition annexed and a penalty for nonfulfilment. In Bouvier's Law Dictionary "obligation" is defined as a bond containing a penalty, with a condition annexed for the

payment of money, performance of covenants, or the like. *Maxwell v. Jacksonville Loan & Improvement Co. (Fla.)* 34 South. 255, 267.

### OBLIGATION.

See "Alternative Obligation"; "Conditional Obligation"; "Express Obligation"; "Imperfect Obligation"; "Joint Obligation"; "Maritime Obligation"; "Moral Obligation"; "Natural Obligation"; "Pecuniary Obligation"; "Perfect Obligation"; "Personal Obligation"; "Primary Obligation"; "Principal Obligation"; "Simple Obligation"; "Solidary Obligation."

All obligations, see "All."

Other obligation, see "Other."

"Obligation" is defined to be the act of obliging or binding; that which obligates; the binding power of a future promise, vow, or contract. *Webst. Dict.* The word is derived from the Latin "obligatio," tying up, and that from the word "obligo," to bind or tie up, to engage by the ties of a promise or oath, or form of law; and "obligo" is compounded of the verb "ligo," to tie or bind fast, and the preposition "ob," which is prefixed to increase its meaning. *Blair v. Williams*, 14 Ky. (4 Litt.) 34, 65; *Lapsley v. Brashears*, Id. 47, 65; *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793.

*Bouvier* says: "Obligation in its general and most extensive sense is synonymous with duty. In the more technical sense it is a tie which binds us to pay or do something agreeably to the laws and customs of the country in which the obligation is made." *Webster* defines "obligation" to be "the binding power of a vow, promise, or contract of law, civil, political, or moral, independent of a promise; that which constitutes legal or moral duty, and which renders a person liable to coercion and punishment for neglecting it." *Crandall v. Bryan (N. Y.)* 5 Abb. Prac. 162, 168, 15 How. Prac. 48. See, also, *Morrison v. Lovejoy*, 6 Minn. 319, 353 (Gil. 224, 236); *McRae v. Cochise County (Ariz.)* 44 Pac. 299, 300.

The word "obligation" is defined to be "the constraining power or authoritative character of a duty, a moral precept, a civil law, or a promise or contract voluntarily made; that to which one is bound; that which one is obliged or bound to do, especially by moral or legal claims; a duty." *Colter v. State*, 39 S. W. 576, 577, 37 Tex. Cr. R. 284 (quoting *Cent. Dict.*).

The word "obligation" has two well-defined legal meanings: (1) Where it is the name given to the contract itself; (2) the other includes those cases where it refers to the duty imposed on a person in connec-

tion with a contract to perform it, or to a liability arising from his contract, or from his actionable, tortious conduct. *Exchange Bank v. Ford*, 3 Pac. 449, 451, 7 Colo. 314.

The word "obligation," as used in a requested instruction in an action against a railroad company for damages by fire, that if the jury found from the evidence that the railway ran through a prairie country, with prairie and wild grass on either side, both on the railroad's right of way and outside and adjacent to its track, "the defendant was under no legal obligation to mow or cut the said wild or prairie grass outside of its road ties along its right of way," refers to the duty of defendant as respects carelessness—its duty or obligation to avoid negligently exposing the property of others to injury from its engines. It does not refer to a duty imposed by statute. *Siblrud v. Minneapolis & St. L. Ry. Co.*, 11 N. W. 146, 29 Minn. 58.

"Obligation of the instrument," as used in superior court rule No. 7, which is as follows: "In any action brought on any deed, bond, bill, note, or other instrument of writing, a copy of which shall have been filed with the declaration, the defendant, not being an executor or administrator, shall not on the trial be allowed to deny his signature, or that of any other party to the instrument, and the execution of such instrument shall be taken to be admitted, unless the defendant shall have filed an affidavit denying the signature or the obligation of the instrument, by reason of fraud, duress, or other legal cause," etc., means the obligation which arises solely from the free and voluntary signature of the instrument. The phrase does not relate to the existing obligation to pay the amount secured to be paid by the instrument, nor to any obligation, other than as hereinbefore mentioned, existing at the time of filing the plea. *Vandergrift v. Hollis (Del.)* 6 Houst. 90, 102.

An obligation is a legal duty by which a person is bound to do or not to do a certain thing. *Civ. Code Cal. 1903*, § 1427; *Rev. Codes N. D. 1899*, § 3762; *Civ. Code S. D. 1903*, § 1114; *Civ. Code Mont. 1895*, § 1920. It arises from (1) contract or (2) operation of law. *Code Civ. Proc. Cal. 1903*, § 26; *Code Civ. Proc. Mont. 1895*, § 3475.

"Obligation" is, in its general and most extensive sense, synonymous with "duty." *Civ. Code La. 1900*, art. 1756.

### Agreement in writing.

"The word 'obligation' originally meant a bond containing a penalty, with a condition for the payment of money or to do or suffer some act or thing. *Co. Litt.* 172a. The meaning of the word, however, has gradually been enlarged by the court, and it

has ceased to be restricted to a bond or writing obligatory, and has been extended to mean a paper by which some fixed duty is assumed to be performed at a certain time, or an instrument in writing whereby one party contracts with another for the payment of money at a fixed date, or for the delivery of specific articles. But, however various have been the definitions given the word, the one essential element has always been that it must be a written paper. The duty assumed by it must be a fixed duty. *Bouv. Law Dict.* tit. "Obligations." The word, as used in *Stock Corp. Law*, § 48, providing that no corporation which shall have refused to pay any of its notes or other obligations may transfer property to its officers, directors, or stockholders, does not include an indebtedness for services furnished by a telegraph company under a contract providing for a fixed rental, and also compensation according to services rendered, as the amount or time of payment cannot be determined by the contract. *Munzinger v. United Press Co.*, 65 N. Y. Supp. 194, 196, 52 App. Div. 338.

The word "obligation" in its most technical meaning implies *ex vi termini* a sealed instrument, but it certainly has also a very broad and comprehensive legal signification, and embraces all instruments of writing, however informal, whereby one party contracts with another for the payment of money, or for the delivery of specific articles, whether same be under seal or not. *State v. Campbell*, 9 S. E. 410, 411, 103 N. C. 344.

The word "obligation," as used in *Gen. St.* § 1834, providing that all joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants, means an agreement in writing, sealed or unsealed, as contradistinguished from its use with reference to legal duty or liability, arising from an oral or written contract or from actionable tortious conduct. *Exchange Bank v. Ford*, 3 Pac. 449, 450, 7 Colo. 314.

The word "obligation," as used in a will, reciting: "Whereas, I now hold obligations against certain of my friends, I direct my executor not to urge the payment of any such obligations before the space of two full years after my decease"—means a written instrument like a note or bond. *Thorn v. Hall*, 41 N. Y. Supp. 1054, 1055, 10 App. Div. 412.

The word "obligation," as used in *Code*, § 120, providing that persons severally liable on the same obligation or instrument, including parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff, was intended to cover only those causes of action evidenced by a writing. The word "obligation" is from the

Latin word "obligatio," defined to be a bond of law, by which we are necessarily bound to pay something according to the laws of our country. *Strong v. Wheaton* (N. Y.) 38 Barb. 616, 623, 628.

#### **Bond.**

In *Webster's Unabridged Dictionary* "obligation," in law, is a bond with a condition annexed and a penalty for nonfulfillment. In *Bouvier's Law Dictionary* "obligation" is defined as a bond containing a penalty, with a condition annexed for the payment of money, performance of covenants, or the like. *Maxwell v. Jacksonville Loan & Improvement Co.* (Fla.) 34 South. 255, 267.

An obligation is a bond, and must arise on a good and valid consideration between persons capable of contracting, and must be executed in the manner required by law. *Pelham v. Grigg*, 4 Ark. (4 Pike) 141, 143.

"Obligations," as used in *Act Ky. 1878* (1 Sess. Acts 1878, p. 77), authorizing the county court of a certain county to compromise and settle with the holders of outstanding coupon bonds, and empowering the court to execute to the holders such bonds and coupons severally the "obligations" of such county, includes a coupon bond payable to the holder of the old bonds and bearer, and is not confined to an ordinary promissory note, nonnegotiable and payable to the holder of the old bonds only. "Obligations" is a generic word, and includes all kinds of contracts by which contracting parties bind themselves, and, in the absence of limiting words or the connection in which it is used, will be construed in its generic sense. *Sinton v. Carter County* (U. S.) 23 Fed. 535, 538.

Under *Laws 1892*, c. 636, §§ 69, 70, as amended by *Laws 1896*, c. 178, which authorized towns to borrow money to improve their highways and to issue obligations therefor, long term negotiable bonds are obligations within the meaning of the statute; "obligation" being a word of large extent, but commonly taken in the common law for a bond containing a penalty, with condition for the payment of money or to do or suffer some act or thing. *Blackstone* makes the word synonymous with "bond." *Ghiglione v. Marsh*, 48 N. Y. Supp. 604, 607, 23 App. Div. 61.

The words "obligation or other security," as used in *Rev. St.* § 5430 [U. S. Comp. St. 1901, p. 3671], which provides that every person who has in his possession or custody, except under authority from the Secretary of the Treasury or other proper person, any obligation or other security engraved and printed under the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same, shall be pun-

ished, etc., imply an executed instrument, or at least one which on its face purports to be executed by somebody. They would not include false or bogus bonds, which bear no signature whatever. *United States v. Williams* (U. S.) 14 Fed. 550, 552. A bond issued by a mining company and resembling a United States bond, but not purporting to be executed by any party whatever, is not an obligation or other security, within the meaning of the statute. *United States v. Sprague* (U. S.) 48 Fed. 828, 830.

#### Contract.

The term "obligation," as used in Pub. St. c. 60, par. 71, allowing a counterclaim in an action arising on obligation, means contract, and comprehends all causes of action arising *ex contractu*, as distinguished from causes of action arising *ex delicto*. *Morrison v. Lovejoy*, 6 Minn. 319, 353 (Gil. 224, 236).

The word "obligation," in a strict, technical sense, means properly a bond. 2 Bl. Comm. 340. But, as used in Comp. St. p. 541, § 71, providing that a counterclaim "must be one arising out of the following causes of action: \* \* \* (2) In an action arising on obligation, any other cause of action arising also on obligation, and existing at the commencement of the suit"—was intended to receive a more liberal construction, and to apply to all matters arising *ex contractu*. *Folsom v. Carll*, 6 Minn. 420, 426 (Gil. 284, 289), 80 Am. Dec. 456.

A partnership indebtedness is an "obligation," within Code Civ. Proc. § 235, providing that, when a judgment is recovered against one or more of several persons jointly indebted upon an obligation by proceedings as provided in this act, those who are not originally served may be summoned to show cause why they should not be bound by the judgment as if originally served. It does not contemplate merely an indebtedness arising upon and evidenced by an agreement in writing. "Obligation" is a generic word, and when used in its broadest sense includes all kinds of contracts by which a person may become bound, and should be so construed unless, from the connection in which it is used, it is to be gathered that the Legislature intended to give it more limited significance. *Sawyer v. Armstrong*, 47 Pac. 391, 392, 23 Colo. 287.

The word "obligation," in its origin, imports compulsion, the tying or binding of one against or irrespective of his consent. But consent is of the essence of a contract. The presence of compulsion on either side is fatal to its existence. The contract, therefore, or act of contracting, does not create an obligation, and does not of itself put any force upon the contracting party, since by the very nature of the transaction he volun-

tarily undertakes to do the thing promised. The obligation—that which, by a force stronger than his dissenting inclination or his repelling interest, constrains his will or ties him to the performance of his promise, whether he continue willing or not, and but for which he would, in any instance, refuse such performance—is the creature exclusively of law. The contract is the occasion, but it is not the efficient cause, of obligation. It is manifestly the legal obligation of contracts which such legislation is forbidden by the Constitution to impair. *Wood v. Wood* (S. C.) 14 Rich. Law, 148, 154, 156.

#### Debt or Liability.

The term "obligation," as used in an attachment affidavit, alleging that defendant fraudulently contracted the debt or incurred the obligation, was synonymous with the term "debt," the obligation and the debt meaning necessarily the same thing; and therefore the affidavit was not rendered void for uncertainty by reason of the use of the disjunctive conjunction "or" between the allegation that the debt was fraudulently contracted and the allegation that the obligation was fraudulently incurred. *Emerson v. Detroit Steel & Spring Co.*, 58 N. W. 659, 660, 100 Mich. 127.

Gen. St. 1889, par. 1268, providing that any two or more railroad companies are authorized to consolidate and form one company, subject to all the "obligations and liabilities to the state" which belong to or rest upon either of the companies making such consolidation, should be construed to include all claims, debts, or other pecuniary demands of each of the original companies. If obligations to the state only were intended, it would not have been necessary to have added the words "liabilities to the state," because "liability" is defined as the state of being liable, as the liability of an insurer, liability to the law, responsibility, accountability, or bounden duty. "Obligation" is also defined as that which obligates or constrains; the binding power of a promise, or a contract; a bond with a condition annexed and a penalty for non-fulfillment. In a larger sense it is an acknowledgment of a duty to pay a certain sum or do a certain thing; responsibility; accountability; bounden duty. To hold that obligations and liabilities are limited to the state only would be to say that the Legislature was guilty of a repetition of the same meaning in different words. On the other hand, if obligations and liabilities are both given their full force and effect, "obligations" may be construed as embracing all pecuniary duties in the way of being answerable for debts, demands, etc. "Liabilities" may mean burdens imposed by the Constitution and the statutes; that is, the responsibility or bounden duty to the state under

the Constitution and statutes. *Berry v. Kansas City, Ft. S. & M. R. Co.*, 34 Pac. 805, 808, 52 Kan. 759, 39 Am. St. Rep. 371.

"Obligation," as used in Code, § 179, subd. 4, permitting the arrest of a defendant for fraud in incurring the "obligation," as used in a general sense, includes all the cases beyond those embraced in the first clause, where the fraud was committed in contracting the debt for which the action is brought. The word is to be construed in this connection as equivalent to "legal liability" or "legal duty." *Crandall v. Bryan* (N. Y.) 15 How. Prac. 48, 53, 5 Abb. Prac. 162.

The reward authorized by Act March 19, 1899, to be paid to the person who shall be first in obtaining an artesian well in the county, offering the reward, and providing that, on the board of supervisors being satisfied with the requirements having been complied with, it shall draw a warrant on the treasurer, and that all expenses shall be chargeable to the county, etc., is an obligation within the meaning of Act Cong. July 30, 1888, c. 818 (24 Stat. 170), limiting the indebtedness of any county to 4 per cent. of the value of the taxable property, and providing that all bonds or obligations in excess of such amount shall be void. *McRae v. Cochise County* (Ariz.) 44 Pac. 299, 300, 33 L. R. A. 851, 56 Am. St. Rep. 579.

#### **Deed or sealed instrument.**

An obligation is defined to be "a deed in writing whereby one man doth bind himself to another to pay a sum of money or to do some other thing." *Cover v. Stem*, 10 Atl. 231, 232, 67 Md. 449, 1 Am. St. Rep. 406 (citing *Shep. Touch.*); *Jeffery v. Underwood*, 1 Ark. (1 Pike) 108, 112.

The word "obligation," in its most technical signification, imports *ex vi termini* a sealed instrument—that is, a bond; but in its more popular sense the term signifies an instrument or writing by which a contract is witnessed. In *Comyn's Digest* an obligation is defined to be a deed whereby a man binds himself under a penalty to do a thing. *Hargroves v. Cooke*, 15 Ga. 321, 330; *Morrison v. Lovejoy*, 6 Minn. 319, 353 (Gil. 224, 236).

It is said there are only three things essentially necessary to the making of a good "obligation," namely, writing on paper or parchment, sealing, and delivering; and it has been adjudged not to be necessary that the obligor should sign or subscribe his name, because the subscribing is no essential part of the deed, the sealing being sufficient. *Jeffery v. Underwood*, 1 Ark. (1 Pike) 108, 112 (citing *Bac. Abr.*).

"Obligation" is a technical term, which in its legal and proper meaning signifies a

contract under seal. *Rippon's Ex'rs v. Townsend's Ex'rs* (S. C.) 1 Bay, 445, 447.

Any memorandum in writing under seal, whereby a debt is acknowledged to be owing, will obligate the party to pay. *Cover v. Stem*, 10 Atl. 231, 232, 67 Md. 449, 1 Am. St. Rep. 406.

An engagement entered into by a bank under its corporate seal is properly termed an "obligation." *Kemmerer v. Wilson*, 81 Pa. (7 Casey) 110, 113.

#### **Draft or note.**

The term "obligation or written contract," in the provision of the statute declaring that an obligation or written contract of several persons shall be joint and several, unless otherwise expressed, held not to embrace or apply to promissory notes or bills of exchange. *Gale v. Myers* (Del.) 4 Houst. 546, 547.

A protested draft is not an obligation, within the meaning of the provisions of Act Pa. April 16, 1850, declaring that the assignees of an insolvent bank shall receive in payment of debts due to said bank its own notes and obligations and the checks of its depositors at par. *Basehore v. Rhodes*, 85 Pa. 44, 46.

#### **Duty of person occupying fiduciary relations.**

The duty of an administratrix to account is an "obligation," within Code Civ. Proc. § 382, subd. 1, limiting actions on contract obligations or liabilities, express or implied, to six years after the cause of action accrued. In re *Nicholls*, 8 N. Y. Supp. 7, 8, 2 Con. Sur. 156.

#### **Enforceable obligation.**

"An obligation, whether arising from contract or by operation of law, is one binding upon the obligor and one that may be enforced by the obligee. It does not rest in the option of the actor to perform or to refrain from performing at his own will. It does not depend for its existence upon the happening of a future event or the event of any contingency. It is an executed, a completed thing, having an existence in the present, binding in the present upon the obligor, and capable of being enforced by the obligee." *Keith v. Haggart*, 33 N. W. 465, 468, 4 Dak. 438.

#### **Evidence of debt.**

As used in a will providing that if, at the distribution, there should be due to the estate from any of the legatees obligations of any kind or evidences of debt of any kind, then such obligations shall be deducted from such legatee's share before payment, the term "obligation" meant to include notes and all instruments by which the maker thereof

binds himself to pay money, and as used the second time it was intended to embrace all those things mentioned in the first clause, namely, obligations of any kind and evidences of debt of any kind. *Hill v. Bloom*, 7 Atl. 438, 440, 41 N. J. Eq. (14 Stew.) 276.

"Obligation," as used in Code, § 1064, making an order, bill of exchange, bond, promissory note, or other obligation a subject of larceny, should be construed to include a duebill; for a duebill is evidence of an obligation to pay money. The maker by it acknowledges the indebtedness, and the law implies and raises the obligation to pay it. *State v. Campbell*, 9 S. E. 410, 411, 103 N. C. 344.

#### Judgment.

The words "contract or obligation," as used in Act June, 1879, which provides that "the rate of interest upon the loan or forbearance of any money, goods, or things in action shall be \$6 upon \$100 for one year, and after that rate for a greater or less sum, or for a longer or shorter time; but nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act," would include a judgment, so that the interest on a judgment recovered before the passage of this act would not be reduced by the act. *Prouty v. Lake Shore & M. S. Ry. Co.* (N. Y.) 26 Hun, 546, 549. Contra, see *O'Brien v. Young*, 95 N. Y. 428, 435, 47 Am. Rep. 64.

#### Limitation on powers of corporation.

Laws 1883, c. 175, which provides that, where any other state shall impose any "obligation" on co-operative life insurance companies of New York doing business in such other states, "the like obligations are hereby imposed on similar corporations of such other state transacting business in this state," does not impose on a Massachusetts corporation doing business in New York the prohibition of St. Mass. 1885, c. 183, § 10, that no policy or certificate shall be issued on "the life of any person more than 60 years of age," since it is the obligations, and not the prohibitions, that are imposed on foreign companies by the retaliatory act of 1883. The provision of the statute referred to is evidently one to be strictly construed, and, when so construed, the term "obligation" will not be held to include a limitation upon the powers of the corporations referred to. *Griesa v. Massachusetts Ben. Ass'n*, 15 N. Y. Supp. 71, 74, 60 Hun, 581.

#### National currency.

Where 13 Stat. 218, § 13, provided that the words "obligation or other security of the United States," used in the act, should include national currency, but the phrase "obligation or other security of the United

States" nowhere appeared in the act, but the word "obligation" appeared alone in another section of the act, the phrase "obligation or other security of the United States" should be construed to have referred to the words used therein separately, and not as a phrase; and hence the word "obligation," as used alone, included national currency. *United States v. Rossvally* (U. S.) 27 Fed. Cas. 901, 902.

#### Order for payment of money.

Orders on the federal treasury, payable on demand, for interest due on United States consols, are not "obligations of the United States," within the statutory provision exempting stocks, bonds, and other obligations of the United States from state and municipal taxation. *Hibernia Savings & Loan Soc. v. San Francisco*, 72 Pac. 920, 139 Cal. 205, 96 Am. St. Rep. 100.

#### Partnership indebtedness.

Code Civ. Proc. § 235, provides that, when a judgment is recovered against one or more of several persons jointly indebted upon an obligation by proceeding as provided in the act, those who were not originally served may be summoned to show cause why they should not be bound by the judgment as if originally served. Chapter 3, § 42, provides that, if plaintiff recover judgment, it may be enforced against all the defendants thus jointly liable as to their joint property, and as to the separate property of the defendants served. Held, that the word "obligation" in section 235 includes a partnership indebtedness. "This word," says the court, "when used in a statute as the name of a contract, is a generic word, including all kinds of contracts by which a person may become bound, and should be so construed, unless from the connection in which it is used it is to be gathered that the Legislature intended to give it a more limited signification." *Sawyer v. Armstrong*, 23 Colo. 287, 290, 47 Pac. 391.

#### Recognizance.

A New Jersey statute of limitations provides that every action of debt or covenant, etc., upon any obligation for the payment of money only, shall be commenced within a certain time. Held, that the words "obligation for the payment of money" are used in the sense of "contracts," and do not include a recognizance, since a recognizance has more of the nature of a judgment than a contract. *Elsasser v. Haines*, 18 Atl. 1095, 1100, 52 N. J. Law (23 Vroom) 10.

#### Tort.

"Obligation," as used in legislative provisions relative to a legal duty or liability, means a duty or liability which may arise from an oral or written contract, or in some instances from tortious conduct which gives

another a right of action. *Exchange Bank v. Ford*, 3 Pac. 449, 451, 7 Colo. 314.

"Obligation," as used in *Laws 1869*, p. 2383, chartering a city, which provides that no action against the city on a contract, obligation, or liability, express or implied, shall be commenced, except within one year after the cause of action shall have accrued, only includes such claims, accounts, or demands as are required to be presented for audit, and does not include liabilities for tort. *McGaffin v. City of Cohoes*, 74 N. Y. 387, 388, 30 Am. Rep. 307.

The word "obligation," as used in Act Feb. 16, 1865, amending Code Civ. Proc. § 191, and providing that an attachment may issue in a civil action for the recovery of money when defendant has "fraudulently or criminally contracted the debt or incurred the obligation for which the suit is about to be or has been brought," is equivalent to "liability" in cases in which the element of criminality is present, and therefore an attachment will lie to recover unliquidated damages for assault and battery; for that is a liability in the origin of which the element of criminality is present. *Sturdevant v. Tuttle*, 22 Ohio St. 111, 114.

#### OBLIGATION FRAUDULENTLY INCURRED.

"Obligation fraudulently incurred," as used in Rev. St. § 5521 (Code, § 191), providing that an attachment may be issued against the property of the person who fraudulently contracted the debt or incurred the obligation in favor of the other party, should be construed to include only contracts other than those by which a debt is created, and not to include all torts and wrongful acts to which in its widest sense the term "fraudulent" could be applied. The term "fraudulent" must be limited to actual and positive fraud, and not to embrace the wide field of constructive fraud. When a person by a device or unfair way obtains credit, he may be said to have fraudulently contracted a debt. But there are many contracts to which the assent of a party may be obtained, the effect of which is not in a strict and proper sense to create a debt. The party who has entered into such contracts, and has, by any device or unfair way, obtained from the other party his assent and the consideration, may very properly be said to have fraudulently incurred an obligation, within the meaning of the statute. Hence the fraudulent conversion of promissory notes, bills of exchange, etc., received in the usual course of business for collection, while a breach of the contract of bailment, does not create an obligation fraudulently incurred, within the meaning of the statute. *Merchants' Bank v. Ohio Life Ins. & Trust Co.*, 12 Ohio Dec. 738, 740.

#### OBLIGATION IN SOLIDO.

See "In Solido."

#### OBLIGATION OF CONTRACT.

See "Impairing Obligation of Contract."

"The Institutes (liber 3, tit. 4, Cooper's translation) say: 'An obligation is the charge of the law by which we are necessarily bound to make some payment according to the law of the land.' Pothier, in his *Treatise Concerning Obligations*, in speaking of the obligation of contracts, calls it 'vinculum legis,' the chain of the law. Paley (page 56) says: 'To be obliged is to be urged by violent motives, resulting from the command of another.' From these authorities, and many more might be cited, it may be fairly concluded that the obligation of the contract consists in the power and efficacy of the law, which applies to an enforced performance of the contract by a payment of an equivalent for nonperformance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but is the law applicable to the contract. The term is used in this sense in the clause of a federal constitution prohibiting laws impairing the obligation of contracts." *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 215, 216, 6 L. Ed. 606.

The term "obligation" has been treated in extenso by many learned moral and civil writers, and has been somewhat mystified by classification, and its correct use in connection with the various and numerous subjects in which it has been applied has not always been very clearly established; but the term, when used in relation to contracts, is neither mystical nor doubtful, and its meaning is well understood by lawyers. "*Obligatio ex contractu*" and "*obligatio est juris vinculum*," are terms of the Roman law with well-defined meaning. "*Obligatio*" is to bind. Obligation implies a duty, and a duty that may be enforced by law to perform the contract according to its terms. The Constitution of the United States uses the term in this sense when it prohibits the enactment of laws impairing the obligation of contracts. *Wachter v. Famachon*, 22 N. W. 160, 161, 62 Wis. 117.

The foremost approved lexicographers, Johnson, Sheridan, Walker, and Jones, all in substance define the word "obligation" to mean the binding power of any oath, vow, duty, or contract; an act which binds any man to some performance. The obligation of a contract is, then, its binding power. It is that which compels its performance. In other words, it is, as defined by the Supreme Court of the United States in *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 197, 4 L. Ed. 529, the law of the contract. Contracts between individuals, voluntarily made



and abstractly considered, have no law in their composition; but the law of the land says that they shall be fulfilled as made, and applies a remedy in case of a breach, and both of these constitute the obligation. *Blair v. Williams*, 14 Ky. (4 Litt.) 34, 85.

"The obligation of a contract is the law which binds the parties to perform their agreement." *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 197, 4 L. Ed. 529; *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 256, 6 L. Ed. 606; *Mason v. Haile*, 25 U. S. (12 Wheat.) 370, 379, 6 L. Ed. 660; *Bedford v. Eastern Building & Loan Ass'n of Syracuse*, N. Y., 21 Sup. Ct. 597, 602, 181 U. S. 227, 45 L. Ed. 834; *Walker v. Whitehead*, 83 U. S. (16 Wall.) 314, 317, 21 L. Ed. 357; *Von Hoffman v. City of Quincy*, 71 U. S. (4 Wall.) 535, 550, 18 L. Ed. 403; *Curran v. Arkansas*, 56 U. S. (15 How.) 304, 319, 14 L. Ed. 705; *Savings & Loan Ass'n v. Alturas County* (U. S.) 65 Fed. 677, 681; *Wachter v. Famachon*, 22 N. W. 160, 162, 62 Wis. 117; *Wood v. Malin*, 10 N. J. Law (5 Halst.) 268, 209; *Bates v. Gregory*, 26 Pac. 891, 893, 88 Cal. 387; *Beverly v. Barintz*, 42 Pac. 725, 726, 55 Kan. 466, 31 L. R. A. 74, 49 Am. St. Rep. 257; *Greeff v. Equitable Life Assur. Soc.*, 57 N. Y. Supp. 871, 878, 40 App. Div. 180; *Shrigley v. Black*, 71 Pac. 301, 306, 66 Kan. 213; *Edwards v. Williamson*, 70 Ala. 145, 151; *Phinney v. Phinney*, 17 Atl. 405, 409, 81 Me. 450, 4 L. R. A. 348, 10 Am. St. Rep. 266; *Long v. Walker*, 105 N. C. 90, 98, 10 S. E. 858-860; *Baily v. Gentry*, 1 Mo. 164, 170, 13 Am. Dec. 484.

The obligation of a contract is found in the terms in which that contract is expressed, and is the duty thus assumed by the contracting parties, respectively, to perform the stipulations of the contract. *Barlow v. Gregory*, 31 Conn. 261, 265.

"Obligation of contract" means the legal compulsion or obligation that grows out of a contract and makes a part of it, that enters into it at the time it is made, and that is intended to be protected and maintained in its full force and vigor by the language of the Constitution. *Webster v. Rose*, 53 Tenn. (6 Helsk.) 93, 97, 19 Am. Rep. 583.

The obligation of a contract is the legal tie which imposes the necessity of doing or abstaining from a particular act, as distinguished from the imperfect obligation arising from gratitude, charity, or other moral duties, binding upon the conscience, but having no legal remedy for their enforcement. This latter is the essence of the legal obligation. *Moore v. Holland*, 16 S. C. 15, 29.

The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to

perform them by one party and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. *McCracken v. Hayward*, 43 U. S. (2 How.) 608, 612, 11 L. Ed. 397; *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 285, 6 L. Ed. 606; *Edwards v. Williamson*, 70 Ala. 145, 151; *Forqueran v. Donnelly*, 7 W. Va. 114, 139; *Cutts v. Hardee*, 38 Ga. 350, 369; *Larrabee v. Talbott* (Md.) 5 Gill, 426, 440, 46 Am. Dec. 637.

The obligation of a contract is the duty to perform it, whatever may be its nature. It may be a moral obligation, or legal obligation, or both; but when we speak of "obligation" generally, we mean legal obligation—that is, the right to performance which the law confers on one party, and the corresponding duty of performance to which it binds the other. *Larrabee v. Talbott* (Md.) 5 Gill, 426, 440, 46 Am. Dec. 637 (citing *Story, Conf. Laws*, § 226).

The obligation of a contract, within the meaning of the Constitution, is not merely the moral obligation of the party who received the consideration, and is therefore equitably bound to perform the agreement on his part; but it is the legal obligation, which embraces not only the right of the party entitled to performance, but the power by law to enforce and consummate that right by compelling that performance. It is this legal obligation, this right to enforce and make effectual by legal compulsion in the case of unexecuted contracts, which is referred to in the Constitution as the obligation of a contract which the state Legislatures are forbidden to impair. *Richardson v. Cook*, 37 Vt. 599, 602, 88 Am. Dec. 622.

"Obligation of a contract" imports for the most part its binding force upon the obligor to perform the duty agreed on, according to the nature and effect of the contract. It relates to the performance, rather than to a breach, of the contract. *Coffman v. Bank of Kentucky*, 40 Miss. 29, 81, 90 Am. Dec. 311.

It is settled that the laws subsisting at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. *Von Hoffman v. City of Quincy*, 71 U. S. (4 Wall.) 535, 550, 18 L. Ed. 403; *Louisiana v. Police Jury of Parish of St. Martin*, 4 Sup. Ct. 648, 650, 111

U. S. 716, 28 L. Ed. 574; *Peabody v. Stetson*, 34 Atl. 74, 77, 88 Me. 273.

The obligation of a contract, within the meaning of the Constitution, is a valid subsisting obligation, not a contingent or speculative one. *Barton Nat. Bank v. Atkins*, 47 Atl. 176, 178, 72 Vt. 33.

A contract is an agreement between two or more persons to do or not to do a particular thing, and the obligation of a contract is found in the terms in which that contract is expressed, and is the duty thus assumed by the contracting parties, respectively, to perform the stipulations of the contract. *Barlow v. Gregory*, 31 Conn. 261, 265.

The obligation of a contract, within the meaning of the constitutional prohibition of laws impairing the obligation of a contract, consists in that which a person has undertaken to perform. If he has agreed to pay a certain sum at a specified period, his contract binds him to pay that sum on that day, and this is its obligation. *Smith v. Mead*, 3 Conn. 253, 256, 3 Am. Dec. 183.

The obligation of a contract consists in the power and efficacy of the law, which applies and enforces a performance of the contract, or the payment of an equivalent for nonperformance. The obligation does not inhere and subsist in the contract itself, but in the law applicable thereto. *Shrigley v. Black*, 71 Pac. 301, 306, 66 Kan. 218.

The obligation of a contract is found in the terms in which the contract is expressed, and is the duty assumed by the contracting parties, respectively, to perform the stipulations of such contract. *Barlow v. Gregory*, 31 Conn. 261, 265.

In construing the provisions of the United States Constitution and the Iowa Constitution, prohibiting the state from passing any law impairing the obligation of contracts, it is said that "perhaps as good a definition of 'obligation' as can be given is that contained in *Lasly v. Phipps*, in the Supreme Court of Missouri, reported in 13 Am. Law Reg. (N. S.) 236, as follows: 'The obligation of a contract is the duty of performance according to its terms; the means of enforcement being the part of the obligation which the states cannot by legislation impair. It has also been said that the obligation of a contract is its binding power; that which compels the performance.' Or, as defined by the Supreme Court of the United States (*Sturgis v. Crowninshield*, 17 U. S. [2 Wheat.] 122, 197, 4 L. Ed. 529), the law of the contract. Obligation is correlative of right. Obligation rests upon one party; right belongs to the other." *Holland v. Dickerson*, 41 Iowa, 367, 370.

#### Contract distinguished.

See "Contract."

#### Remedy as part of.

The obligation of a contract includes the laws relating to remedies for the enforcement thereof. *Gunn v. Barry*, 82 U. S. (15 Wall.) 610, 623, 21 L. Ed. 212. Contra, see *Jones v. McMahan*, 30 Tex. 719, 731.

A law is the true source of the obligation of contract, and the extent of the obligation is defined by law in force at the time the contract is made. The contract alone has no legal obligation, because there is no law to enforce it. The contract is made by the parties and sanctioned by the law, which promises to enforce performance should the party decline performance himself. *Townsend v. Townsend*, 7 Tenn. (Peck) 1, 14 Am. Dec. 722.

The term "obligation," whether we consult its etymology or its general acceptation in our own language, will be found to signify a ligament or tie, something which binds, or obliges us to do or not to do some act. It is derived immediately from the Latin substantive "obligatio," which is from the verb "obligare," to tie, to bind, to oblige; and it is in the same sense that the English words derived from these are universally used and received by all who either speak or write the English language. The obligation of a contract, therefore, is and can be nothing else but that which obliges a person to perform his contract, or to repair the injury done by a failure to perform it. To the duty of performing our contracts, or of repairing the injury done by a failure to perform them, we are, in a state of civil society, not only bound in conscience, but we are, moreover, obliged by the remedy which the law gives to enforce that duty; and as the remedy allowed by law upon a contract is the only civil means which obliges to the performance of the contract, or the repairing of the injury done by a failure to perform it, the legal obligation of the contract evidently consists in that alone. It can consist in nothing else; for if the remedy be withheld or taken away the contract is no legal obligation. The clause in the Constitution of the United States which prohibits the states from passing any law impairing the obligation of contracts refers to this legal obligation. *Blair v. Williams*, 14 Ky. (4 Litt.) 34, 36; *Lapsley v. Brashears*, Id. 47, 53.

The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. *Peabody v. Stetson*, 34 Atl. 74, 77, 88 Me. 273; *Cochran v. Ward*, 29 N. E. 795, 797, 5 Ind. App. 89, 51 Am. St. Rep. 229; *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793. This is the breadth of its vital existence. Without it the contract as such, in the view of the law, ceases to be, and falls into the class

of those imperfect obligations, as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793. *Jones v. National Cotton Oil Co.*, 72 S. W. 248, 249, 31 Tex. Civ. App. 420 (citing *Edwards v. Kearzey*, 96 U. S. 595, 596, 24 L. Ed. 793); *Long v. Walker*, 105 N. C. 90, 98, 10 S. E. 858, 859, 860.

Mr. Justice Trimble, in *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 350-352, 6 L. Ed. 606, says: "The obligation of the contract consists in the power and efficacy of the law, which applies to and enforces performance of the contract, or the payment of an equivalent for nonperformance." Mr. Webster, in the argument of the same case, defines it to be "the duty of performing a legal agreement." Whatever may be the correct definition (and upon this point scarcely any two judges agree), the position that the remedial laws of the state in existence at the time form part of it is untenable. The provision of the Federal Constitution, denying to any state the right to pass any law impairing the obligation of contracts, does not interfere with the right of a state to pass laws acting upon the remedy. *Cutts v. Hardee*, 38 Ga. 350, 369.

There is a distinction between the obligation of a contract and the remedy for its enforcement. Whatever pertains merely to the remedy may be changed or modified at the discretion of the Legislature, without impairing the obligation of the contract, providing the remedy be not wholly taken away, nor so hampered or reduced in effect as to render the contract practically incapable of enforcement. *Smith v. Jennings*, 45 S. E. 821, 825, 67 S. C. 324.

The distinction between the obligation of contract and the remedy given by the Legislature to enforce that obligation exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. *Wood v. Malin*, 10 N. J. Law (5 Halst.) 208, 209.

The obligation of a contract is found in the terms of the agreement sanctioned by moral and legal principles, and consists in acts of the parties, and is ascertained by the binding words of the contract; while the mode of enforcing the obligation emanates from the lawmaking power, which may be exercised at the discretion of the Legislature, within the prescribed limits of the Constitution. *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 573, 9 L. Ed. 773, 938.

The obligation of the contract is the means provided by law by which it can be enforced—by which the parties can be obli-

ged to perform it. *Rader v. Union Tp. Committee*, 44 N. J. Law (15 Vroom) 259, 260; *Louisiana v. City of New Orleans*, 102 U. S. 203, 26 L. Ed. 132; *Antoni v. Greenhow*, 2 Sup. Ct. 91, 100, 116, 107 U. S. 769, 27 L. Ed. 468; *Phinney v. Phinney*, 17 Atl. 405, 407, 81 Me. 450, 4 L. R. A. 348, 10 Am. St. Rep. 266.

By the "obligation of contracts" is meant the legal, and not the moral, obligation; the law which obliges the parties to the performance of a contract, embracing in this idea as well the law which is applicable to the contract itself as that which pertains to the remedy for its enforcement. *Rutland v. Copes* (S. C.) 15 Rich. Law, 84, 105.

### OBLIGATION OF RECORD.

A bond taken by an officer of the court by authority of law, and required to be returned into court, is, when so returned and placed upon the files, an "obligation of record." *Lawton v. State*, 5 Tex. 270, 271.

### OBLIGATION OR OTHER SECURITY.

The words "obligations or other security" of the United States, as used in Rev. St. U. S. § 5414 [U. S. Comp. St. 1901, p. 3662], punishing the forging or counterfeiting of any obligation or security of the United States, are defined by section 5413 so as to mean all bonds, certificates of indebtedness, national currency, coupon, United States notes, treasury notes, fractional notes, certificates of deposit, bills, checks, drafts for money drawn by or upon authorized officers of the United States, and other representations of value, of whatever denomination, which have been or may be issued under any act of Congress. *Neall v. United States* (U. S.) 118 Fed. 699, 706, 56 C. C. A. 31.

### OBLIGATORY BILL.

See "Bill Obligatory."

### OBLIGATORY WRITING.

See "Writing Obligatory."

### OBLIGE.

The meaning of Civ. Code La. art. 2315, providing that "every act whatever of man, that causes damage to another, obliges him through whose fault it happened, to repair it," is that under our law the wrong done by one human being to another or to his estate creates an obligation, i. e., brings at once into existence the relation of debtor and creditor, between the wrongdoer and the injured party. This provision includes corporations as among those who are subjected to this obligation. *United States v. City of New Orleans* (U. S.) 17 Fed. 483, 487.

**OBLIGEE.**

An obligee or creditor is the person in favor of whom some obligation is contracted, whether such obligation be to pay a sum of money, or to do or not to do something. Civ. Code La. 1900, art. 3556, subd. 20.

The parties to a lease are the lessor and lessee, neither of whom can with propriety be called "obligee"; and therefore an act providing for the assignment of notes and other instruments in writing, and allowing a defendant in a suit by the obligee or payee of any instrument in writing to plead a want of consideration, cannot apply to an action on a lease. *Dunbar v. Bonesteel*, 4 Ill. (3 Scam.) 32, 34.

As used in an act relating to promissory notes, and providing that, in any action on a note or instrument in writing for the payment of property or money by an obligee, the term "obligee" has a technical meaning, and applies only to notes, bonds, and bills, whether they are given for the payment of money or property or the performance of conditions or covenants, and not to mortgages. *Hall v. Byrne*, 2 Ill. (1 Scam.) 140, 142.

**OBLIGOR.**

"Obligor" or "debtor" is the person who has engaged to perform some obligation. Civ. Code La. 1900, art. 3556, subd. 21.

**OBLITERATE—OBLITERATION.**

To "obliterate" is to blot out; to "cancel" is to cross out. The former leaves the words illegible; the latter leaves the words legible. By either method a will can be legally revoked in whole or in part. *Townshend v. Howard*, 29 Atl. 1077, 1078, 86 Me. 285.

To "obliterate," in legal effect, would be to deface, to efface, to blot out, to destroy. To "obliterate," in the law, may be to alter, but certainly to alter will not necessarily be held as an obliteration; and an indictment charging that defendant did falsely, feloniously, and without lawful authority alter, "obliterate," and deface a receipt, without alleging in what manner or how he changed the receipt or what he did to it, is insufficient to charge an offense. *State v. Knippa*, 29 Tex. 295, 298.

A "cancellation" is, in legal meaning, an equivalent to and synonymous with an "obliteration." This cancellation or obliteration may be effected by words written across the instrument, as "obliterated" or "canceled." The end may be equally well accomplished by any erasure, partial or complete; it may be done by drawing the pen through the words. Any act of this sort is effectual, for the reason that it puts the instrument in condition

whereby its invalidity appears on its face the moment it is produced. Under a statute providing that a will may be revoked by burning, tearing, or obliterating it, a line drawn lengthwise through the name of testatrix, and an upright line through each of the words thereof, accompanied by a declaration of intention to destroy the will, is a sufficient obliteration. *Glass v. Scott*, 60 Pac. 186, 188, 14 Colo. App. 377.

"Obliterating" a will includes drawing a strong black line over and along the whole signature. *Baptist Church v. Robbarts*, 2 Pa. (2 Barr) 110, 111.

"Obliteration," within the meaning of the statutes of wills of 1833, authorizing the revocation of wills by obliteration, etc., does not require the effacing of the letters of the will so completely that they cannot be read. A line drawn through the writing constitutes an obliteration, though it may leave the will as legible as before. *Appeal of Evans*, 58 Pa. (8 P. F. Smith) 238, 242.

"Obliteration," within the meaning of the Pennsylvania wills act, does not include a careful interlineation. *Appeal of Dixon*, 55 Pa. (5 P. F. Smith) 424.

The word "obliterating," in Act April 8, 1833; § 13, authorizing the revocation of a will by burning, cancelling, obliterating, or destroying the same, does not include the act of testator in writing the word "obsolete" on the margin of his will, without signing the same. *Lewis v. Lewis* (Pa.) 2 Watts & S. 455, 457.

**OBLOQUY.**

"Obloquy" is defined as blame, reprehension; and to expose one to "obloquy" is to expose him to censure and reproach, such terms being synonymous with the word "obloquy." *Bettner v. Holt*, 70 Cal. 270, 275, 11 Pac. 713. So that language which tends to injure a man in his occupation, or expose him to censure and reproach, is within the meaning of Civ. Code, § 45, defining "libel" as a false and unprivileged publication which exposes any person to obloquy. *Tonini v. Cevalasco*, 46 Pac. 103, 105, 114 Cal. 268.

**OBNOXIOUS.**

"Obnoxious," as used with reference to a juror, does not refer necessarily to legal incompetency or unfitness, since a juror may be "legal" by the application of legal tests, and yet "obnoxious" to one or the other of the parties. *State v. Fourchy*, 25 South. 109, 117, 51 La. Ann. 228.

**OBSCENE—OBSCENITY.**

The word "obscene" is defined in the Century Dictionary as "offensive to modesty

and decency; impure, unchaste, indecent, lewd; as, 'obscene' actions or language; 'obscene' pictures. 'Obscene publication,' in law: Any impure or indecent publication tending to corrupt the mind and to subvert the respect for decency and morality." In the Standard Dictionary the definition is: "Offensive to chastity, delicacy, or decency; expressing or presenting to the mind or view something that decency, delicacy, and purity forbid to be exposed." And this is exactly the definition found in Webster. In Black's Law Dictionary "obscene" is defined as "lewd, impure, indecent." The word cannot be said to be a technical term of the law, and is not susceptible of exact definition in its juridical uses. *Timmons v. United States* (U. S.) 85 Fed. 204, 205, 30 C. C. A. 74.

Obscenity is such indecency as is calculated to promote the violation of law and the general corruption of morals. It is applied to language spoken, written, or printed, and to pictorial productions, and includes what is foul and indecent, as well as immodest or calculated to excite impure desires. *State v. Pfenninger*, 78 Mo. App. 313, 317; *United States v. Loftis* (U. S.) 12 Fed. 671, 672.

The word "obscene" is defined as "expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be expressed." It is used in such sense in Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], prohibiting a transmission of "obscene" books, pamphlets, etc., in the mails. *United States v. Bebout* (U. S.) 28 Fed. 522, 524; *Same v. Britton* (U. S.) 17 Fed. 731, 733. Obscene writing has been defined as one offensive to decency, indelicate, impure, as an indecent one. *Same v. Williams* (U. S.) 3 Fed. 484, 485.

"Obscene," as used in Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], prohibiting the use of the mails for obscene matter, means matter offensive to the common sense of decency and modesty of the community, and which is of such a character as to deprave and corrupt those whose minds are open to such immoral influences. *United States v. Harmon* (U. S.) 45 Fed. 414, 417; *Same v. Clarke* (U. S.) 38 Fed. 732, 733; *Same v. Williams* (U. S.) 3 Fed. 484, 485; *Same v. Britton* (U. S.) 17 Fed. 731, 733; *Same v. Bennett* (U. S.) 24 Fed. Cas. 1093; *Same v. Martin* (U. S.) 50 Fed. 918, 919; *Same v. Moore* (U. S.) 104 Fed. 78.

The words "obscene," "lewd," "lascivious," or "of an indecent character," in the federal statute prohibiting the sending of such matter through the mail, does not necessarily mean that the separate words are of such a character, but the character of the letter is to be determined by treating it as a whole. *United States v. Hanover* (U. S.) 17 Fed. 444.

An instruction was approved, in a prosecution for the violation of a statute prohibiting the mailing of "obscene, lascivious, lewd, or indecent" publications, that the question what constitutes obscene, lewd, lascivious, or indecent publications is largely a question for the conscience and opinion of the jury, but that, before it can be said of such literature or publication, it must come up to this point, that it must be calculated with the ordinary reader to deprave his morals or lead to impure purposes. *Dunlop v. United States*, 17 Sup. Ct. 375, 376, 165 U. S. 486, 41 L. Ed. 799.

The question whether a book, writing, picture, etc., is obscene or indecent, is for the jury. *People v. Muller* (N. Y.) 32 Hun, 209, 210.

#### Accusation of indecent offense.

The words "obscene, lewd, or lascivious," as used in Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], prohibiting the transmission of any obscene, lewd, or lascivious print, writing, etc., through the mails, etc., do not apply to a letter imputing to the person addressed an atrocious crime, though exceedingly coarse and vulgar, where it has no tendency to excite libidinous thoughts or impure desires, or to deprave and corrupt the morals of those whose minds are open to such influences. The words imply something tending to suggest libidinous thoughts or excite impure desires. *United States v. Wightman* (U. S.) 29 Fed. 636.

The mailing of a private sealed letter directed to and containing indecent charges against the mother of the writer does not constitute the offense of mailing a letter containing obscene, lewd, and lascivious matter within the statute. *United States v. Wroblewski* (U. S.) 118 Fed. 495, 496.

#### Insulting language.

The words "obscene, lewd, or lascivious," in Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], prohibiting the sending through the mails of any obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, are not descriptive of language of merely an insulting character, but are limited to the use of words or pictures appealing to the animal passion, stimulating it, corrupting and debauching the mind and heart. *United States v. Durant* (U. S.) 46 Fed. 753.

The words "obscene, lewd, or lascivious," in Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], making it criminal to transmit any obscene, lewd, or lascivious book, etc., through the mail, do not clearly characterize letters inclosed in envelopes, directed to a debtor, on which the words "dead beats" are printed in such a manner as to attract attention. The purpose of the act was to

prevent the mails from being used to circulate matter to corrupt the morals of the people. The history of this legislation clearly shows that Congress determined to exclude from the mails impure and immodest writings, and that rough and coarse language is not within the terms of the act. *Ex parte Doran* (U. S.) 32 Fed. 76, 77.

#### Medical works.

The term "obscene or indecent publication," within the meaning of Rev. St. U. S. § 3893 [U. S. Comp. St. 1901, p. 2658], includes an illustrated pamphlet purporting to be a work on medical subjects, but of an indecent character, and intended for general circulation, even though the work consists partially of extracts from standard medical works. *United States v. Chesman* (U. S.) 19 Fed. 497. See, also, *United States v. Smith* (U. S.) 45 Fed. 476.

In a prosecution for the publication of an obscene libel, the court said: "That it did not matter whether the things published in the book were true, and in conformity with nature and the laws of our being, or not. If they were unfit to be published, and tended to inflame improper and lewd passions, it was an obscene libel. That even scientific and medical publications containing illustrations exhibiting the human form, if wantonly exposed in the open markets with a wanton and wicked desire to create a demand for them, and not to promote the good of society by placing them in proper hands for useful purposes, would, if tending to incite lewd desires, be held to be obscene libels." *Commonwealth v. Landis*, 8 Phila. 453, 454.

#### Nudity in art.

The test of the indecency or obscenity of a picture, within the meaning of Pen. Code, § 317, prohibiting the selling of any obscene or indecent pictures or publications, etc., is their capability of suggesting impure thoughts. It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting and sculpture, as all know, represent nude human forms. *People v. Muller*, 96 N. Y. 408, 411, 48 Am. Rep. 635; *People v. Muller* (N. Y.) 32 Hun, 209, 211.

#### Sexual impurity.

"Obscene," as used in Rev. St. U. S. § 3893 [U. S. Comp. St. 1901, p. 2658], making it a criminal offense to place in the mails any obscene, lewd, or lascivious publication, signifies that form of immorality which has relation to sexual impurity, and has the same meaning as is given at common law in prosecutions for obscene libel. *Swearingin v. United States*, 16 Sup. Ct. 562, 563, 161 U. S. 446, 40 L. Ed. 765; *United States v. Males* (U. S.) 51 Fed. 41, 42.

Within the meaning of a statute forbidding obscene and vulgar language in the presence of a female, the language of a man in asking a female to go to bed with him is vulgar and obscene. *Dillard v. State*, 41 Ga. 278.

An article is not unmailable merely because it offends the religious sentiments of the majority of the people by attacking the doctrine of the immaculate conception of Christ in coarse or even obscene language, where it has no tendency to induce sexual immorality; that being the only class of publications against which it is the purpose of the statute to protect the public. *United States v. Moore* (U. S.) 104 Fed. 78.

#### OBSCENE EXHIBITION OF PERSON.

The terms obscene and indecent exhibition of the person as used in Pen. Code, § 343, prohibiting the "obscene and indecent exhibition of the person," mean "an exposure of those parts of the person which are commonly considered as private, and which custom and decency require should be covered and kept concealed from public sight. They do not mean or include obscene or indecent prints, pictures, or written composition placed on the clothes worn on the person." *Tucker v. State*, 13 S. W. 1004, 28 Tex. App. 541.

#### OBSERVATION.

See "Ordinary Observation."

#### OBSERVE.

"Observed," as used in an instruction in a personal injury action by a railroad brakeman injured by the failure of his engineer either to see or obey certain signals, was obscure and confusing, since the term, in that connection, might mean either seen or obeyed. *Western Ry. v. Williamson*, 21 South. 827, 831, 114 Ala. 131.

"Observe," as used in a liquor dealer's bond, providing that the liquor dealer shall observe all the provisions of a certain act, the failure of the liquor dealer to pay the tax required by the act is a breach of such condition, since "observe" means to conform one's action or practice to; to keep; to heed or obey; to comply with. *Marshall County v. Knoll*, 69 N. W. 1146, 1148, 102 Iowa, 573.

#### OBSOLETE.

The act of a testator in writing the word "obsolete" on the margin of his will, without signing it, or having any person sign it for him, in the manner prescribed by law, does not constitute a revocation of the will, un-

der Act April 8, 1833, enacting that no will in writing concerning any real estate shall be repealed otherwise than by some other will or codicil in writing, or some other writing declaring the same, executed and proved in the same manner as thereinbefore provided, or by burning, canceling, obliterating, or destroying the same by the testator himself, or by some one in his presence, or by his express direction. *Lewis v. Lewis* (Pa.) 2 Watts & S. 455, 457. See, also, *Jack v. Shoenberger*, 22 Pa. (10 Harris) 416, 420.

## OBSTINATE DESERTION.

"Obstinate desertion," within the meaning of a divorce statute which provides that divorce may be decreed for willful, continued, and obstinate desertion for the term of two years, means a desertion which has resisted such effort or concession as the party alleging desertion ought, under the particular circumstances of the case, to have made to bring it to an end. A wife's desertion is not obstinate where the husband was partly to blame, and where he made no effort to prevent her going on the day of her departure, nor any subsequent effort to induce her to return, though they met several times thereafter on friendly terms. *Van Wart v. Van Wart*, 41 Atl. 965, 57 N. J. Eq. 598. See, also, *Cornish v. Cornish*, 23 N. J. Eq. (8 C. E. Green) 208; *Bowlby v. Bowlby*, 25 N. J. Eq. (10 C. E. Green) 406, 410; *Payne v. Payne* (N. J.) 28 Atl. 449; *Trall v. Trall*, 32 N. J. Eq. (5 Stew.) 231, 232.

The law as to what constitutes desertion is well settled. Chancellor Green, in *Moore v. Moore*, 16 N. J. Eq. (1 C. E. Green) 275, 280, said: "To constitute desertion, a wife must absent herself from her husband of her own accord, without his consent and against his will. The simple inquiry is, has the wife for three years absented herself from her husband without his consent and against his will? If she has not, the desertion is not, within the contemplation of law, willful and obstinate. And the principle is firmly established that if a wife leaves her husband without cause, and with intent to throw off her marital duty, and afterwards realizes that she has acted hastily or foolishly, and would return if the way was open to her, and her husband refrains from doing anything to induce her to return, for the purpose of making her absence a ground of divorce, her desertion in such case is neither obstinate nor against his will." The essence of the wrong of desertion by a wife consists in the refusal by her, against the will and contrary to the wishes of her husband, to perform her marital duties and her obligations. *Newing v. Newing*, 45 N. J. Eq. (17 Stew.) 498, 18 Atl. 166.

Desertion cannot be considered as obstinate when the separation is acquiesced in

by, and entirely satisfactory to, the other, who neither entertains nor manifests any desire that the separation, or the cause which brought it about, should cease. And a wife who is prosecuting an action against her husband for divorce cannot maintain that separation during the pendency of such suit is obstinate on his part. *Chipchase v. Chipchase*, 48 N. J. Eq. (3 Dick.) 549, 22 Atl. 588.

Where a husband and wife separated by mutual agreement that the husband, who was not able to support his wife, should go to a distant place and build up a medical practice, and, when able to maintain the wife, should send for her, and he did not do so, and, though having an opportunity to communicate with him, the wife did not, on her part, terminate the agreement, and it did not appear that the husband was at any time during the separation able to support his wife, whereby the agreement would terminate by its own limitation, the separation is not an obstinate desertion by the husband, within the meaning of the statute allowing a divorce for such cause; nor, if the husband did nothing to induce the wife to return, even if her separation from him was without sufficient cause, her desertion is not deemed obstinate. *Costill v. Costill*, 21 Atl. 35, 37, 47 N. J. Eq. 346.

## OBSTRUCT—OBSTRUCTION.

See "Willful Obstruction."

Hinder synonymous, see "Hinder."

"Obstruct, hinder, and prevent" are commonly used as synonymous, and are given as such in the dictionary. But they are of different roots, and are employed conventionally to express varying shades of meaning. Speaking etymologically, to obstruct "obstruo" (Latin), is to build or set up something in the way; to hinder, "hind" (Anglo-Saxon), as in "behind," "hindmost," is to pull back; to prevent, "prævenio" (Latin), is to come before; to thwart by anticipating. In a more critical acceptation, "obstruct" implies opposition without active force, and does not imply that the opposition was, in the end, effective; "hinder" implies action, and, to some extent, effectiveness; to "prevent" is to be effective, but not necessarily by force, either active or inert. Thus it may be that an officer of the law was obstructed in his duty, and hindered, perhaps, for a long time, but not finally prevented, from performing it. So, too, he may have been obstructed; but, surmounting or avoiding the obstruction, he may have been not even hindered. Again, he may be prevented by stratagem, though stratagem alone can neither hinder nor obstruct him; and yet, should the success of the stratagem involve action, as it would almost necessarily, it might be very questiona-

ble whether the act ought not to be regarded as a hindrance. These distinctions are, however, the appropriate subjects of scholastic, rather than juridical, disquisition. Statutes defining crimes, unless the phraseology they employ has been itself legally defined, must be interpreted as their language is understood by mankind at large, according to the everyday import of the words. I shall therefore charge you that the words "obstruct," "hinder," and "prevent," in the act before us (Fugitive Slave Law, § 7), making it a criminal offense knowingly and willfully to frustrate or retard the attempted recapture of a fugitive slave by his master, mean substantially the same thing. *United States v. Williams* (U. S.) 28 Fed. Cas. 631, 633.

Gen. St. 1878, c. 32, § 78, authorizing a person who is hindered and obstructed, in driving logs, by the logs of another, to drive such obstructing or hindering logs to some point where they can be conveniently separated, and to recover a reasonable compensation for so driving from the owner, should be construed to mean that if the logs of one person are in the way of the logs of another, so that such other cannot drive his logs until they are gotten out of the way, he is hindered or obstructed. It is not necessary, to constitute such hindrance or obstruction, that the logs should have come in actual contact. *Anderson v. Maloy*, 19 N. W. 387, 32 Minn. 76.

#### Of due administration of justice.

The words "obstruct the due administration of justice therein," used in a penal enactment, necessarily limit the offense there denounced to cases therein—in the court, still "before the same"—and exclude past cases. They do not cover misbehavior which, though not directed to a particular case, affects all cases alike in the general administration of justice. The words "obstruct the administration of justice," in a section not penal, regarding a power to preserve the purity and independence of the court, and thereby promote the dispensation of justice, are broad enough to include not only improper acts in particular, but those which undermine the general administration of justice as well. *Ex parte McLeod* (U. S.) 120 Fed. 130, 139, 140.

#### Of highway.

Encroachment distinguished, see "Encroachment."

An obstruction is a blocking up—filling with obstacles or impediments, and impeding, embarrassing, or opposing passage along and over the street—and, to constitute it such, it need not be such as to stop travel. Shade trees from 25 to 40 feet high, and about 12 inches in diameter, standing within the sidewalk, from 8 to 15 inches from the curb of a street, are obstructions. *Chase v.*

*City of Oshkosh*, 51 N. W. 560, 562, 81 Wis. 313, 15 L. R. A. 553, 29 Am. St. Rep. 898.

Obstruct does not necessarily mean to render impassable, as used in an ordinance punishing whoever shall obstruct any street or highway. The word evidently means to place an obstacle in the way, or an impediment which will interfere with the free passage along the street. *Overhouser v. American Cereal Co.*, 92 N. W. 74, 75, 118 Iowa, 417.

An obstruction, within the act of incorporation of a railroad company providing that it should be so constructed as not to obstruct or impede the free use of any public road, street, lane, or bridge, is anything set in the way, whether it totally closes the passage, or only hinders and retards progress. A road may be obstructed more or less. Such word, understood in its ordinary import, would make a railroad per se an obstruction to the free use of a street by the public. Under the charter, a railroad cannot be built on a street in such a manner as to cause any material obstruction. *Commonwealth v. Erie & N. E. R. Co.*, 27 Pa. (3 Casey) 339, 355, 67 Am. Dec. 471.

To obstruct a highway means to stop up and wholly prevent travel upon a road, or render it unfit for travel. *Newburyport Turnpike Corp. v. Eastern R. Co.*, 40 Mass. (23 Pick.) 326, 328.

"Obstruction," as used with respect to a highway, is applied to impediments to travel and passage placed in the open street, and tending to make its use difficult and dangerous. *Gorham v. Withey*, 17 N. W. 272, 52 Mich. 50.

A fence along a highway is an obstruction, if it prevents public travel from being perfectly safe, although it does not extend across the track. *Mosher v. Vincent*, 39 Iowa, 607, 609.

"Obstruction," as used in Code, § 993, providing that the supervisors shall remove obstructions in the highways caused by fences or otherwise, means an obstacle; an impediment; a hindrance; that which impedes progress. In order to obstruct a highway, it is not necessary that it should be rendered impassable. Hence it would include trees growing within the limits of the road or highway which interfere with travel. *Patterson v. Vail*, 43 Iowa, 142, 145.

Rev. St. § 1326, providing that whoever shall obstruct any highway, or fill up or place any obstruction in any ditch constructed for the draining of water from any highway, shall forfeit a certain sum, should be construed to include a barn occupying nearly one-half of the width of a highway in a populous village, and impeding and interfering with travel on such highway. The fact



that a portion of the width of the street was left open, so that travelers thereon could conveniently pass the structure, does not make it an encroachment, instead of an obstruction of the street. It is difficult to lay down any general rule by which to determine, in any given case, whether an object placed in a highway is an obstruction or an encroachment. It may safely be said that an object or structure, to be an obstruction, need not necessarily be such as to stop travel on the highway. *State v. Leaver*, 22 N. W. 576, 578, 62 Wis. 387.

The term "obstruction" will not include the rightful use of a highway by individuals, which is itself in reasonably safe and fit condition, or their misconduct upon it, though such misconduct may amount to a public nuisance, as used in Rev. St. c. 5701, making persons causing an obstruction on a highway liable for damages arising therefrom. *Ray v. City of Manchester*, 46 N. H. 59, 60, 88 Am. Dec. 192.

The obstruction of a public road is a public nuisance, but private individuals cannot complain of such a matter unless they can show an injury peculiar to themselves. *Hill v. Hoffman* (Tenn.) 58 S. W. 929, 931.

#### Of mails.

"Obstructing the mails," as used in Rev. St. U. S. § 3995 [U. S. Comp. St. 1901, p. 2716], providing that any one guilty of obstructing the mails shall be punished, etc., includes the placing of obstructions by boys on the track of an electric railway whereon the United States mails are carried, by which the mail is delayed or forced to be carried in some other way. *United States v. Thomas* (U. S.) 55 Fed. 380.

Within the meaning of Rev. St. U. S. § 3995 [U. S. Comp. St. 1901, p. 2716], which provides that any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage horse, driver, or carrier carrying the same, for every such offense shall be punishable, etc., would include the stopping of a train carrying United States mail, although the person stopping the same had a judgment and writ of possession from a state court against the railroad company in respect to the lands about to be crossed by such train. *United States v. De Mott* (U. S.) 3 Fed. 478.

#### Of navigation.

The meaning to be given to the words "not to obstruct the navigation," as used in Rev. St. § 5263 [U. S. Comp. St. 1901, p. 3579], requiring cable companies constructing a submarine cable to so construct and maintain it as "not to obstruct navigation," must depend upon each individual case, and must be disposed of upon its own facts; and it may be taken as a safe rule that the

degree of obstruction will vary with the character and extent of the navigation. *Western Union Tel. Co. v. Inman & I. S. S. Co.* (U. S.) 59 Fed. 365, 367, 8 C. C. A. 152.

As applied to navigation, there cannot be a distinction between an obstruction and an interference. Where submarine telegraph cables, laid in the soft mud at the bottom of a navigable river, whatever their exact position was, were in a permanent position, if they interfered at all with the rightful or necessary use of steamers in that locality, the interference was also permanent; and a permanent interference which prevents a vessel from going where she ordinarily has the right to go, and wherever in her maneuvers she may find it necessary to go, whether the necessity be constant or frequent, or only occasional, as emergencies may compel her, constitutes obstruction. In *re City of Richmond* (U. S.) 43 Fed. 85, 88.

By an "obstruction" to the navigation of a river is meant such an impediment to the navigation that boats, in passing along the stream, cannot, by the use of skill and care, avoid being injured. *Terre Haute Drawbridge Co. v. Halliday*, 4 Ind. 36, 41.

The prohibition contained in Act Cong. Sept. 19, 1890, 26 Stat. 454, prohibiting creating an obstruction in navigable waters, is general in its terms. Where, by reason of the plastic nature of a substratum of clay under a railroad right of way located some distance from a navigable river, the track of the road settled, and the additional weight of an embankment built by the company forced the clay onto the bed of the river, causing a bar which obstructed navigation, such a bar was an obstruction, within the meaning of the statute. *Northern Pac. R. Co. v. United States* (U. S.) 104 Fed. 691, 694, 44 C. C. A. 135, 59 L. R. A. 80.

What is an unlawful obstruction to navigation must always depend upon the circumstances of the particular case. In a sense, every vessel that is launched upon a river is an obstruction to its navigation, but such obstruction is not an unlawful one. So long as the vessel, however guided or propelled, does not actually prevent or render hazardous the navigation of the river by others, it cannot be considered an obstruction to navigation in the ordinary sense of the term. *The Vancouver* (U. S.) 28 Fed. Cas. 958, 960.

The word "obstruction," in Act Feb. 2, 1854, § 28, making it the duty of the city of Philadelphia to keep the navigable waters within such city free from obstruction, was construed not to include a rock in the bottom of the river, of which no notice had been given to the city authorities. *Snyder v. City of Philadelphia*, 78 Pa. (28 P. F. Smith) 23, 25.

The term "obstruction," employed in reference to navigation, includes a rope stretch-

ed across the archway of a bridge over a navigable river, and over the principal channel of the river crossed. *The Swan* (U. S.) 19 Fed. 455.

"Obstruction by ice," within the meaning of a clause in a charter party that during the obstruction of the navigation by ice the lay days are not to be counted, applies to such obstructions as prevent the loading of a vessel, as well as those which prevent her from going to sea. *Ladd v. Wilson* (U. S.) 14 Fed. Cas. 928.

#### Of officer.

"Obstruct" as used in Code, § 4476, providing for the punishment of any person who shall knowingly and willfully obstruct, resist, or oppose any sheriff, coroner, or other officer or person duly authorized, in serving or attempting to serve or execute any lawful process, means to oppose. According to Webster, "to obstruct an officer" means to oppose that officer. It does not mean to oppose or impede the process with which the officer is armed, or to defeat its execution, but that the officer himself shall be obstructed. It is opposition to the officer, and the words "obstruct, resist, or oppose" have nearly the same meaning, and the word "oppose" would cover the meaning of the words "resist or obstruct," and they all mean the same thing. *Davis v. State*, 76 Ga. 721, 722.

#### Of prosecution of action.

"Defeat or obstruct," within the statute providing that if any surety shall abscond, or otherwise defeat or obstruct any person from bringing suit, signifies the performance of some act on the part of the surety which will amount to the prevention or hindrance of a suit in opposition to the will and right of a creditor, such as he cannot with reasonable diligence obstruct. The terms import resistance and obstruction in his rights, and unless the acts complained of are, in point of fact, such as would hinder and prevent him from bringing suit notwithstanding his desire to do so, they cannot be properly said to defeat or obstruct such suit. *Walker v. Sayers*, 68 Ky. (5 Bush) 579.

Persistent legal resistance to a judgment is not an obstruction, within Gen. St. c. 71, art. 4, § 9, providing that, if a defendant by any indirect means obstructs the prosecution of an action, the time of the obstruction shall not be computed as part of the period within which the action may be commenced. *Phillips v. Shipp*, 81 Ky. 436, 442.

#### Of railroad track or train.

Pen. Code, art. 678, punishing any person who shall willfully place "any obstruction upon the track of any railroad," means an obstruction such as might have endangered human life; and a piece of iron bar, which a person was unable to remove with

his foot, but could remove with his hands, is not such an obstruction. *Bullion v. State*, 7 Tex. App. 462, 463.

The term "obstruction," as used by railroad men, means that which may obstruct or hinder the free and safe passage of a train, or that which may receive an injury or damage such as would be unlawful to inflict if run over or against by the train, as in case of stock or a man approaching on the track. *Nashville & C. R. Co. v. Carroll*, 53 Tenn. (8 Heisk.) 347, 368.

To constitute an obstruction, within the meaning of a statute prescribing the duties of a railroad company when a person, animal, or other obstruction appears on the road, the animal must be in a position to be struck or directly injured by the train while moving on the rails. Where the animal appears on some other part of the company's right of way, it is not an obstruction. *Louisville, N. & G. R. Co. v. Reidmond*, 79 Tenn. (11 Lea) 205, 208; *Alabama G. S. Ry. Co. v. Chapman*, 80 Ala. 615, 619, 2 South. 738.

Under a statute requiring a locomotive engineer, on perceiving any obstruction on the track of the road, to use all means in his power, known to skillful engineers, in order to stop the train, and making the railroad company liable for damages to persons, stock, or property, resulting from a failure to comply with such requirements, where plaintiff's mule was killed by defendant's train the burden was upon defendant to show a compliance with such statute. A mule is a pretty large object. All trains running at night carry headlights casting bright light on the track before them, and an engineer keeping a proper lookout will perceive so large an obstruction as a mule on the track some time before encountering it. It then becomes his duty to use all means in his power to stop the train. *South & North Alabama R. Co. v. Williams*, 65 Ala. 74, 77.

Gen. St. §§ 63, 107, making it an offense for any one to obstruct a railroad train, does not apply to a passenger who, from whatever motive, pulls a signal rope to a bell upon the engine, and thereby causes the train to be stopped, and the safety of the passengers to be endangered. *Commonwealth v. Killian*, 109 Mass. 345, 347, 12 Am. Rep. 714.

Gen. St. 1878, c. 94, § 63, providing for the punishment of any one who shall willfully obstruct any engine or carriage passing on any railroad so as to endanger the safety of any person conveyed in or on the same, does not mean the actual stoppage or impeding the passage of such engine or carriage by its coming in collision with some obstacle placed in the way, but means the placing of an obstacle on a railway in such a manner that any train, in passing, may strike it, and of

such a character that the safety of persons conveyed will be endangered if a train come in collision with it. *State v. Kilty*, 10 N. W. 475, 28 Minn. 421.

**Of sidewalk.**

It is not necessarily an obstruction to a sidewalk to cover it by a roof 12 or 15 feet above it. *Beecher v. People*, 88 Mich. 289, 291, 81 Am. Rep. 316.

**OBTAIN.**

A landowner signed an agreement with a railroad company by which he relinquished to such company the right of way for its railroad through his land "in consideration of the prospective advantages which may accrue to him, arising from the road's location through such county." The company surveyed a road across such land, and did some work thereon within the six years thereafter, but did not complete the road, and for more than 25 years did no work upon such land, nor asserted any dominion over the right of way. During such time such landowner cultivated the land as the rest of his farm. The statute provided that "no railroad company shall be barred or presumed to have conveyed any right of way, easement, or other interest in the soil which may have been condemned or otherwise obtained for its use as a right of way by any statute of limitations, or by occupation of the same by any person whatsoever." The court, in construing this statute, held that the word "obtained" must have been used in the sense of "secured" or "acquired," and that by mere survey and preliminary work the railroad company had not obtained the right of way across such land, so as to prevent loss of its right thereto by the adverse occupation of the landowner. *Beattie v. Carolina Cent. Ry. Co.*, 108 N. C. 425, 432, 12 S. E. 913, 915.

"Obtaining," as used in an indictment charging a person with obtaining money under false pretenses, means the same as the word "get," in its sense of "acquire"; that is, the word means not so much a defrauding or depriving another of his property, as the obtaining of some benefit by the defendant. *People v. General Sessions of New York County* (N. Y.) 13 Hun, 395, 400.

"Obtaining goods by false pretenses" is defined by statute in New York as follows: "Every person who, with intent to cheat or defraud, shall designedly, by color of any false token in writing, or by any other false pretense, obtain from any person any money, personal property, or valuable thing, shall be guilty of obtaining goods by false pretenses." *Baldwin v. Need* (N. Y.) 17 Wend. 224, 229.

The word "obtain," in a statute providing that when any judgment is obtained, and

execution is returned unsatisfied, an alias execution, etc., may issue, is to be construed as having a prospective operation only, and is to be read as "hereafter obtained." *McGovern v. Connell*, 43 N. J. Law (14 Vroom) 106, 109.

In shipping articles by which seamen engaged to perform a whaling voyage in consideration of the shares or lays to be paid for all that was obtained during the voyage, as soon after the return of the ship to a certain port as the oil could be sold and the voyage be made up, "obtained" means the products brought safety to the port of destination. It does not mean that the seamen shall have a right to be paid their lays in all the oil taken on board the ship during the fishing voyage. *Reed v. Hussey* (U. S.) 20 Fed. Cas. 440, 444.

Though the Supreme Court of Tennessee, in *Barnes v. Hayes*, 1 Swan, 304, said that an execution related to the date of the teste, which is the first day of the term from which it issues, and operates as if it were actually running from the date of its return, and is a lien on all the goods owned by the defendant during that time, yet a lien of a judgment may be said to have been obtained within four months, within the meaning of the bankruptcy act, where the judgment was obtained in Tennessee, and the lien of the execution related back to the teste thereof, which was more than four months prior to the petition in bankruptcy. In *re Darwin* (U. S.) 117 Fed. 407, 408, 54 C. C. A. 581.

**As acquire possession of.**

"Obtain," as used in a charge stating that defendant may be convicted of larceny if he obtains property with intent to steal it, is synonymous with "to acquire possession of." *State v. Will*, 22 South. 378, 379, 49 La. Ann. 1337.

"Obtain," as used in an instruction that certain money must have been obtained by means of force and violence, in order to constitute robbery, is equivalent to "take," as used in a statute, since "to obtain" means to get hold of by effort; to gain possession of; to acquire; and "take," as used in the statute, also means to get possession of. *State v. Miller*, 36 Pac. 751, 752, 53 Kan. 324.

"To obtain" is to get hold of; to obtain possession of; to acquire; to maintain a hold upon; to keep; to possess. "To contract for" does not approach it in meaning. *Sundmacher v. Block*, 39 Ill. App. 553, 562 (quoting Webst. Dict.); *State v. McGinnis*, 33 N. W. 338, 339, 71 Iowa, 685; *Connor v. State*, 10 South. 891, 892, 29 Fla. 455, 30 Am. St. Rep. 126.

**As continue.**

"Obtaining," as used in an averment that a conspiracy was to prevent a certain per

son from obtaining work or employment, or continuing in his said work and employment, is synonymous with "continue." The two words convey a conjunctive, and not a disjunctive, meaning. Any other signification than that the conspiracy was to prevent the person from having employment would be forced and unnatural. *State v. Dyer*, 32 Atl. 614, 818, 67 Vt. 690.

#### As issuance of patent.

"Obtain," as used in St. 5 & 6 Wm. IV, c. 83, § 4, providing that "if any person who now hath or shall hereafter obtain any letters patent as aforesaid, shall advertise," etc., on petition the crown may grant an extension of the patent, means to become possessed of it either by original grant, by assignment, or by any other title, and does not refer solely to those originally had from the crown. *Russell v. Ledsam*, 14 Mees. & W. 573, 588.

"Obtained," as used in St. 5 & 6 Wm. IV, c. 83, § 1, authorizing any person who, as grantee, assignee, or otherwise, "hath obtained" letters patent for using an invention, to disclaim any part of the title of such invention or of the specification, means only the party who obtains letters patent from the crown, not simply one who has possession of them by assignment or otherwise. *Spillsbury v. Clough*, 2 Q. B. 466, 471.

#### As obtaining in person.

Code, § 4370, declaring that any person who by any false pretense obtains from another any money, etc., is not limited in its meaning to an obtaining in person by the accused, but money paid to another at his request is obtained, within the meaning of the statute. *Sandy v. State*, 60 Ala. 58, 60.

"Obtains," as used in Comp. Laws 1879, p. 339, c. 31, § 94, providing for the punishment of any one obtaining money by false pretenses, means getting possession of something purposely by effort; that is, by false pretense. It is not alleged that money was obtained when it is said that, upon false representations and pretenses, certain liens and incumbrances were paid. *State v. Lewis*, 26 Kan. 123, 129.

#### Delivery.

As used in an information charging that defendant obtained complainant's signature by fraud, "obtain" means to get hold of, to get possession of, or to acquire, and hence includes the idea of delivery, so that an allegation of the delivery of the note containing the signature was not necessary. *People v. Kinney*, 67 N. W. 1089, 1090, 110 Mich. 97.

"Obtain," as used in a statute providing for the punishment of any person who by false pretense or pretenses shall obtain from any other person any money, goods, merchandise, or effects whatever, with intent to

cheat and defraud such person, in its primary meaning, as given by Webster, is to get hold of by effort. There is a difference between frauds which are perpetrated by means of the abuse of the forms of legitimate commercial transactions, and those which consist of personations and so-called confidence games and tricks. In either case, and by whatever means accomplished, the crime consists in the obtaining of the property; getting hold of the property. That is the *corpus delicti*. In this case, the goods not being delivered to defendants, they were held not to have obtained them. *Ex parte Parker*, 9 N. W. 33, 34, 11 Neb. 809.

#### Retention.

An indictment for conspiracy to obtain from the Ansonia Clock Company, by false pretenses, money, etc., is not sustained by proof that the accused was an agent of the clock company, and as such collected money belonging to it, which he retained, and, by falsification of his accounts, concealed the fact of such retention. The word "obtain," in the statute and in the indictment, is not used in any antiquated and obsolete sense, but in its ordinary and popular signification, as an active verb, meaning to acquire. *Watson v. People*, 27 Ill. App. 493, 497.

#### OBVIOUS.

Giving a copy of the writ to one of defendant's negro servants in the piazza of his dwelling house is a good service, under a statute requiring it to be left at some "obvious" part of the house. *Bowers v. Alsten's Ex'rs* (S. C.) 1 Nott & McC. 458.

"Obvious" is defined as meaning readily perceived by the eye. In an action for injuries alleged to have been caused by the absence of lights at an excavation in a street, a charge that, to render defendant free from negligence, the lights must have been such that the ditch could have been readily seen, was equivalent to an instruction that the lights should have been sufficient to make the excavation obvious. *Missouri, K. & T. R. Co. v. Johnson*, 67 S. W. 768, 769, 771, 95 Tex. 409.

Where the defendant in an action for a malicious prosecution claimed that, in order to entitle plaintiff to a recovery, the malice of the defendant and the innocence of the plaintiff must be obvious to the jury, and prayed the court so to instruct them, which was not done, it was held that such omission was no ground for a new trial, the instruction shown not being sufficiently precise and definite; the court saying: "The word 'obvious' might have received different interpretations by different jurors. Some of them might have supposed it meant the highest attainable certainty; others, that it was to be understood to mean absolute cer-

tainty; and others might suppose it meant reasonable certainty." *Stone v. Stevens*, 12 Conn. 219, 220, 30 Am. Dec. 611.

### OBVIOUS RISKS.

The phrase "obvious risk," in an accident policy excepting an insurer from liability in case injuries result from exposure to an obvious risk, includes not only a risk which may be readily perceived by the eye or senses, but one also that may be perceived by the intellect. *Small v. Travelers' Protective Ass'n of America*, 45 S. E. 706, 708, 118 Ga. 900, 63 L. R. A. 510.

The obvious dangers of an employment are those which are apparent. They are the apparent risks of the work. They are the risks which are apparent in the exercise of ordinary observation, and which are disclosed by the use of the eyes and other senses. If the servant fails to observe what is obvious, and suffers, he cannot charge the consequences on his master. The risk so taken is impliedly assumed by him. *Dillenberg v. Weingartner*, 45 Atl. 638, 640, 64 N. J. Law, 292; *Foley v. Jersey City Electric Light Co.*, 54 N. J. Law, 411, 24 Atl. 487; *Chandler v. Atlantic Coast Electric Ry. Co.*, 39 Atl. 674, 61 N. J. Law, 380.

In an action for an injury to a servant while operating a machine, in which defendant contended the plaintiff had assumed the risk, it was said that risks which are incident to the business must not be confounded with such as are denominated obvious. "The former sort comprises those which accompany or arise from the natural or usual method of conducting the particular business, and has more special relation to perils which attend the business generally, while the latter includes such as are manifest to the sense of observation, open, and readily discernible, whether they arise from the nature of the business, the particular manner in which it is conducted, or the use of defective or unsafe appliances." *Stager v. Troy Laundry Co.*, 63 Pac. 645, 647, 38 Or. 480, 53 L. R. A. 459.

Under an accident insurance policy providing that it should be void if the accident occurred from voluntary or unnecessary exposure to danger or to obvious risk of injury, it is held that jumping from a moving train after it had passed a station was an exposure to obvious risk of injury, within the meaning of the policy. *Smith v. Preferred Mut. Acc. Ass'n*, 104 Mich. 634, 635, 62 N. W. 990.

### OCCASION.

See "Solemn Occasion."

The word "occasion" signifies necessity or need as well as a particular time. In a

personal injury action against a railroad, a charge that "the only question, so far as the negligence of the defendant was concerned, was, was the brake defective, out of order, not in reasonable repair, not reasonable for the occasion?" correctly used the word in either sense. *Mackey v. Baltimore & P. R. Co.*, 19 D. C. 282, 301.

The use of the word "occasion" in the report of the viewers of a private road, that "there is occasion for it," is a sufficient compliance with the statute requiring them to report whether it is necessary, for, though mere convenience is perhaps not sufficient to authorize such road, the report is never drawn with the precision of an indictment, and, in the apprehension of the mass, the terms "necessary" and "occasion" are convertible. In *re Pocopson Road*, 16 Pa. (4 Harris) 15, 17.

Where the husband, without further consideration, conveyed land in trust that it should be conveyed to his wife, and the trustee, without consideration, conveyed it to the wife accordingly, the conveyance to the wife was occasioned by a payment or pledge of the property of the husband, within the meaning of those terms as used in the statute providing that every married woman shall hold to her own use, and free from the control of her husband, the property inherited by her, provided the conveyance or bequest is not occasioned by payment or pledge of the property of the husband. *Vogt v. Ticknor*, 48 N. H. 242.

#### As directly or indirectly cause.

Webster defines an occasion, as distinguished from a cause, to be that which incidentally brings to pass an event, without being itself efficient cause or sufficient reason. *Pennsylvania Co. v. Congdon*, 33 N. E. 795, 796, 134 Ind. 228, 39 Am. St. Rep. 251.

The word "occasioned," as used in an instruction in an action for injuries that, if the jury could find the injuries were occasioned by the negligence of the defendant, they should find for the plaintiff, is used as a synonym of "caused," and the jury would not be misled thereby. *Union Gold Min. Co. v. Crawford*, 69 Pac. 600, 603, 29 Colo. 511.

Where injunctions caused delay, and the delay resulted in loss, the loss was occasioned by the injunctions, though they might not be the direct cause of the loss. *Meysenberg v. Schlieper*, 48 Mo. 426, 434.

The statute giving a right of action for all damages occasioned by laying out, making, and maintaining a railroad, etc., refers to any damage which may be directly or indirectly caused by the railroad. *Parker v. Boston & M. R. Co.*, 57 Mass. (3 Cush.) 107, 50 Am. Dec. 709; *Rand v. City of Boston*, 41 N. E. 485, 487, 164 Mass. 354.

The word "occasioned," in a statute imposing a liability for damages occasioned by the failure of a railroad to construct and maintain a fence, means occasioned by that only, and therefore the contributory negligence of one allowing his stock to go on the track is a defense to an action against a railroad for violation of the statute. "Of course, the want of a fence cannot cause injury, but it gives occasion to the injury; causes it incidentally. The word was apparently used in one sense of 'caused,' and accurately used. Dr. Johnson's first definition of the verb 'to occasion' is to cause occasionally; his second, simply to cause. Dr. Webster's is not substantially different—to give occasion to; to cause incidentally; to cause. Mr. Crabb appears to give a like construction to the word: 'What is caused, seems to follow naturally; what is occasioned, follows incidentally.'" *Curry v. Chicago & N. W. Ry. Co.*, 43 Wis. 665, 676.

#### OCCASION OF PRIVILEGE.

See "Privileged Occasion."

#### OCCASIONAL WEAIGHER.

Where one was employed by the customhouse officials as an "occasional weigher," and paid as such, the officials must have meant by the use of such term that the employé's position was to be a different one from that of customhouse weigher, within the meaning of Act July 28, 1866, fixing the salary of customhouse weighers. *Pray v. United States*, 14 Ct. Cl. 256, 262.

#### OCCUPANCY.

In relation to building in insurance, see "Vacant"; "Unoccupied."

"Occupancy" is defined by Blackstone as the taking possession of those things which before belonged to nobody, and movables found on the surface of the earth or in the sea, and unclaimed by any owner, are supposed to be abandoned by the last proprietor, and, as such, are returned into the common stock and mass of things, and therefore they belong, as in a state of nature, to the first occupant or founder." *Goodard v. Winchell*, 52 N. W. 1124, 86 Iowa, 71, 17 L. R. A. 788, 41 Am. St. Rep. 481; *Peabody v. Proceeds of Twenty-Eight Bags of Cotton (U. S.)* 19 Fed. Cas. 39, 43.

Occupancy is a mode of acquiring property by which a thing which belongs to nobody becomes the property of the person who took possession of it with the intention of acquiring a right of ownership upon it. Civ. Code La. 1900, art. 3412.

Occupation is ownership, with a present, active use. *New England Hospital v. City of Boston*, 113 Mass. 518, 520.

"Occupancy is the taking possession of those things which before belonged to nobody. Whatever movables are found upon the surface of the earth or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and as such are returned to the common stock and mass of things, and therefore they belong, as in a state of nature, to the first occupant or finder." An aërolite falling upon land cannot be acquired by occupancy, but becomes a part of the soil. *Goddard v. Winchell*, 52 N. W. 1124, 86 Iowa, 71, 17 L. R. A. 788, 41 Am. St. Rep. 481.

*Puffendorf*, lib. 4, c. 6, §§ 2, 10, defines occupancy of beasts *feræ naturæ* to be the actual corporeal possession of them; and *Bynkershock* is cited as coinciding in this definition. *Barneyrac*, in his notes on *Puffendorf*, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms that actual bodily seizure is not in all cases necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use so as to exclude the claims of all other persons by title or occupancy to the same animals, and he is far from averring that pursuit alone is sufficient for that purpose. Actual bodily seizure is not indispensable to acquire a right to, or possession of, wild beasts. On the contrary, the mortal wounding of such a beast by one not abandoning his pursuit may with the utmost propriety be deemed possession of him, since thereby the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So, also, encompassing and securing such animals with nets and toils, or otherwise intercepting them so as to deprive them of their natural liberty and render escape impossible, may justly be deemed to give possession of them to those persons who by their industry and labor have used such means of apprehending them. But the mere pursuit of a fox by a hunter with his dogs is not such possession or occupancy as gives such hunter a right to the fox as against another who killed it and took it away. *Pierson v. Post (N. Y.)* 3 Caines, 175, 177, 178, 2 Am. Dec. 264.

"Occupancy" means possession, and may be used with reference to personal property as well as real estate. *Herman v. Katz*, 47 S. W. 86, 87, 101 Tenn. 118, 41 L. R. A. 700.

Act Feb. 19, 1849, § 10, authorizing a railroad company to determine and locate its road as may be deemed expedient, except as to "dwelling houses in the occupancy of the owner," means dwelling houses which are occupied in good faith by the owner.

"The Legislature meant to protect the man who owned his land and occupied it in good faith. Their protection cannot extend to the man who becomes an occupant for the mere purpose of defeating public improvements, or for the purpose of extorting excessive compensations." *Hagner v. Pennsylvania S. V. R. R.*, 25 Atl. 1082, 1084, 154 Pa. 475.

The term "occupancy," as used in a fire insurance policy, requires a living in, and not a supervision over, so that where the assured, a farmer, rented his place to a tenant, and left the house four weeks before the fire, visiting it at intervals, and removing all the stock, but leaving most of the wearing apparel and a portion of the household articles, there was no occupancy. *Craig v. Springfield Fire & Marine Ins. Co.*, 34 Mo. App. 481.

### OCCUPANCY—OCCUPATION—OCCUPY (Of Land).

See "Actual Occupancy"; "Actual Occupation"; "Actually Occupy"; "Cease to Occupy"; "Constructive Occupancy." Change in occupation, see "Change." Occupied for unlawful purpose, see "Unlawful Purpose."

Otherwise occupied, see "Otherwise."

"Occupy," as used in General Indian Protection Act March 2, 1889 (25 Stat. 980, 1005), relating to the opening to settlement of certain Oklahoma lands, and providing that, until such lands are open for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating such provision should ever be permitted to enter any of said lands or acquire any right thereto, are used in the ordinary sense of the words, and have no technical significance. *Smith v. Townsend*, 13 Sup. Ct. 634, 635, 148 U. S. 490, 37 L. Ed. 533.

One's occupancy of land being in its nature a continuing act, every day's occupancy thereof by him is, in legal contemplation, a new and independent act of occupation, so that under Pen. Code, § 250, making it an offense to occupy land under a forged title, knowing the same to be forged, a prosecution is not barred if the accused was in possession of the land within the time of the statute of limitations, though the occupancy was taken first prior to such time. *Coker v. State*, 41 S. E. 684, 115 Ga. 210.

"Occupy," as used in 11 Geo. III, c. 12, § 36, relating to rates to be paid by any person who shall "inhabit, hold, occupy, be in possession of, or enjoy" any lands, etc., would include water or gas companies in respect of their pipes which are laid beneath the soil. *Reg. v. Waterworks Co.*, 18 Q. B. 705, 715.

Neighbors frequently run up fences within or beyond the boundary lines or joint fences with the knowledge and understanding that such acts are merely temporary, and done with reference to the right of both to ultimately ascertain and fix the rights by an action of boundary or by a formal legal survey, and, until this happens, such land is held in occupancy. *Williams v. Bernstein*, 25 South. 411, 415, 51 La. Ann. 115.

### Actual occupancy or residence.

Occupancy implies that a person is in actual, bona fide possession of the land as a resident. One who has never had actual possession cannot be an occupant. *Gill v. Wallis* (N. M.) 70 Pac. 575, 579.

"Occupy" is to hold or keep for use, to possess, and to cover or fill. So to say that one occupies or has occupied land continuously is tantamount to saying that he has or has had actual possession of the same. *Hall v. Roberts* (Ky.) 74 S. W. 199, 200.

The term "occupancy," as used in the homestead exemption laws of this state, has invariably been construed as meaning an actual occupancy of the premises. *Quehl v. Peterson*, 49 N. W. 390, 391, 47 Minn. 13.

A will providing that the testator's wife should hold, use, occupy, and enjoy his entire estate, both real and personal, as he had done before, during her natural life, means that she is to live on it with her children, servants, and employes. *Rountree v. Dixon*, 11 S. E. 158, 159, 105 N. C. 350.

"Occupy" as used in the possessory act (St. 1852, p. 153), relating to actions for the recovery of possession of real estate, and providing that no person can maintain an action thereunder unless he occupy the land, is equivalent to the term "reside upon." *Wolfskill v. Malajowich*, 39 Cal. 276, 279.

The term "occupy," as used in the homestead statutes, does not require continuous actual possession. In discussing the meaning of the term, the court says: "What is the meaning of 'occupy,' or 'continuing to occupy,' within the meaning of the Legislature? In common parlance, and in reference to housekeeping, we at once attach the idea of actual residence, dwelling, abiding on; the place of bed, board, and washing—three acts of constant recurrence to supply the necessities of life and renew the physical man. This is the second sense given it by Webster, but it is used also in the sense of possess generally; and Webster also uses the word 'possess' in the same variety of senses, in the main, as is given to 'occupy' or 'occupancy.' Turn to 2 Bouv. Law Dict. 240, 'Occupancy,' 336, 'Possess,' and we find the words used and understood in the same great variety of senses. If a man go abroad, animo revertendi, and reside for temporary pur-

poses of trade or business, he will not lose his domicile, and yet we know that the party's domicile follows his actual residence. So it is with foreign ministers and diplomatic agents. In contemplation of law, they continue to occupy their mansions or dwellings in their own country, though actually resident abroad for years. A person may have a constructive possession or occupancy, and he may have a *possessio pedis* by tenants or actual inclosures, and, in contemplation and within the meaning of the law, he may have actual possession, actual occupation, without residence." *Tumlinson v. Swinney*, 22 Ark. 400, 405, 76 Am. Dec. 432.

The occupancy contemplated by the laws requiring notice to the occupant before a tax title could exclude a redemption is constituted by the building of a house thereon, and using it as a home. *People v. Wemple*, 89 N. E. 397, 398, 144 N. Y. 478.

"Occupied," as used in Laws 1849, relating to homesteads, and exempting from execution, as such, premises occupied, means something more than what is known in law as "constructive possession," as contradistinguished from "actual possession." It also means more than such possession as arises where land is cultivated, or being fenced and improved. It means premises which are used and occupied as a home; a place to abide in; a place for the family. *Charles v. Lamberson*, 1 Iowa (1 Clarke) 435, 443, 63 Am. Dec. 457.

"Occupied, as used in the statute exempting every homestead owned and occupied by any resident, means actual occupancy; possession of the premises as a home. *McConaughy v. Baxter*, 55 Ala. 379, 382.

"Occupied," as used in Comp. St. p. 569, § 92, exempting from execution the homestead occupied by a debtor and his family, should be construed to require actual residence on the premises, and not as meaning "use, tenure, possession," though such is the frequent meaning of the word. *Tillotson v. Millard*, 7 Minn. 513, 518 (Gil. 419, 420), 82 Am. Dec. 112.

Though the word "occupy," applied to a house, conveys to any man the meaning of living in the house, yet, in a statement of grounds of appeal made under an act of Parliament, the word "occupy" does not mean "reside in." Even actual occupation would not necessarily mean residence, because a man might dwell in one parish, and then rent a house and land in the adjoining one, occupying it by his servant. Some other words, therefore, are necessary to show residence. Per *Patteson, J.* A man may occupy either land or dwelling house without residing. Per *Whitman, J.* Reg. v. West Riding Justices, 2 Q. B. 705, 711.

Under a statute requiring seven years' residence by adverse possession to give title, seven years' occupancy was not a bar. An occupancy may exist without a residence. *Chiles v. Jones*, 34 Ky. (4 Dana) 479, 484.

Under Gen. St. c. 39, § 1, providing that when the lands of two persons join, and both parties shall occupy the land, it shall be the duty of each party to build one-half of the line fence, the word "occupy" does not mean actual residence upon the land, but only such occupation as makes it necessary or advantageous for the purpose thereof to fence the land. *Maudlin v. Hanscombe*, 20 Pac. 619, 620, 12 Colo. 204.

Occupation of land is a fact. The effect of it, when its nature and extent are shown, is a matter of law; and a witness may testify to the fact of occupation and its extent, as to time and space, without stating the particular acts of which it consists. *Child v. Kingsbury*, 46 Vt. 47, 55.

#### **Adverse possession distinguished.**

Distinguished from adverse possession. see "Adverse Possession."

#### **Constructive occupancy.**

To occupy means to take; to hold possession of; to hold or keep for use; to possess; to use; to hold possession. The popular idea of a homestead is uniformly associated with that of the occupancy of the place so designated, either in the past, the present, or the future. The nature of the occupancy by which land may be impressed with the homestead character should always be carefully distinguished from possession such as may be sufficient to serve as evidence of notice of title in the owner. The latter may be constructive, while the former must in every instance be actual, in the sense that it should not depend upon paper evidence, the mere erection of improvements, the payment of taxes, or the exercise of personal control over the property to be affected. Occupancy is essential to the existence of the homestead right, but when the premises have become invested with the homestead character, and the homestead has once been acquired, a constructive occupancy may be sufficient to retain it. *Ball v. Houston*, 66 Pac. 358, 359, 11 Okl. 233.

#### **Constructive possession.**

The term "occupancy," as used in the law relative to adverse possession, includes constructive possession of land adjoining a line acquiesced in. *Child v. Kingsbury*, 46 Vt. 47, 55.

"Occupied," as used in a notice to terminate a lease as provided by Rev. St. c. 80, § 10, which notice spoke of "the premises now occupied by you" (referring to the premises occupied by the lessor), is used in the



sense of "held in possession," and as indicating a constructive possession only. *Consolidated Coal Co. v. Schaefer*, 25 N. E. 788, 789, 135 Ill. 210.

#### **Cultivation.**

Under Laws 1858, p. 173, § 9, relating to the sale of swamp lands, and making provision for two distinct classes of purchasers, namely, settlers and occupants of such land at the time of the passage of the act, and owners and occupants of adjoining lands, occupancy of the adjoining lands might consist of cultivation and use without actual residence, or might be by a tenant. *People v. State Treasurer*, 7 Mich. 366, 370.

The use of the word "occupy," in § 9 Stat. 323, granting to religious societies certain missionary stations occupied by them in Oregon, not exceeding 640 acres, does not confine the grant to the land actually inclosed and cultivated by the societies, but it is to be construed to include the maximum quantity at each station occupied by them; that is, claimed and in any way used by them, and not in the actual possession of anyone else. In so ruling, the courts say: "To occupy is to possess, not constructively, but actually. It is derived from 'ob' and 'capio'—to lay hold of—and means to possess by having hold of, or being actually upon the thing possessed, continuously and exclusively." *Dalles City v. Missionary Soc.* (U. S.) 6 Fed. 356, 370.

Laws 1886, c. 315, § 4, provides that, when the line between two towns divides a farm, it shall be taxed, if occupied, in the town where the occupant resides. A. owned a farm which was intersected by a town line, and lived with his father on an adjoining farm owned by his father, and wholly within one town. Work was done on A.'s farm with the father's teams and tools, and the father's cows were pastured there, but milked on his own farm. Produce was brought from A.'s farm to that of the father, where the teams were kept. Held, that A.'s farm was occupied, within the meaning of the law above cited. *People v. Gaylord*, 5 N. Y. Supp. 348, 350, 52 Hun, 335.

Where land was used and cultivated by the owner, it was occupied by him, though he did not reside on it. *Lyons v. Andry*, 31 South. 38, 39, 106 La. 356, 55 L. R. A. 724, 87 Am. St. Rep. 299.

Setting out trees or building a sidewalk in a highway is not such an occupation as can be made the foundation of a claim to title by adverse possession against the true owner. *Bliss v. Johnson*, 94 N. Y. 235, 242.

#### **Inclosure of part.**

Occupancy, within the meaning of How. Ann. St. § 8503, which provides that, if dis-

tingent lots be occupied as one parcel, they may be sold together on foreclosure sale, does not require that all the lands be improved. The actual inclosure of a part carries with it the occupancy of a balance which is used, or intended to be used, as part of one farm. *Harris v. Creveling*, 45 N. W. 85, 86, 80 Mich. 249.

#### **Location or selection of public lands.**

"Occupation," as used in Rev. St. U. S. § 2319 [U. S. Comp. St. 1901, p. 1424], providing that "all mineral deposits in lands belonging to the United States are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase," means possession. The right to occupy is the right to possess and hold, and includes the right to locate. *Tibbitts v. Ah Tong*, 2 Pac. 759, 761, 4 Mont. 536.

The mere selection by surveying platted ground into lots, blocks, and streets will not be sufficient to constitute an occupation of the land for the purposes of a town site. *Carson v. Smith*, 12 Minn. 546, 562 (Gil. 458, 476).

#### **Occupancy by mistake.**

As used in 1 Rev. St. 412, § 83, requiring that if, when proceedings are brought to redeem land sold for unpaid taxes, the land is occupied, the occupants must have notice, means being occupied with an intention on the part of the occupant to enjoy the property; and an accidental or chance occupation of a small part of the land by a mistake in the fencing thereof was not an occupancy, within the meaning of the statute. *Smith v. Sanger*, 4 N. Y. (4 Comst.) 577, 579.

#### **Occupancy by servant.**

The term "occupy," both in a popular and legal acceptation, has a known, certain, and definite meaning, and implies actual use, possession, and cultivation; and it would be nonsense to say that a man occupied a farm which was in the possession and management of another. *Jackson v. Sill* (N. Y.) 11 Johns. 201, 214, 6 Am. Dec. 363.

"Occupier," as used in Code, § 936, providing that, before a highway can be lawfully established, a notice shall be served on each owner or occupier of land lying in the proposed highway, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county, cannot be construed to include a foreign railroad company whose right of way crosses a proposed highway. The occupier who is entitled to notice is one who personally resides in the county. The statute does not contemplate an occupier who is represented only by an agent, and who through such agent is in the occupation of the land, and himself an actual

resident of some other state. *State v. Chicago, B. & Q. R. Co.*, 28 N. W. 37, 68 Iowa, 135.

"Occupy," as used in 2 Wm. IV, c. 45, § 27, conferring a right of voting on one occupying a house as a tenant, did not include one who occupied a house of the requisite value, where it was necessary, for the discharge of his duties as hall keeper, that he should reside in the house in question, which was built for the residence of a hall keeper, as such occupancy was rather that of a servant than of a tenant. *Clark v. Bury St. Edmunds*, 1 G. B. (N. S.) 23, 32.

#### Occupancy by tenant.

"Occupancy," when applied to land, is nearly synonymous with "possession," and may, in contemplation of law, exist in the same manner by and through a tenancy. *Walters v. People*, 21 Ill. 178; *People v. State Treasurer*, 7 Mich. 366, 370.

Where a farm has been rented, and the rent used for the support of the widow and family, the homestead is occupied, within the meaning of the homestead laws. *Walters v. People*, 18 Ill. 194, 199, 65 Am. Dec. 730; *Brinkerhoff v. Everett*, 38 Ill. 263, 265.

The word "occupied," within a statute exempting from taxation the real property of a board of trade so long as such property shall be occupied by said board of trade for the purposes contemplated in its organization, does not apply to that portion of the realty of the board which is rented for business purposes to third persons, though the rent is applied to the purposes of the board, and the remainder of the building is used for board of trade purposes. *City of Louisville v. Board of Trade*, 14 S. W. 408, 90 Ky. 409, 9 L. R. A. 629.

Rev. St. c. 7, § 5, enacts that "the personal property of all literary, benevolent, charitable, and scientific institutions, \* \* \* and such real estate belonging to such institutions as shall be actually occupied by them or by the officers of such institutions for the purposes for which they were incorporated, shall be exempt from taxation." The occupation of a building by an officer or professor as lessee is not such an occupation as is intended by the statutes. It would be otherwise if the building were built for the professor or officer, and had been occupied by him with the permission of the college, and without his having any estate therein, or paying any rent therefor. *Pierce v. Inhabitants of Cambridge*, 56 Mass. (2 Oush.) 611, 613.

Gen. St. tit. 7, § 192, providing that any person may seize any animal in any highway opposite to land owned or occupied by him, etc., means an actual or constructive occupation, and a mere ownership while a ten-

ant was in actual and exclusive occupation is not sufficient. *Herskell v. Bushnell*, 37 Conn. 36, 41, 9 Am. Rep. 299.

"Occupy," as used in a stipulation in a lease declaring that it shall be void in case the lessee permitted more than one family or tenant to every 160 acres to reside on, use or occupy any part of the premises, would include a letting of parts of the premises to persons for a year to cultivate for shares. *Jackson v. Brownell* (N. Y.) 1 Johna. 267, 271, 3 Am. Dec. 326.

A pauper who hired a distinct and separate building, and held same for one year, with part of the house let to an undertenant, occupied it, within the meaning of St. 59 Geo. III, c. 50, requiring that, in order to acquire a settlement by the renting of a tenement, it shall consist of a separate and distinct dwelling house or building, hired at £10 a year, and shall be held and the land occupied for the term of one whole year. *Rex v. Inhabitants of Great Bolton*, 8 Barn. & C. 71.

#### Occupancy of licensees.

The term "person in actual possession or occupancy of land," within the meaning of Revenue Law, § 216, providing that, before a purchaser at a tax sale shall be entitled to a deed, he shall serve notice on every person in actual possession or occupancy of such land, does not include a person who is allowed, without payment of rent, to stack hay on a part of land which is rented to a third person. *Drake v. Ogden*, 21 N. E. 511, 128 Ill. 603.

#### Operation of mine.

"Occupancy," to constitute the foundation of title to mining land, must be with the intent or design to acquire the ownership of the thing desired; and a temporary occupation, though entitled to protection against unlawful intrusion, is insufficient to give title, real or presumptive, to the land, and no title to mineral lands can be acquired by occupancy, unless for the purpose of mining or extracting the minerals, and an entry and occupation not for this purpose, but for the establishment of a mill site, is not the occupancy required under Rev. St. U. S. § 2319 [U. S. Comp. St. 1901, p. 1424]. *Burns v. Clark*, 66 Pac. 12, 14, 133 Cal. 634, 85 Am. St. Rep. 233.

Occupancy of mining property, under the statute, implies a substantial and practical use of the earth for the uses for which it was claimed or located, and as contemplated by the claimants and locators. When a man occupies a dwelling house, his character of occupancy is with reference to the purposes for which the house was built. He lives in it. When he occupies a barn, his occupancy is complete, under the law, if he puts his horses and wagons in it. That is, an occu-

pancy of property is to be understood with reference to the nature and character of the property involved. To occupy mining property, and to enjoy the right of occupancy, under the statute, is to mine the same in a miner-like manner, and to extract ore from the same, mill it and dispose of it, and not to merely go upon it, yet refuse to dig and mine the ground. *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.*, 60 Pac. 1039, 1042, 24 Mont. 125.

#### Possession.

To "occupy land" means to possess it. *Gardener v. Wagner* (U. S.) 9 Fed. Cas. 1154, 1156.

The words "possession" and "occupancy," as used in Revenue Law, § 216 (Rev. St. 1874), are controvertible terms, and are practically synonymous. *Taylor v. Wright*, 13 N. E. 529, 533, 121 Ill. 455; *Walker v. Converse*, 36 N. E. 202, 204, 148 Ill. 622.

There is a distinction between "occupation" and "possession," because there may be a legal or constructive possession where there is no actual occupation. *Ward v. Dewey*, 16 N. Y. 519, 531.

"Occupation" is synonymous with the expression "subjection to the will and control" and with "possessio pedis," and signifies "actual possession." *Lawrence v. Fulton*, 19 Cal. 683, 690. The word occupation ordinarily, in the law, means subject to the will and control—*possessio pedis*—and is synonymous with "subjection to the will and control." *United States v. Rogers* (U. S.) 23 Fed. 658, 666; *McKenzie v. Brandon*, 12 Pac. 428, 429, 71 Cal. 209.

"Occupation," as used in Acts 1893, c. 22, providing that occupation shall constitute sufficient ownership to entitle the party to the benefit of the act which prescribes the proceedings for the establishment of boundaries, is employed in the sense of "possession." *Basnight v. Meekins*, 27 S. E. 992, 993, 121 N. C. 23.

"Occupancy," as used in How. Ann. St. § 7836, providing for compensation for improvements made by defendants in ejectment who shall have been in actual, peaceable occupation of the premises for six years before the commencement of the action, or who shall have occupied for a less time than six years under a claim of title and in good faith, means such occupancy as under the rules of common law would entitle one to acquire a title by adverse possession. *Jones v. Merrill*, 71 N. W. 838, 839, 113 Mich. 433, 67 Am. St. Rep. 475.

"Occupied," as used in Organic Act, § 1, providing that the title to the land, not exceeding 640 acres, now occupied as missionary stations among the Indian tribes of said

territory, shall be confirmed and established in the several religious societies to which said missionary stations respectively belong, is synonymous with the word "possess." *Corporation of the Catholic Bishop of Nesqually v. Gibbon*, 21 Pac. 315, 316, 1 Wash. St. 592; *Id.* (U. S.) 44 Fed. 321, 323. It is an appropriate word to use for the purpose of identifying land in actual possession and use. *Corporation of the Catholic Bishop of Nesqually v. Gibbon* (U. S.) 44 Fed. 321, 323.

"Occupied," as used in Act Cong. Jan. 6, 1883, § 2, providing that "all that part of the Indian Territory lying north of the Canadian river, and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes, shall after the passage of this act be annexed to and constitute a part of the United States judicial district of Kansas," means no more than possession of the country. To have possession does not require actual residence. Where there is a subjection of land to the will and control of another, with title in him, it is occupied by that other. It is in the actual, legal possession of that other. *United States v. Rogers* (U. S.) 23 Fed. 658, 665.

"Occupied," as used in Rev. St. p. 1152 (P. L. 65, § 6), providing that when the line between two townships divides a farm owned by the person taxed, the same shall be taxed, if occupied, in the township or ward in which the occupant resides, means such an occupation or possession as will enable the tenant or possessor, without the aid of a paper title, to maintain an action for a trespass on it. *Colwell v. Abbott*, 42 N. J. Law (13 Vroom) 111, 113.

"Occupation," as used in an affidavit on which an application to purchase lands from the state was based, reciting that there was no occupation of such lands adverse to any which the affiant had, is equivalent to "actual possession." *McKenzie v. Brandon*, 12 Pac. 428, 429, 71 Cal. 209.

"Occupied," as used in an instruction in an action of trespass to try title, where the defendant had been in possession under no color of title, that the defendant was entitled by reason of such adverse possession to only so much of the land as he actually occupied, is synonymous with "possession." Hence the instruction is correct. *Evans v. Foster*, 15 S. W. 170, 171, 79 Tex. 48.

Within the meaning of Comp. Laws 1871, § 778, requiring the occupant of land to erect line fences, "occupancy" means something more than boarding or living on the premises. To be an occupant in the sense of the statute, one must be in possession and have the use and control of the land. His connection with the property must be such that it would be proper and

consistent for him, if he so willed, to fence voluntarily. *Carpenter v. Vail*, 38 Mich. 226, 228.

#### **Residence distinguished.**

See "Residence."

#### **Sole possession.**

"Occupancy," as used in 2 Rev. St. 303, providing that, if the premises for which ejectment is brought are actually occupied by a person, such actual occupant shall be named "defendant," the occupancy intended was the possession which was requisite to subject the party to the action before the passage of the statute. It is only another name for such possession, and the occupant named in the statute was the same person who before was called the "tenant in possession," and who alone, at common law, could be served with notice to appear and defend the suit brought in form against the casual ejecter. An occupant is one who has actual use or possession. *Bouv. Law Dict.* It is distinguished from a claim. Possession is the detention or enjoyment of a thing which a man holds or exercises by himself or by another, who keeps or exercises it in his name. Occupancy or possession by one implies the exclusion of every other individual from the occupancy and possession. A man who only enjoys the use of premises in common with the public can in no just sense be said to be an occupant. *Redfield v. Utica & S. R. Co.* (N. Y.) 25 Barb. 64, 58.

The word "occupied," as used in the homestead act exempting from sale one-fourth of an acre within a recorded town plat or city or village, and a dwelling thereon owned and occupied by the debtor as a homestead, is to have a controlling effect in the application of the statute; and hence while by the law of the state the owner of a lot bounded by a street in a recorded town plat, city, or village takes the fee to the center of the street, he has no right to occupy any portion of such street as his homestead, and land included in any such public street or alley is consequently not to be reckoned with in determining the homestead. *Weisbrod v. Daenicke*, 36 Wis. 73, 76.

#### **Tenancy.**

"Occupy," as used in a lease providing that the rent should be paid monthly in advance so long as the tenant should occupy the house and lot of ground, should not be construed simply in the sense of actual or personal occupancy, but in the larger sense of tenancy actually existing under the lease. The word means sometimes the actual use of premises as a residence or as a place to store goods, but that is not the only meaning in which it is used.

In the primary and most familiar sense of the word, it is the equivalent of the word "possess." It implies the conception of permanent tenure for a period of greater or less duration. *Lane v. Nelson*, 31 Atl. 864, 868, 167 Pa. 602 (citing *Lacy v. Green*, 84 Pa. 520); *Morrow v. Brady*, 12 R. I. 130, 131.

#### **Use.**

"Occupied," as used in *Hill's Ann. Laws Or.* § 2732, subd. 3, exempting from taxation such real estate belonging to educational institutions as shall be actually occupied for the purposes for which they were incorporated, is synonymous with the word "use." *Willamette University v. Knight*, 56 Pac. 124, 126, 35 Or. 33.

Real estate purchased by an incorporated charitable institution, upon which, as soon as purchased, the corporation begins to erect a building for the purposes for which it was incorporated, will be deemed to be occupied, and, as such, exempt from taxation, under *Gen. St. c. 11, § 5, cl. 3*. *New England Hospital v. City of Boston*, 113 Mass. 518, 520; *Trinity Church v. City of Boston*, 118 Mass. 164, 166.

In *Rev. St. c. 7, § 5, cl. 2*, relating to exemptions from taxation of property owned by certain educational institutions, and requiring that the property exempted should be actually occupied by them, the word "occupied" was not used in the general sense in which a corporation or individual may be said to occupy their real estate when it is not occupied by any one else, but in the sense in which such institutions as an incorporated college, academy, hospital, or like institution, occupies its lands and buildings connected therewith. *Lynn Workman's Aid Ass'n v. City of Lynn*, 136 Mass. 283, 285.

The requisites of occupancy of land for the purpose of a town site are complied with by an occupation for purposes of trade, commerce, or manufacture. *Leech v. Rauch*, 3 Minn. 448 (Gil. 332, 337); *Hagar v. Wikoff*, 39 Pac. 281, 283, 2 Okl. 580.

#### **Whole interest in estate.**

"Occupy," as used in a provision of a lease and release that the lessor shall live in and occupy the said cottage, with the appurtenances, as he theretofore had done and then did, for life, reserves the whole estate to the lessor for life. *Rex v. Inhabitants of Easington*, 4 Term R. 177, 179.

"Occupancy," as used in a charter of a railroad company giving it the right to take possession of land on paying or tendering damages for the occupancy, was intended to embrace all the right and interest which the company could acquire in the land. *Mettler v. Easton & A. R. Co.*, 25 N. J. Eq.

(10 C. E. Green) 214, 218; *Browning v. Campden & W. R. & Transp. Co.*, 4 N. J. Eq. (3 H. W. Green) 47, 54.

### OCCUPANT—OCCUPIER.

See "Actual Occupant"; "Bona Fide Occupant."

As owner, see "Owner."

Change of occupants, see "Change."

An occupant is one who has the actual use or possession of a thing. *City of Bangor v. Rowe*, 57 Me. 436, 439.

#### Of land.

"Occupant of the land," as used in a statute requiring commissioners to cause notice in writing to be given to the occupant of land over which a contemplated railroad is to run, should be construed to mean actual occupant. *People v. Supervisors of Allegheny County* (N. Y.) 36 How. Prac. 544, 548.

The most ordinary meaning of the word "occupant" is one who occupies or takes possession; one who has the actual use or possession, or is in the possession, of a thing. Occupancy is said to be the act of holding possession. *Davis v. Baker*, 14 Pac. 102, 103, 72 Cal. 494.

Within the statutes relating to forcible detainer, the word "occupant" is defined as one who within five days preceding such unlawful entry was in the peaceable and undisputed possession of such lands. *Kennedy v. Dickie*, 69 Pac. 672, 674, 27 Mont. 70; *Shelby v. Houston*, 38 Cal. 410, 422. It does not require an actual residence—a personal presence—but only that occupancy which is sufficient in cases of forcible entry, which is that the occupant must show an actual, peaceable, and exclusive possession. *Shelby v. Houston*, 38 Cal. 410, 422.

"Occupant," as used in Rev. St. § 1810, relating to the liability of railway companies to occupants of adjoining lands when cattle are injured on railway tracks in consequence of the neglect of the company to erect fences, has the same meaning as when used in other statutes, such as relate to taxation, partition, fences, highways, etc., and as in common parlance, and means one in actual possession. *Veerhusen v. Chicago & N. W. Ry. Co.*, 11 N. W. 433, 434, 53 Wis. 689 (citing 2 Abb. Law Dict. tit. "Occupy"; *Smith v. Sanger* [N. Y.] 3 Barb. 360).

The word "occupant," in Gen. St. 1894, § 1808, providing that, whenever the supervisors of a town receive a petition to lay out a highway, they shall cause notice of the time and place fixed for hearing thereon to be served on all occupants of land through which the highway may pass, is used not in the sense of owner, but rather synony-

mously with "possessor." The Legislature undoubtedly considered that every purpose would be subserved by requiring notice to be served upon the person having the actual occupancy or possession and control of the land to be affected by the highway. It is frequently inconvenient to reach the owner of land by the local authorities, because of his nonresidence; and, in the supposition that notice to the occupant or person in possession would in most instances reach the owner, such service was deemed all that was necessary, beside the general service by posting the same in a public place. A son residing upon land with his mother, who had a life estate therein, and who was in control thereof, was not entitled to a notice. *Thompson v. Town of Berlin*, 91 N. W. 25, 87 Minn. 7.

#### Same—Agent or employé.

"Occupant," as used in Sp. St. 1868, c. 448, § 3, providing that if any sawdust or refuse wood or timber of any sort shall be thrown into the Penobscot river "by any person or persons who may be in the employ of any mill owner or owners, mill occupant or occupants, such owner or owners, occupant or occupants, shall also be liable" for such offenses, does not apply to the agent of the owner and lessor of a mill. *State v. Coe*, 72 Me. 456, 459.

"A servant or employé claiming no title or interest in himself, or any right to the possession, is not an occupant, within the meaning of the rules of law governing ejectments. He is acting under the control of another, and it is only in another's right that he occupies the premises. *Spencer v. Kansas City Stockyards Co.* (U. S.) 56 Fed. 741, 745 (citing Sedg. & W. Tr., tit. "Land," § 242).

Where a pauper employed as a laborer by the board of ordinance, having previously occupied a house at an annual rental of £7, which was then purchased by the board, still continued to reside in part of the premises at a weekly rent of 2s, which was deducted from his wages, and during such last occupation he also occupied a shop which, together with the house, was of the annual value of £10, and on his dismissal he gave up possession as required, his last occupation was not that of a tenant, but as a servant, and no settlement was gained thereby. *Rex v. Inhabitants of Cheshunt*, 1 Barn. & Ald. 473, 478.

A clerk who attends his employer on a race track, and records in a book bets which his employer makes on the races, but who makes no bets himself, is not guilty of "occupying a place on the ground for the purpose of recording bets," within Pen. Code, § 351, providing a punishment for such offenses. *People v. Fallon*, 46 N. E. 302, 152 N. Y. 1; 46 N. E. 302, 37 L. R. A. 419.

**Same—Guardian.**

The occupier of property, who is held to be liable criminally for nonrepair of a bridge, the repair of which is charged on the land, should be one in whom the law supposes to be vested a command over, and actual possession of the profits of, the land. An infant inheriting land on which his guardian in socage resides, and on which the infant did not, except on occasional visits, was not such an occupier of the land, but the guardian was the person liable. *Rex v. Sutton*, 3 Adol. & El. 597, 600.

**Same—Husband of owner.**

A husband residing with his wife on her separate property is not the occupant of the property within the meaning of the statute allowing lands to be assessed to occupants. The statute meant one who occupied the property in his or her own right, as tenant or otherwise, and in the absence of a possession by the real owner. *Hamilton v. City of Fond du Lac*, 25 Wis. 496, 497.

A husband, though the head of the family, is not in any legal sense the possessor or occupant of the house or land owned by his wife, and in or upon which the family reside. *Kavanagh v. Barber*, 12 N. Y. Supp. 603, 59 Hun, 60.

Under a statute of New York providing that real estate shall be assessed and taxed in the name of the owner or occupant, it is held that a husband living separately from his wife is neither an owner nor occupant of land belonging to his wife, so that an assessment to him of such land was void. *Smith v. Read*, 51 Conn. 11, 13.

**Same—Landlord.**

Code Civ. Proc. § 1160, giving an "occupant" of land the right to maintain an action for an unlawful detainer, would not include a landlord in possession merely through his tenant. *Hammel v. Zobelein*, 51 Cal. 532, 533.

**Same—Mortgagee in possession.**

"Occupant," as used in Rev. St. c. 116, giving to an occupant of land the right to recover gross damages awarded by a jury on a complaint for flowing land, would include a mortgagee who makes entry under his mortgage title on the premises, and demands of the tenant holding by parol leases from the mortgagor to attorn to him, to which demand the tenant has acceded. *Abbott v. Upham*, 54 Mass. (13 Metc.) 172, 174.

**Same—Tenant.**

To make one an occupant within a statute requiring land to be assessed in the name of the occupant, it is not necessary that the person should have his home upon the premises, but refers to one who lives upon his own lands, but cultivates or raises crops upon

other lands not his own. *Tweed v. Metcalf*, 4 Mich. 578, 586.

"Occupant," as contained in a deed giving a right to take water from a certain spring "by the aqueduct as now laid from said house to said spring to the extent and as has been the custom of the occupant of the house hereby conveyed," refers to the custom of the tenants, and not that of the original builder of the aqueduct. *Wright v. Newton*, 130 Mass. 552, 555.

"Occupier," as used in a law which declares that the occupier and not the owner of the building is liable to third persons for damages arising from any defect in the building, means the person who occupies it as a tenant, having control of it, and not merely the person who physically occupies such building. *Ahern v. Steele*, 22 N. E. 193, 197, 115 N. Y. 203, 5 L. R. A. 449, 12 Am. St. Rep. 778 (citing *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480).

The term "occupant," within the meaning of the statute providing that one who occupies land without special contract shall be liable for rent, does not apply to one who lives with, and as a member of the family of, a tenant, in pursuance of a contract with the tenant. *Tinder v. Davis*, 88 Ind. 99, 101.

A statute providing that, if any lands sold and conveyed by the controller be in the actual occupancy of any person, the grantee shall serve written notice on the person occupying such land, should be construed to include a tenant in actual possession of a portion of the lands. Boarders, lodgers, and servants, however, are not occupants, within the meaning of the statute, upon whom notice is to be served. *National Fire Ins. Co. v. McKay* (N. Y.) 5 Abb. Prac. (N. S.) 445, 449.

Six persons jointly leased a house which they and others used for the purposes of a political association. The rent and wages of the servants who had charge of the premises were paid out of a common fund, to which the lessees and other members of the association were subscribers. Various members of the association transacted the business of the association on the premises, and the lessees when in London frequented the premises, partly transacting the business of the association, and partly transacting their own affairs. Held, that the possession by the lessees was an occupation of each, within 2 Wm. IV, c. 45, § 27, giving the right to vote to the actual occupants of buildings, either in their own right or as tenants. *Lockett v. Bright*, 2 Man. G. & S. 193, 195.

Under Act April 4, 1798, directing that a writ of *scire facias* sued out to preserve the lien of a judgment on real estate must be served on the terre-tenants or persons occupying the real estate, the occupiers are those who come in under the owners of the fee

simple. In *re Dohner's Assignees*, 1 Pa. (1 Barr) 101, 104.

#### Of public land.

One who erects, or causes at his own expense to be erected, on a town lot, a building for the purpose of trade or business, is an occupant, within the town site law. *Hagar v. Wikoff*, 39 Pac. 281, 283, 2 Okl. 580; *Leech v. Rauch*, 3 Minn. 448, 453 (Gil. 332, 338).

"An occupant, within the meaning of the town site law of Congress, is one who is a settler or resident of the town, and is in the bona fide actual possession of the lot at the time the entry is made." *Singer Mfg. Co. v. Tillman* (Ariz.) 21 Pac. 818; *Hussey v. Smith*, 1 Utah, 129, 132.

"Occupant," as used in the law of the United States allowing occupants who possess certain qualifications, and who have made a certain character of improvements, to pre-empt a quarter section of land, means the person who is living on the quarter to be pre-empted, but does not necessarily mean one who is in possession of the entire quarter. The person living on a quarter section, and possessing the other qualifications of a pre-emptor, and having made the necessary improvements, is entitled to pre-empt the entire quarter, though he may not be in actual possession of a tenth part thereof. *O'Neale v. Cleaveland*, 3 Nev. 485, 492.

"Occupant," as used in the laws of the United States relating to occupants of government lands, and entitling them to a deed to the land under certain conditions, and on proof of actual occupancy, meant that the party should have the actual use or possession of land. The acts necessary to constitute possession must in a great measure always depend on the character of the land, and the locality and object for which it is taken up. But in all cases where a party relies solely on the possession there must be a subjection of the land to the will and control of the claimant. The occupant must assert an exclusive ownership over the land, and his acts must at all times be in harmony with his title. His possession must, in the language of the authorities, be apparent, open, notorious, and unequivocal *pedis possessio*, carrying with it the evidence and marks of ownership. *Lechler v. Chapin*, 12 Nev. 65, 72 (citing *Eureka Min. & Smelting Co. v. Way*, 11 Nev. 171, and authorities there cited).

#### Of sawmill.

The hiring of logs to be sawed does not constitute the owner of them, if a nonresident, such an occupant of the sawmill as to subject the logs to taxation in the town wherein the mill is situated, within St. 1845, c. 151, § 10, cl. 1, providing that all goods, wares, and merchandize, and all logs, timber,

boards, and other lumber, in any city, town, or plantation within this state, other than where the owners reside, shall be taxed in such city, town, or plantation, "if the owners occupy any store, shop, mill, or wharf therein, and shall not be taxed where the owners reside." *Campbell v. Inhabitants of Machias*, 33 Me. 419.

#### Of street.

The city of St. Louis is not the "occupant" of that portion of a street which has been set apart by ordinance as a stand for market wagons during certain hours of the day, within Rev. Ord. 1866, p. 329, § 21, making the owner or occupant of property fronting on portions of streets liable to the contractor for the cost of repaving the streets. *Bixler v. Hagan*, 42 Mo. 367, 373.

#### OCCUPANT STATUTES.

Statutes which provide that a bona fide occupant, making lasting improvements in good faith, shall have a lien upon the estate recovered by the real owner, to the extent that his improvements have increased the value of the land, are called betterment or occupant statutes. *Jones v. Great Southern Fireproof Hotel Co.* (U. S.) 86 Fed. 370, 386, 30 C. C. A. 108.

#### OCCUPATION.

See "Usual Occupation."

Like occupation, see "Like."

Occupation of land, see "Occupancy—Occupation—Occupancy (Of land)."

Other occupation, see "Other."

"Occupation," as used in Code Civ. Proc. § 1187, requiring a materialman to file his lien claim within 30 days after the completion of the structure, and providing that the occupation of the structure by the owner shall be deemed conclusive evidence of completion, should be construed to include the releasing of the contractor, and the taking control and possession of the work by the owner for the purpose of completing it. *Giant Powder Co. v. San Diego Flume Co.*, 25 Pac. 976, 88 Cal. 20.

#### Of dwelling house.

When used in a will giving the testator's widow the use and occupation of his mansion house, "occupation" does not mean living and residing, in the absence of any language in the will which implies a personal occupation or residence. *Reeve v. Troth* (N. J.) 42 Atl. 571, 574.

The occupation of a house is not sufficient to satisfy the words "live and reside" in it. *Fillingham v. Bromley*, 1 Turn. & R. 530, 536.

"By the term 'occupation' is meant use or tenure, as of a house." *Fleming v. Mad-dox*, 30 Iowa, 239, 241.

For a dwelling house to be in a state of occupation, there must be in it the presence of human beings, as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. For what length of time it may remain unoccupied will depend upon the circumstances. *Van Derhoof v. Agricultural Ins. Co.*, 12 N. Y. St. Rep. 341, 343.

#### Of pond.

Stocking a great pond with a new species of fish, and closing the outlet with a wire screen, is a sufficient occupation of a pond for the purpose of artificially cultivating and maintaining fish therein, within St. 1867, c. 334. *Commonwealth v. Weatherhead*, 110 Mass. 175, 178.

#### Of wharf.

The piling of sawed lumber upon a wharf to season, and the payment of wharfage therefor, do not constitute such an occupation of the wharf as to make the lumber taxable there, instead of at the owner's residence. *Stockwell v. Inhabitants of Brewer*, 59 Me. 286, 289.

### OCCUPATION (Vocation).

As property, see "Property."

Occupation is defined to be that which occupies or engages the time or attention; the principal business of one's life; vocation; employment; calling; trade. *Union Mut. Acc. Ass'n v. Frohard*, 25 N. E. 642, 643, 131 Ill. 228, 10 L. R. A. 383, 23 Am. St. Rep. 664.

"Occupation" means regular business. *Standard Life & Acc. Ins. Co. v. Fraser* (U. S.) 76 Fed. 705, 709, 22 C. C. A. 499.

The word "occupation," as used in an insurance policy stating that any member receiving an injury while engaged temporarily or otherwise, in an occupation more hazardous than the one in which he was engaged when insured, means the vocation, profession, trade, or calling which the assured has engaged in for hire or profit, and does not preclude him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations, *Union Mut. Acc. Ass'n v. Frohard*, 25 N. E. 642, 643, 131 Ill. 228, 10 L. R. A. 383, 23 Am. St. Rep. 664; *Hess v. Preferred Masonic Mut. Acc. Ass'n*, 70 N. W. 460, 462, 112 Mich. 196, 40 L. R. A. 444; or from engaging in mere acts of exercise, diversion, or recreation, and hence a merchant who was killed while hunting

could not be said to be engaged in the occupation of a hunter at the time of his death, so that his beneficiary would be only entitled to the indemnity allowed in case of a hunter, *Union Mut. Acc. Ass'n v. Frohard*, 25 N. E. 642, 643, 131 Ill. 228, 10 L. R. A. 383, 23 Am. St. Rep. 664; *Wildley Casualty Co. v. Sheppard*, 59 Pac. 651, 652, 61 Kan. 351, 47 L. R. A. 650; *Holiday v. American Mut. Acc. Ass'n*, 72 N. W. 448, 449, 103 Iowa, 178, 64 Am. St. Rep. 170.

Within the meaning of the statute imposing a tax upon all occupations, the keeping of a private billiard table for the use of the owner and his guests, for which no charge is made or profit derived therefrom, directly or indirectly, is not an occupation. The word "occupation," as used in the Constitution, authorizing such a tax, and in the statute imposing the tax, means a profitable pursuit, or a pursuit undertaken and prosecuted for a profit. *Tarde v. Benseman*, 31 Tex. 277, 282.

In construing Pen. Code, art. 110, providing that "any person who shall pursue or follow any occupation, calling, or profession, or do any act taxable by law, without first obtaining a license therefor, shall be fined," as applied to a charge of an unlicensed sale of intoxicating liquors by one who never followed the occupation of selling liquors, but on the day alleged in the information had sold four bottles of medicated bitters that was an intoxicant when drunk in sufficient quantities, the court said: "A single sale of intoxicating liquors would not of itself constitute pursuing or following the occupation of a liquor dealer. 'Occupation,' as used in this statute, and as understood commonly, would signify vocation, calling, trade, or business which one principally engages in to procure a living or obtain wealth. It is not the sale of liquor that constitutes this offense. It is the business of engaging in the sale without paying the occupation tax. It does not require even a single sale to constitute the offense, for a person may engage in the business without succeeding in it even to the extent of one sale. So, on the other hand, a person may make occasional sales of liquor without pursuing or following, or intending to pursue or follow, the occupation of selling liquor." *Standford v. State*, 16 Tex. App. 331, 332; *Williams v. State*, 5 S. W. 136, 137, 23 Tex. App. 499; *State v. Austin Club*, 33 S. W. 413, 115, 89 Tex. 20, 30 L. R. A. 500.

A person is not engaged in the "occupation of vending medicine," who, while performing missionary duties, sold three bottles of a mixture which was called the "Oil of Life"; the person not being in the business of selling this oil, but his occupation and profession being that of a missionary preacher. "Occupation" means a vocation, trade



or business in which one principally engages to make a living or to obtain wealth. *Love v. State*, 20 S. W. 978, 31 Tex. Cr. R. 469.

The phrase "occupation or exposure classed by this company as more hazardous," in a life policy, was construed to mean distinct, classified occupations or employments, such as railroad conductors, brakemen, engineers, blacksmiths, carpenters, etc., and not to include the act of insured in attempting to board a moving train, he in fact not being a railroad employé. *Miller v. Travelers' Ins. Co.*, 40 N. W. 839, 840, 39 Minn. 548.

#### **Attorney in fact or guardian.**

"Occupation," as used in Act April 15, 1834 (P. L. 512) § 4, making all offices and posts of profit, professions, trades, and occupations taxable, should be construed to include an employment or business. One who had become the attorney in fact of some of the owners of a large and valuable estate, consisting of lands and ironworks, etc., and the guardian of the remaining owners of the same, who were minors, and had undertaken to superintend and manage the whole estate, for which he was to receive and had been receiving \$2,000 a year for attending to and managing it, was engaged in an occupation, within the meaning of the statute. *Commissioners of Lebanon County v. Reynolds* (Pa.) 7 Watts & S. 329, 330.

#### **Building contractor.**

Code Or. § 211, exempting from execution tools and implements used by a person engaged in any "trade, occupation, or profession," does not include the business of a building contractor. In *re Whetmore* (U. S.) 29 Fed. Cas. 921.

#### **Manufacturer.**

Under a statute exempting tools, implements, etc., to enable a person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, a manufacturer is entitled to the exemption. *Wood v. Bresnahan*, 30 N. W. 206, 208, 63 Mich. 614.

#### **Minister.**

The term "occupations," in Act April 29, 1844, § 32, declaring that all offices, posts of profit, professions, trades, and occupations, except the occupation of farmers, shall be valued, assessed, and subject to taxation, include a minister of the gospel. *Miller v. Kirkpatrick*, 29 Pa. (5 Casey) 226, 229.

#### **Public office.**

"Occupation" means calling or avocation, and embraces the duties of a public office. *Schuchardt v. People*, 99 Ill. 501, 506, 39 Am. Rep. 34.

### **OCCUPATION TAX.**

As assessment, see "Assessment."

An occupation tax is peculiar in its character. It is not a tax upon property, but upon the pursuit which a man follows in order to acquire property and support his family. It is a tax upon income, in the sense only that every other tax is a tax upon income; that is to say, it reduces a man's fair income by the precise amount of the tax, but it is an income tax in no sense. *Appeal of Banger*, 109 Pa. 79, 95.

An occupation tax is a tax upon an occupation or the prosecution of a business, etc. "The distinction between a tax upon a business, and what might be termed a license, is that the former is exacted by reason of the fact that the business is carried on, and the latter is exacted as a condition precedent to the right to carry it on. In the one case the individual may rightfully engage in and carry on the business without paying a tax. In the other he cannot." *Adler v. Whitbeck*, 9 N. E. 672, 675, 44 Ohio St. 539.

The tax imposed by Laws March 24, 1881, imposing on every firm, person, or association of persons owning or running any palace, sleeping, or dining room cars not owned by the railroad company an annual tax, is an occupation tax, which is unconstitutional, because it is not equal and uniform, as it exempts one class of persons pursuing an occupation, and imposes a tax on others pursuing the same occupation. *Pullman Palace Car Co. v. State*, 64 Tex. 274, 276, 53 Am. Rep. 758.

### **OCCUPIED AS DWELLING HOUSE.**

A condition in a fire policy that it is to be occupied as a dwelling house does not render the policy invalid because a part of the building insured is used as a stable. If the family live in the building, it is not deprived of its character as a dwelling because domestic animals are also housed there. *Hannan v. Williamsburg City Fire Ins. Co.*, 45 N. W. 1120, 1122, 81 Mich. 556, 9 L. R. A. 127.

A recital in a policy of fire insurance that the building insured is occupied as a dwelling is ordinarily a warranty by the insured that the building so described, and on which the risk is taken, is in fact at the time of issuing the policy a building occupied only as a dwelling house. *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, 288.

In an application for fire insurance, and in a policy issued, the premises were described as occupied by a certain individual as a private dwelling or residence. Held, that such clause should not be construed to

amount to a warranty of the continuance of the occupation during the risk, and therefore the insurer was liable, though before the loss the occupant had removed and left the premises vacant. *O'Neill v. Buffalo Fire Ins. Co.*, 3 N. Y. (3 Comst.) 122.

#### OCCUPIED AS A MOROCCO FACTORY.

An insurance policy describing the property insured as "occupied as a morocco factory" indicates the use contemplated by the parties to the contract, and hence, there being a provision in the policy that in case the property should become unoccupied the policy should be suspended, it became unoccupied on a total and absolute suspension of the business; that is, when it ceased to be occupied as a morocco factory. *Halpin v. Phenix Ins. Co.*, 23 N. E. 482, 483, 118 N. Y. 165 (cited in *Caraher v. Royal Ins. Co.*, 17 N. Y. Supp. 864, 63 Hun, 82).

#### OCCUPIED AS A RESIDENCE.

The term "occupied as a residence," as used in a statute exempting homesteads so occupied from seizure and sale on judicial process, means that the premises shall be the home of the party claiming a homestead right therein, and this implies a permanent occupation; and hence mere temporary absence by the householder and his family, without acquiring another home, does not constitute an abandonment of the right. *Potts v. Davenport*, 79 Ill. 455, 458.

Const. art. 15, § 9, which provides that a homestead "occupied as a residence by the family of the owner," together with all the improvements on the same, etc., shall be exempt from sale under process of law, etc., is construed so that a purchase of a homestead with a view to occupancy, followed by an occupancy within a reasonable time, will secure ab initio the exemption of the homestead from sale on execution or other process, as provided by this section of the Constitution. *Ingels v. Ingels*, 32 Pac. 387, 388, 50 Kan. 755. It does not always require an actual occupancy, but may sometimes permit a constructive occupancy. *Ashton v. Ingle*, 20 Kan. 670, 671, 27 Am. Rep. 197.

Under the homestead exemption laws (Comp. Laws 1879, p. 437, § 1), where the owner had a family, consisting of a wife and children, who resided in Illinois, and the owner never had any intention of bringing them to reside on the property in Kansas, he cannot be said to have occupied the property with his family, so as to render the same exempt. *Farlin v. Sook*, 26 Kan. 397, 403.

"Occupied as a family residence," as used in a fire policy describing the house insured as occupied as a family residence,

must be construed and regarded as a representation as to the then use of the house, and not as a warranty or obligation that it should continue to be so used during the continuance of the policy. *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468, 471.

#### OCCUPIED AS STORE.

Where property insured was described as a five-story brick building "occupied as stores on the first floor," and such floor was divided into several rooms, the policy did not require that all the rooms should be occupied for stores at the same time; it being satisfied if any of the rooms were so occupied. *Carter v. Humboldt Fire Ins. Co.*, 17 Iowa, 456, 459.

#### OCCUPIED AS STOREHOUSE.

Where an application for fire insurance described the premises to be insured as a building occupied as a storehouse, such language was not a warranty that the building was used only as a storehouse, but was a mere representation. *Wall v. Howard Ins. Co.* (N. Y.) 14 Barb. 383, 391.

The words "occupied as a storehouse," in a fire policy in which there are other words to identify the building containing the property insured, have been held to explain a fact relating to the risk, and cannot be regarded as employed for any other purpose, or as implying that the house is not occupied for any other purpose. *Texas Banking & Ins. Co. v. Sonne*, 49 Tex. 4, 11.

#### OCCUPIED DWELLING HOUSE.

A house used as a place of residence by a man and his family is an occupied dwelling house, within the meaning of Pen. Code, § 138, though every member of the family may be temporarily absent at a time when the house is maliciously and willfully burned. *Meeks v. State*, 27 S. E. 679, 102 Ga. 572.

#### OCCUPIED FOR SAME PURPOSE.

A condition in a lease of property occupied for the manufacturing of carpet bags, that "the property is to be occupied for the same purpose as it is now," is not violated by the use of the property for the manufacture of caps. *Shumway v. Collins*, 72 Mass. (6 Gray) 227, 231.

#### OCCUPY.

See "Occupancy — Occupation — Occupy (Of Land)."

The word "occupy" is defined by the Century Dictionary as "to take possession

of; seize; take up; employ; to take possession of and retain or keep; enter upon the possession and use of; hold and use; especially to take possession of a place as a place of residence, or, in warfare, a town or country, and to become established in it; to be in possession or occupation; hold possession; be an occupant; have possession and use." *Lyons v. Audry*, 31 South. 38, 39, 106 La. 356, 55 L. R. A. 724, 87 Am. St. Rep. 299.

"To occupy" means "to hold in possession; to hold or keep for use, as to occupy an apartment." *Missionary Soc. of M. E. Church v. Dalles City*, 2 Sup. Ct. 672, 674, 107 U. S. 336, 27 L. Ed. 545 (citing *Webst. Dict.*).

"To occupy" means to take; to seize; to hold or get possession of; to have in possession and use of a thing—and is applicable to personal property as well as to realty. *Herman v. Katz*, 47 S. W. 86, 87, 101 Tenn. 118, 41 L. R. A. 700; *Coleman v. Eberly*, 76 Pa. (26 P. F. Smith) 197, 201.

The use of the words "hold and occupy" in a lease which recites that the lessee shall hold and occupy the premises for a term of years amounts to a general covenant for quiet enjoyment during the term. *Ellis v. Welch*, 6 Mass. 246-250, 4 Am. Dec. 122.

"Occupied by me," as used in the following devise, "I give to my dear wife, E. B. F., during her natural lifetime, the house and lot occupied by me in Market street, in the city of Camden, together with the lot adjoining the same on the east"—are used merely to identify the corporeal hereditament devised. *Fetters v. Humphreys*, 19 N. J. Eq. (4 C. E. Green) 471, 480.

Where a municipal provision provides that no one shall occupy any stand within a certain market without permission from the clerk, etc., a stand may be occupied, within the meaning of the regulation, by a person having a box within the limits of the market containing articles for sale, and offering them for sale. *Commonwealth v. Rice*, 50 Mass. (9 Metc.) 253, 256.

#### OCCUPYING CLAIMANT.

When any person has settled upon any real estate, and occupied the same for three years, under or by virtue of any law or contract with the proper officers of the state for the purchase thereof, or under any law of, or by virtue of any purchase from, the United States, and shall have made valuable improvements thereon, and shall be found not to be the owner thereof, or not to have acquired a right to purchase the same from the state or the United States, such person shall be an occupying claimant, within the

meaning of the chapter relating to occupying claimants. Rev. St. Utah 1898, § 2025.

#### OCCUR.

The word "occur," as used in a policy of fire insurance providing that no action can be maintained on such policy unless commenced within the term of 12 months next after such loss or damage shall occur, must be construed as synonymous with "accrue"; meaning that the limitation commences when the loss is due and payable, and not from the time of the physical burning of the property. Though there is undoubtedly a difference in the derivation and etymological meaning of the words "accrue" and "occur," yet, as used by insurers in contracts of insurance, they have the same signification; representing the happening of an event from which a claim arises. Moreover, this construction accords with the general rule which regards the statute of limitations as beginning to run on a contract of indemnity from the time at which the plaintiff is actually damaged, and not from the happening of the event from which the loss arises. *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, 324, 42 Am. Rep. 297; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235, 243, 33 Am. Rep. 607; *Chandler v. St. Paul Fire & Marine Ins. Co.*, 21 Minn. 85, 86, 18 Am. Rep. 385. See, also, *Steen v. Niagara Fire Ins. Co. (N. Y.)* 61 How. Prac. 144, 146.

"Occur," as used in a fire insurance policy requiring an action to be commenced thereon within 12 months after the loss shall occur, is not to be construed in the sense of "accrue." The word "occur" means to happen, in its general and most popular sense, while the word "accrue" is to be added or attached to something else, in its generally received sense. The loss occurred at the time the fire destroyed the property. *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92, 94, 33 Am. Rep. 47.

#### OCEAN.

See "Western Ocean."

The open sea, the high seas, the ocean, is that which is the common highway of nations, the common domain, within the body of no country, and under the particular right or jurisdiction of no sovereign, but open, free, and common to all alike, as a common and equal right. *United States v. Morel (U. S.)* 26 Fed. Cas. 1310, 1312.

The term "ocean," when used as a boundary of land granted, means the ocean at the ordinary high-water mark. *Seaman v. Smith*, 24 Ill. 521, 524.

. The ocean was thought by Sir Matthew Hale to include only that portion of the sea which lies without the body of a county, and not to include "the arms or branches of the sea lying within the fauces terræ, where a man may reasonably discern between shore and shore, which is or may be within the body of a county." *De Jure Mar.* c. 4. *United States v. Rodgers*, 14 Sup. Ct. 109, 111, 150 U. S. 249, 37 L. Ed. 1071; *United States v. Grush* (U. S.) 26 Fed. Cas. 48, 51.

"In other matters than crimes connected with admiralty jurisdiction, it may be important at times to discriminate between the seas and the high seas, but I apprehend that in crimes 'the seas' or 'the high seas' or 'the ocean' means much the same." *United States v. New Bedford Bridge* (U. S.) 27 Fed. Cas. 91, 120.

The term "ocean" has the same meaning as the term "main sea," and is used to designate that portion of the sea which lies outside the body of the county, and is distinguished from the term "sea," in that the latter includes arms or branches of the sea which may be within the body of the county. *De Lovio v. Boit* (U. S.) 7 Fed. Cas. 418, 428.

#### OCEAN WATERS.

The phrase "ocean waters" embraces all waters opening directly or indirectly into the ocean, and navigable by ships, foreign or domestic, coming in from the ocean, of draft as great as is drawn by the larger ships which traverse the open seas. *The Victory* (U. S.) 63 Fed. 631, 636.

#### OCTB.

The objection that "Octb.," in a writ commanding the sheriff to summon the defendant "to appear before the judges on the first day of their next octb. term, to be holden on the third Monday of said month," expressed no particular month, is too slight, as the abbreviated word could not be mistaken. *Kearns v. State* (Ind.) 3 Blackf. 334, 337.

#### ODIUM.

"Odium" means hatred, dislike, and it is used in such sense in Rev. St. 1881, § 412, providing that the court in term, or the judge in vacation, shall change the venue of any civil cause upon application, supported by affidavit, showing, among other things, that an odium attaches to the applicant, or to his cause of action or defense, on account of local prejudices. It implies such a general ill feeling toward a party to an action as will render it uncertain, at least, whether the cause can be tried by impartial triers,

free from an atmosphere impregnated with malice or corrupting prejudices. *Brow v. Levy*, 29 N. E. 417, 418, 3 Ind. App. 464.

#### OF.

A contract for the sale of "mess pork of Scott & Co." means pork manufactured by Scott & Co. *Powell v. Horton*, 2 Bing. N. C. 668, 675.

Acts La. 1887, § 1, provides that "the circuit court shall not have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note, or other chose in action, in favor of any assignee or of any subsequent holder of such instrument, to be payable to bearer, and be not made by any corporation, unless such suit," etc. Held, that the word "of," in the phrase "or of any subsequent holder of such instrument," should be construed to mean "if"; the word "of" being erroneously used in its stead. *Newgass v. City of New Orleans* (U. S.) 33 Fed. 196, 198.

#### As belonging to.

The "property of another," within the meaning of the embezzlement statutes of many of the states in which the subject of the offense is required to be the "property of another," has been construed almost universally to mean that it must be wholly the property of another. It has resulted that, as a rule, a member of an ordinary partnership could not be convicted of embezzlement of partnership property. *State v. Kusnick*, 15 N. E. 481, 482, 45 Ohio St. 535, 4 Am. St. Rep. 564; *State v. Reddick*, 48 N. W. 846, 847, 2 S. D. 124.

Money or property of another, within the meaning of Gen. St. c. 95, § 23, authorizing the punishment of any clerk, agent, servant, etc., for embezzling, without the consent of his employer, or master, any money or property of another, means any money or property not belonging to the defendant. *State v. Kent*, 22 Minn. 41, 42, 21 Am. Rep. 764.

"Among the definitions of the preposition 'of' as given by Webster's International Dictionary 'is 'belonging to,' and another is 'denoting possession or ownership.'" Thus the word "of," in an indictment for larceny, alleging the property to be the goods and chattels of J., imports ownership of such goods and chattels in the said J. *State v. King*, 51 Atl. 1102, 1103, 95 Md. 125.

"Of," as used in an indictment charging that the accused burglariously broke and entered into the infirmary of Morgan county, is equivalent to "the property of" or "belonging to." *Davis v. State*, 38 Ohio St. 505.

The use of the word "of" in an indictment for arson, describing the burned build-

ing as the house of a certain person, renders the allegation a sufficient statement of the person to whom the property belonged. *Jordan v. State*, 41 N. E. 817, 818, 142 Ind. 422.

"Of another," as used in Code, § 283, providing that every person who shall set fire to the dwelling house of another shall be guilty of arson, is employed in the sense of ownership of property; and an indictment for burning a dwelling house, which alleged that it was used and occupied as a place of abode by anybody, was sufficient. *McClaine v. Territory*, 25 Pac. 453, 455, 1 Wash. St. 345.

The words "right of way of such railroad company," in a conveyance of "all the line of railroad heretofore belonging to the S. Railroad Company, together with the right of way," etc., "of the said railroad company," are to be construed as meaning "right of way owned by such company," as the phrases "property of" and the "property owned by" an individual or corporation, as commonly used and understood, mean precisely the same thing. *Ohio & M. Ry. Co. v. Barker*, 17 N. E. 797, 799, 125 Ill. 303.

"Of them," as used in 20 Stat. p. 141, c. 259, providing that no postmaster intrusted with the sale or custody of postage stamps shall use or dispose of them in the payment of debts or purchase of merchandise, confines the operation of the statute to stamps intrusted to the postmaster by the government. *United States v. Williamson* (U. S.) 26 Fed. 690, 691.

The words "land of," in a description of land in a deed as being bounded westerly by the land of L., means land belonging to or owned by L. *Segar v. Babcock*, 26 Atl. 257, 18 R. I. 203.

Under a statute providing that judgments shall be liens on the real estate of a debtor, the term "real estate of the debtor" means that which is in fact of or belonging to the debtor, irrespective of the fact whether the legal title appears in the debtor or another. *Burke v. Johnson*, 15 Pac. 204, 207, 37 Kan. 337, 1 Am. St. Rep. 252.

The preposition "of," in Act April 7, 1852, which provides that "all personal property, moneys at interest, bonds, and mortgages of the taxable inhabitants of the borough of Carlisle, county of Chamberlain, now taxable for state, county, and school purposes, shall hereafter be taxable for borough purposes," expresses the relation of ownership or property, and the whole section means that the inhabitants of Carlisle shall pay taxes to the borough on the same description of property owned by them as is taxed for county and school purposes. The word "of," in such connection, is to be construed as meaning "belonging to" and

"owned by." *Borough of Carlisle v. Marshall*, 36 Pa. 397, 401.

Rev. St. c. 103, § 14, providing that a widow may remain in the "house of her husband" 90 days next after his death without being chargeable with rent therefor, means the house in which her husband owned the fee at the time of his decease. *Young v. Estes*, 59 Me. 441.

Gen. St. c. 118, § 44, providing that an assignment under the insolvent laws shall vest in the assignee all the "property of the debtor" real and personal, which he could have lawfully sold, assigned or conveyed, or which might have been taken on execution or judgment against him, cannot be construed to include property held in trust by the debtor. *Silbey v. Quinsigamond Nat. Bank*, 133 Mass. 515, 517.

#### As by.

"Of," as used in a deed of land described as "all the land situate and lying north of the road aforesaid, bounded north of the heirs of Matthew Clark's land," should be construed in its obsolete, but perfectly grammatical, meaning of "by," as in the familiar examples, "seen of men," "led of the spirit," "tempted of the devil." *Hannum v. Kingsley*, 107 Mass. 355, 361.

#### As for.

The words "of the county," as used in a statute in reference to the clerks of the county, is synonymous with the phrase "for the county," as used in the statute with reference to such clerks. *Slymer v. Maryland*, 62 Md. 237.

#### As from or off.

The word "of," in a requested instruction that the "defendants were discharged from all liability on the note sued on, the plaintiffs not having used due diligence in collecting said note of Burke," was construed to have been used in the sense of the word "from." *Rives v. McLosky* (Ala.) 5 Stew. & P. 330, 338.

Act June 30, 1885, § 4, requiring the treasurer of every private corporation, upon payment of interest, to assess the tax provided in the act, and that he shall deduct three mills on every dollar of the interest paid as aforesaid, means that he shall deduct the tax off the interest paid. *Commonwealth v. Delaware Division Canal Co.*, 16 Atl. 584, 585, 123 Pa. 594, 2 L. R. A. 798.

#### As in.

The word "of," in Act Aug. 14, 1885, to establish the city court of Macon, was construed as synonymous with the preposition "in," and to have been used to indicate that the city court should be located in the city. These prepositions are frequently used as

synonymous. When we speak of A. of Macon, we mean that he is a resident of Macon and lives in Macon. When the defendant is alleged to be of a certain county, the allegation is sufficient to show that he is a resident in that county. *Ivey v. State*, 37 S. E. 398, 399, 112 Ga. 175.

#### As portion or part of.

"Of," as used in a declaration in ejectment describing the lands as "lots 1 and 2 of range 31 east, 19 south, and fractional section 30," means portion or part of the township. *Wade v. Doyle*, 18 Fla. 630, 633.

"Of and concerning," as used in an allegation of libel declaring that the words were used of and concerning different matters alleged to be libelous, should not be construed to mean that the libel is stated to be of and concerning all of such matters, so that it would be necessary to prove a libel relating specifically to every one of the matters alleged, and that there would be a failure of proof if such was not the case, but the words only require that plaintiff prove the libel relating to those matters, so far as they are concerned with the libel, in respect either to the particular defamatory character ascribed to it in the declaration, or of the manner in which it is afterwards set out. *May v. Brown*, 3 Barn. & C. 113, 125.

Where testator by his will devised his property to his wife for life, with power to appoint the remainder "to whom she thinks proper of her heirs," the testator only meant that she might appoint to any one or more of her legal heirs. Her selection was limited to that class. She could select among them. This is the import of the word in the portion of the will above quoted. She could not, in executing this power, go out of this class of her legal heirs. *Milhollen's Adm'r v. Rice*, 13 W. Va. 510, 513.

#### Residence in place implied.

Certain English statutes direct that the maintenance of parents by children who have a sufficiency shall be according to that rate prescribed by the justices of the peace of such county where that person dwells. Thereunder an order was duly entered on Thomas Gilbert, "of the parish of Mersham in the county of Kent, for the maintenance of his destitute father, and it was objected that the order did not show that Gilbert dwelt within the county of Kent, and was therefore within the jurisdiction of the justices." Held, that "of," in such connection, generally imports dwelling, and that it was sufficiently averred that the man dwelt in the parish of M., and that the words "of a parish" in Kent sufficiently denotes that the person identified resides in that parish. *Reg. v. Toke*, 8 Adol. & E. 227.

24 Geo. II, c. 44, 1, requiring that on the back of a notice shall be endorsed the

name of the party's attorney or agent, together with the place of his abode, is sufficiently complied with by an endorsement of the attorney's name with the words "of Birmingham," the same being a sufficient description of the attorney's place of abode. *Osborn v. Gough*, 3 Bos. & P. 551, 554.

"Of Brooklyn," as used in a certificate of the formation of a partnership declaring that the general partners interested therein were two certain persons, "both of Brooklyn," is a precise equivalent to "both residents of Brooklyn," which conveys the same idea. It is universally so understood. It is the better mode of indicating a man's residence, and it means present residence. Where a former residence is described, the term is "from Brooklyn," or "late of Brooklyn," while "of Brooklyn" has no appropriate signification but that the person resides there. *Lachalse v. Marks* (N. Y.) 4 E. D. Smith, 610, 616.

An affidavit stating that "G. S., 'of' the city of Albany, being duly sworn, says," etc., does not sufficiently indicate that the affiant was a resident of Albany. *Staples v. Fairchild*, 3 N. Y. (3 Comst.) 41, 44.

A notice by the selectmen of one town to those of another town stating that "paupers of your town are here, poor and unable to support themselves," means that they were paupers who were supported by the town to which they belonged, and did not imply that they were being supported as paupers by the town in which they were residing. *Town of Beacon Falls v. Town of Seymour*, 46 Conn. 281, 283.

#### As to.

The changing of the word "of," as used in a bond requiring the master of a vessel to exhibit a certified copy of the list of the ship's company of the first boarding officer, to the word "to," is immaterial because it does not alter the meaning and construction of the bond. *United States v. Hatch* (U. S.) 26 Fed. Cas. 220, 222, 223.

#### As with.

"Of his malice aforethought" is equivalent in meaning to "with malice aforethought," so that the use of the former expression in an indictment for murder, instead of the latter, does not invalidate the indictment, though the latter is the statutory form. *Rocha v. State*, 63 S. W. 1018, 43 Tex. Cr. R. 169.

#### As word of exclusion.

A deed describing a line as running within four rods of a brook excludes the stream, and means from the side of the stream, and not from the center of it. The word "of," as well as the word "from," is used as a term of exclusion. *Haught v. Hamor*, 22 Atl. 369, 372, 83 Me. 453.

**OF THE BLOOD.**

See "Blood."

**OF THE BODY.**

See "Heirs of the Body"; "Issue of the Body."

"Of the body," usually denominated words of procreation, are not indispensable to the creation of an estate tail by devise. *Ewan v. Cox*, 9 N. J. Law (4 Halst.) 10, 12.

**OF COUNSEL.**

A statute disqualifying a judge where he had been "of counsel" for either party means where he had been of counsel in the particular action in which he is sought to be disqualified, and not where he had been of counsel for either of the parties in some other and different action. *The Richmond* (U. S.) 9 Fed. 863, 864.

**OF COURSE.**

"Of course," as used in Prac. Act, § 495, declaring that the prevailing party shall be entitled to costs of course, means as a matter of right. *Stoddard v. Treadwell*, 29 Cal. 281, 282.

The term "of course," as applied to writs, means according to the course and practice of the court from which it issues, and it is competent for the court to prescribe the precise course in which it shall issue. *Yates v. People* (N. Y.) 6 Johns. 337, 359.

Motions of course are those which are granted without the court being called upon to investigate the truth of any allegation or suggestion upon which they are founded. *Merchants' Bank v. Chrysler* (U. S.) 67 Fed. 388, 390, 14 C. C. A. 444.

**OF GRACE.**

The phrase "of grace," predicated of a decree in equity, had its origin in an age when kings dispensed their royal favors by the hands of their chancellors; but, although it continues to be repeated occasionally, it has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. *Walters v. McElroy*, 151 Pa. 549, 557, 25 Atl. 125.

**OF LIKE TENOR.**

See "Like Tenor."

**OF MY NAME.**

See "Name."

**OF RECORD.**

See "Books of Record"; "Court of Record"; "Court not of Record"; "Debt of Record"; "Matter of Record"; "Mortgagee of Record"; "Obligation of Record"; "Title of Record."

"Of record," as used in Crim. Code, § 383, providing that recognizances shall be of record, means of record in the sense that is taken by inferior tribunals—that they have been taken and certified to the clerk of the court of record and by him recorded. *King v. State*, 25 N. W. 519, 523, 18 Neb. 875.

**OF UNSOUND MIND.**

See "Unsound Mind."

**OFF.**

The word "off," written by the clerk of the court in preparing the court docket for the next term under an entry showing the filing of a motion for a new trial, cannot be regarded as an entry overruling the motion. *St. Francis Mill Co. v. Sugg*, 44 S. W. 247, 248, 142 Mo. 358.

**OFF LARGE.**

A vessel off large is a vessel having the wind free on either tack, which enables it to take a course to either side, or proceed straight forward, or return back to its anchorage. It is a vessel free in the wind. *Ward v. The Fashion* (U. S.) 29 Fed. Cas. 181, 182, 188.

**OFF SHORE.**

A marine insurance policy prohibiting "loading off shore" means loading at a distance from and away from the shore while the vessel is lying at anchor, and does not include loading at a bridge pier. A bridge pier is really a projecting wharf, is a permanent structure attached to and firmly connected with the mainland, and loading from such a place one would naturally suppose was like taking in a cargo from shore. We should not understand that the words loading off shore include or were intended to apply to the case of loading at a bridge pier. In a certain sense loading at the end of a bridge pier 1,500 feet long is loading off shore or away from and distant from the mainland, but it is apparent that it is loading under quite different conditions from a vessel taking in a cargo from rafts and barges while anchored off shore, which manner of loading is that intended to be and in fact prohibited by the inhibition against loading off shore. *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87, 89.

## OFFAL

In an ordinance prohibiting the deposit of garbage or offal in certain places, the words "garbage" and "offal" were defined to include every refuse accumulation of animal, fruit, or vegetable matter, liquid or otherwise, that attends preparation, use, cooking, dealing in, or storing of meat, fish, fowl, fruit, or vegetable. *City of Grand Rapids v. De Vries*, 82 N. W. 269, 270, 123 Mich. 570.

Where a fishing lease stipulated that the lessor, as a consideration for the lease, shall be entitled to all the offal, the word "offal" means that portion of the product of the seine which is not fit for food or is sold or consumed for that purpose. *Read v. Granberry*, 30 N. C. 109, 112.

"Offal" is defined in the Century Dictionary as: "(1) That which falls off, as a chip or chips in dressing wood or stone; that which is to fall off as of little value or use. (2) Waste meat; the parts of a butchered animal which are rejected as unfit for use. (3) Refuse of any kind; rubbish." The heads and feet, and bones of beef cattle from which the flesh and skin have been removed, and which are fresh and clean, and emit no offensive odor, do not come within the meaning of "offal" as used in an ordinance regulating the hauling of the same in the public streets. *City of St. Louis v. Robinson*, 37 S. W. 110, 113, 135 Mo. 460.

Offal is refuse animal matter, and is garbage. *City of St. Louis v. Weitzel*, 31 S. W. 1045, 1050, 130 Mo. 600 (citing Cent. Dict.).

## OFFENDER.

The word "offender," as used in 2 Rev. St. p. 669, § 21, declaring the term "felony," when used therein, to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or imprisonment in the state prison, is not employed as a word of limitation, making it dependent on the personal status of the criminal or his exemption from a particular punishment by reason of mental capacity, youth, etc., where the offense for which he is convicted is a felony, but as a word of general application, in a general sense to define the punishment defining the crime. *People v. Park*, 41 N. Y. 21, 24, 1 Cow. Cr. R. 227, 228.

## OFFENSE.

See "Capital Crime or Offense"; "Combined Offense"; "Compound Offense"; "Continuing Offense"; "Criminal Offense"; "Cumulative Offense"; "Indictable Offense"; "International Offense"; "Malum in Se"; "Malum Prohibitum"; "Municipal Offense"; "Public Offense"; "Same Offense."

Any offense, see "Any."

"An 'offense,' in its legal signification, means the transgression of a law." *Moore v. State of Illinois*, 55 U. S. (14 How.) 13, 19, 14 L. Ed. 306; *People v. Welch*, 9 N. Y. Cr. R. 144, 149, 26 N. Y. Supp. 694.

As synonymous with the word "offense," Webster gives "misdemeanor," "transgression," "delinquency." *State ex rel. Reid v. Walbridge*, 24 S. W. 457, 458, 119 Mo. 383, 41 Am. St. Rep. 663.

"Offense" is defined by Bouvier to mean the doing of that which a penal law forbids to be done, or omitting to do what it commands. It has been held that the terms "offense" and "crime" are synonymous. *People v. Police Com'r's of City of New York*, 4 N. Y. Cr. R. 300, 302, 39 Hun, 507; *Same v. French*, 102 N. Y. 583, 7 N. E. 913. *Abbott's Law Dictionary* says: "An offense is a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights. A punishable violation of law; a crime; also, sometimes, a crime of lesser grade; a misdemeanor." In *Moore v. Illinois*, 55 U. S. (14 How.) 13, 14 L. Ed. 306, the court said: "An 'offense,' in its legal signification, means the transgression of the law. The terms 'crime,' 'offense,' and 'criminal offense,' are all held, in the appeal of *State v. West*, 42 Minn. 147, 43 N. W. 845, to be synonymous." *Cruthers v. State*, 67 N. E. 930, 932, 161 Ind. 130.

An offense is defined to be an act committed against the law, or omitted where the law requires it, and punishable by it; and where the statute speaks of a party as having committed an offense we understand a crime, and when it employs the words "crime" and "offense" we understand these as mere synonymous terms, or as an expression of different degrees of crime. To commit an offense is in legal parlance to be guilty of crime. The words "crime" and "offense" are used in the lawbooks as convertible terms, and the latter word is often employed both in the common and our statute law as crime of every degree. *Illies v. Knight*, 3 Tex. 312, 314.

The word "offense," as used in *Excise Act 1857*, § 17, as amended by *Laws 1869*, c. 856, making the offense of intoxication an offense against the provisions of the act, and providing for its punishment, is synonymous with "crime," and a conviction therefor is a conviction of a crime, within the meaning of *Consolidation Act*, § 268 (*Laws 1882*, c. 410), providing that no person should be appointed to membership in the police force who has been convicted of any crime. *People v. French*, 7 N. E. 913, 915, 102 N. Y. 583.

"An offense," says Mr. Wharton, "which may be the subject of criminal procedure, is an act committed or omitted in violation of the public law, either forbidding or com-



manding." *United States v. Chapel* (U. S.) 25 Fed. Cas. 395.

The word "offense" means any act or omission for which the laws of this state prescribe a punishment. Gen. St. p. 820, § 2; *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1, 15.

The term "offense," when used in any statute, shall mean any violation of law liable to punishment by criminal prosecution. Code Miss. 1892, § 1511.

The term "offense," when used in any statute, is to be construed to mean any offense for which any criminal punishment may be inflicted. 2 Rev. St. p. 886, § 37; *Behan v. People* (N. Y.) 3 *Parker, Cr. R.* 686, 690.

The word "offense" includes every act or omission for which a fine, forfeiture, or punishment is imposed by law. Code W. Va. 1899, p. 134, c. 13, § 17.

An offense is an act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in this Code. Pen. Code Tex. 1895, art. 53; *Hardin v. State*, 46 S. W. 803, 806, 39 Tex. Cr. R. 426.

All offenses against persons or property are in some sense offenses against the injured individual, but they are also offenses against the public. *State v. Corliss*, 85 Iowa, 18, 51 N. W. 1154.

As used in Rev. St. art. 1198, subd. 8, providing that where the foundation of the action is some crime, offense, or trespass for which a civil action in damages will lie, the suit may be brought in the county where such crime, offense, or trespass was committed, the term "offense" means an offense punishable by law. *Austin v. Cameron*, 18 S. W. 437, 438, 83 Tex. 351.

The terms "crime," "offense," and "criminal offense" are all synonymous, and are ordinarily used interchangeably, and include any breach of law established for the protection of the public as distinguished from an enforcement of mere private rights, for which a penalty is imposed or punishment inflicted in any judicial proceeding. *State v. West*, 43 N. W. 845, 847, 42 Minn. 147.

The word "offense," as used in the Declaration of Rights, art. 12, declaring that no subject shall be held to answer for any crimes or offenses until the same is fully and plainly and formally described to him, does not embrace the affidavit and proof required by Gen. St. c. 124, § 5, before a person can be arrested in a civil action. In re *Frost*, 127 Mass. 550, 554.

Under Cr. Code, making it an offense to institute a criminal prosecution against any

person for the purpose of harassing him, the offense consists in instituting the prosecution or causing it to be instituted; and where the process was issued in D. county, and the arrest was made in W. county, the arrest did not constitute the offense, but the offense was committed when the preliminary steps, including the issuance of the warrant, were taken. *Hubbard v. Lord*, 59 Tex. 384, 385.

"Offense," as used in the statute which points out the penalty to be imposed for a third offense against the liquor law, means the third offense which has been legally ascertained and determined, and is synonymous with third conviction. In re *Buddington*, 29 Mich. 472, 475.

#### As act or transaction.

"Offense," as used in Rev. St. § 4499 [U. S. Comp. St. 1901, p. 3060], authorizing a seizure in any district court of the United States having jurisdiction of an offense for the purpose of the collection of a penalty, "has no precise or technical signification, and is used generally and loosely in the sense of the transaction which constitutes the subject or cause of the suit." *The Idaho* (U. S.) 29 Fed. 187, 189, 192.

The word "offense," as used in Const. U. S. art. 1, § 7, providing that no person for the same offense shall be put twice in jeopardy of punishment, is not identical in meaning with the word "act." It imports, in legal sense, any infraction or transgression of a law—the willful doing of an act which is forbidden by law, or omitting to do what it commands. *State v. Oleson*, 5 N. W. 959, 969, 26 Minn. 507.

#### Contempt of court.

Act Cong. March 3, 1875, c. 145, 18 Stat. 479, 1 Supp. Rev. St. p. 89 [U. S. Comp. St. 1901, p. 3722], declares that any person convicted of an offense against the laws of the United States, and confined in any prison or penitentiary of any state or territory which has no system of commutation for its own prisoners, shall be allowed a deduction of five days in each calendar month during which no charge of misconduct has been charged against him. Held, that the term "convicted of an offense against the laws of the United States" meant an offense for which the person charged was entitled to be proceeded against by indictment, information, or written complaint, and to be tried by a jury, and hence such statute had no application to an imprisonment for contempt, that not being an "offense," as that term was intended in the statute. In re *Terry* (U. S.) 37 Fed. 649, 651.

#### Violation of city ordinance.

The word "offenses," as used in Const. art. 5, § 8, providing that the Governor shall

have power to grant reprieves, commutations, and pardons after conviction for all offenses except treason and cases of impeachment, means violations of state laws, and does not include violations of city ordinances. There is a well-recognized distinction between the nature of offenses which consist in violations of city ordinances, and those which consist in the violation of a state law. *State ex rel. Kansas City v. Renick*, 57 S. W. 713, 715, 157 Mo. 292.

#### **Felonies and misdemeanors.**

The word "offenses," as used in Or. Code, § 54, entitled "An act to provide for prosecuting offenses on information," embraces all infractions of the Criminal Code of the grade of felonies. *Bolin v. State*, 71 N. W. 444, 445, 448, 51 Neb. 581.

"Bouvier defines 'offense' as the doing that which a penal law forbids to be done, or omitting what it commands. In this sense it is nearly synonymous with 'crime.' In a more confined sense it may be considered as having the same meaning as a misdemeanor, but it differs from this in this: that it is not indictable, but punishable summarily by forfeiture or a penalty. In *re Terry* (U. S.) 37 Fed. 649, 650.

The terms "crime," "offense," and "criminal offense," when used in any statute, shall be construed to mean every offense, as well misdemeanor as felony, for which any punishment by imprisonment, or fine, or both, may by law be inflicted. *Gen. St. Kan.* 1901, § 2311; *Rev. St. Mo.* 1899, § 2396; *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1, 15; *State v. Blitz*, 71 S. W. 1027, 1030, 171 Mo. 530.

#### **Omission of duty.**

The Pennsylvania statute which requires real estate brokers to pay a yearly license, and imposes a penalty, to be recovered in an action at law as debts are, for each offense, does not mean a crime, but only an omission or failure of duty year by year. *Angell v. Van Schaick*, 9 N. Y. Supp. 568, 569, 56 Hun, 247.

Act April 12, 1859, declares that it shall not be lawful for any person, within the limits of certain counties, to expose to sale at auction, etc., any goods, wares, or merchandise manufactured within the limits of such counties. It is also provided that each and every person "offending against the provisions of this act shall for every such offense forfeit and pay the sum of fifty dollars, to be recovered in an action of debt." Held, that the words "offending" and "offense," as used in the statute, were not used in any criminal sense, but in the sense of breaking or violating the prohibitory injunction of the statute. *Ott v. Jordan*, 9 Atl. 321, 323, 116 Pa. 218.

#### **Vagrancy or incorrigibility.**

*Rev. St.* § 2071, providing that the expenses of maintaining infants, committed to a house of refuge and correction for "offenses against a law of the state," does not include infants committed to a house of refuge and correction under *Rev. St.* § 2050, providing for the incarceration of infants in consequence of vagrancy or of any incorrigible or vicious conduct, since an offense against a law of the state must be an act punishable as a crime. *State v. Schlatterbeck*, 39 Ohio St. 268, 270.

#### **OFFENSE CHARGED.**

In a prosecution for homicide the court instructed that the defendant was presumed to be innocent of the offense charged, and that before conviction the state must overcome that presumption by proving him guilty beyond a reasonable doubt. The specific offense charged in the indictment was murder in the first degree. Held that, inasmuch as an indictment for murder in the first degree embraces all grades of homicide, the words "offense charged" would also include all grades of homicide, and not first-degree murder only. *State v. Smith*, 65 S. W. 270, 273, 164 Mo. 567.

Under *St.* 1867, p. 126, providing that the indictment "must be direct and contain . . . the offense charged," and *St.* 1861, p. 479, § 412, providing that "in all cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment," a person charged in the indictment with assault with intent to kill is also charged with simple assault, for an indictment charging an offense of a higher grade, as an assault with intent to kill, also charges, by operation of law, every less offense that may be included under the charge of assault with intent to kill. *State v. Quinn*, 16 Nev. 89, 90.

Under the Constitution giving an appeal in all criminal cases in which the offense charged amounts to a felony, the judgment appealed from determines the offense charged. If punished as a felony, that is the offense charged, and an appeal may be taken, and, if punished as a misdemeanor, that is the offense charged, and an appeal will not lie. *State v. McCormick*, 14 Nev. 347, 349.

#### **OFFENSE OF POLITICAL CHARACTER.**

During a revolution in the republic of Salvador the killing of persons because of their actual or supposed enmity to the government by the president and his officers, and the capture or the taking possession of funds of a bank by way of a forced loan to

obtain money with which to protect the government, are offenses of a political character, and as such the authors of such acts should not be subject to extradition. *In re Ezeta* (U. S.) 62 Fed. 972, 997.

### OFFENSIVE.

Anything that is hurtful, disturbs happiness, impairs rights, or prevents the enjoyment of them is injurious, and if it causes displeasure, gives pain, or unpleasant sensations, it is offensive. The disturbing cause must be real, not fanciful; something more than mere delicacy or fastidiousness; but it need not necessarily be apparent to the senses of sight, smell, or hearing, for it may be injurious without offending either. Thus, by the general principles of equity, the continuance of a powder, dynamite, or fire establishment, or a house of ill fame, will be enjoined at the suit of one who is deprived of the comfortable enjoyment of his property by the close proximity of such a nuisance. The use of premises as an undertaker's establishment for the sale of caskets and furnishing goods for funerals, also for embalming bodies, for autopsies, and post mortem examinations, and for the reception and temporary deposit of human remains awaiting burial, is offensive and injurious, within the meaning of a covenant that such premises shall not be used for any trade or business injurious or offensive to the neighboring inhabitants. *Rowland v. Miller*, 15 N. Y. Supp. 701.

The term "noxious or offensive," in a conveyance of property which contains a provision that the premises are not to be used for any trade or business which may be noxious or offensive to neighboring inhabitants, will not be construed to include a building thereon for use as a residence for nurses, without evidence justifying a conclusion that the building so used will be more noxious to neighboring inhabitants than a building used as a common residence for any other class of persons. "To be included within the general terms mentioned it must be found as a fact that it is the business which may be in any wise noxious or offensive to the neighboring inhabitants. The definition given to such a covenant by the Court of Appeals (*Rowland v. Miller*, 34 N. E. 765, 139 N. Y. 93, 22 L. R. A. 182) would seem to include the use to which the defendant intends to put these premises. In that case the court said: 'We cannot suppose that the parties had in mind any business which might be offensive to a person of supersensitive organization or to one of a peculiar or abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and

business which would be offensive to people in general, and thus render the neighborhood to such people undesirable as a place of residence.'" *Moller v. Presbyterian Hospital*, 72 N. Y. Supp. 483, 485, 65 App. Div. 134.

"Offensive business," within the meaning of a covenant in a lease not to employ the leased tenement in a business that may be offensive, does not include the opening of the tenement as a public house. *Jones v. Thorne*, 1 Barn. & C. 715.

A mutual covenant between grantors and grantees, providing that the premises conveyed should not be used for any business offensive to the neighboring inhabitants, prohibits the establishment of a coal yard on a part of the premises conveyed, since nothing would be more offensive to the ladies of the neighborhood than the filthy coal dust, which settles on their doorsteps, thresholds, and windows, and enters into their dwellings, and into their carpets, their cups, their kneading troughs, their beds, and their lungs, discoloring their linen and their robes of beauty and comfort, defacing their furniture, and blackening and besmearing and injuring every object of utility, of beauty, and of taste. *Barrow v. Richard* (N. Y.) 8 Paige, 351, 360, 35 Am. Dec. 713.

### OFFENSIVE WEAPON.

"'Offensive' and 'dangerous' weapons would seem to be synonymous terms." *State v. Dineen*, 10 Minn. 407, 411 (Gil. 325, 328).

"Offensive weapons," as used in 9 Geo. IV, c. 69, § 9, relating to night poaching, would include large stones capable of inflicting serious injury if used offensively, and which were brought and used by the defendants for that purpose. *Rex v. Grice*, 7 Car. & P. 803.

Bats, which are long poles used by smugglers to carry tubs of spirits, are not "offensive weapons," within 6 Geo. IV, c. 108, § 56, providing that if any persons to the number of three or more, armed with firearms or other offensive weapons, shall be assembled in order to be aiding and assisting in the illegal landing of uncustomed goods, every person so offending shall be deemed guilty of a felony and suffer death. *Rex v. Noakes*, 5 Car. & P. 326.

### OFFER.

To offer to do a thing is to bring to or before; to present for acceptance or rejection; to exhibit something that may be taken or received, or not. *Morrison v. Springer*, 15 Iowa, 304, 346.

An offer, without more, is an offer in the present, to be accepted or refused when made.

Vincent v. Woodland Oil Co., 30 Atl. 991, 185 Pa. 402.

"Offer," as used in Pen. Code, § 67, making it a felony for any one to offer any bribe to any executive officer, means a proposition to do a thing, to bring to or before, to hold out, to proffer, to make a proposal to; and hence the crime of offering to bribe an executive officer is complete under the Code without any tender or production of the money offered. *People v. Ah Fook*, 62 Cal. 493, 494.

Act 1825, regulating the general election, which imposes a penalty on any one who shall offer any reward to a voter to bribe or influence him, means to present a reward for acceptance or rejection. *State v. Harker* (Del.) 4 Har. 559, 561.

#### As attempt.

Webster defines the word "offer" as (1) a proposal to be accepted or rejected; (2) first advance; (3) the art of bidding a price or sum bid; (4) attempt, endeavor. "Attempt" is defined to make an effort to effect some object; to make a trial or experiment; to direct; to endeavor; to use exertion for any purpose. Accordingly the words "offer" and "attempt" are convertible terms. Consequently, an indictment for bribery which alleged that the accused did offer to do a certain act was sufficient, as the offer to bribe was an attempt to do so, within the meaning of the statute. *Commonwealth v. Harris* (Pa.) 1 Leg. Gaz. R. 455, 457.

#### As tender.

"Offer," in reference to the duty of a party, seeking to rescind a contract for the purchase of goods, to restore, or offer to restore, whatever he has received under the contract, is frequently used by courts and text writers as synonymous with "tender," and it may be properly so used with reference to articles capable of manual delivery and actually produced. But with respect to heavy articles of merchandise situated at a distance from the place to which they must be transported if restored to the vendor, the phrase "offer to return" is more commonly and more aptly employed to express a willingness or to make a proposal to rescind the contract and return the goods. *Milliken v. Skillings*, 36 Atl. 77, 78, 89 Me. 180.

#### As will buy.

The words "we offer," as used in the following offer in writing, "For a period of six months from date we offer for the product of the Robert E. Lee mine as follows," etc., is equivalent to and synonymous with the phrase "we will buy." *Robert E. Lee Silver Min. Co. v. Omaha & Grant Smelting & Refining Co.*, 26 Pac. 326, 330, 16 Colo. 118.

#### OFFER (In Evidence).

"Offer," as used in an exception to a ruling allowing a person to offer certain evidence, is to be construed as meaning to read. *Ansley v. Meikle*, 81 Ind. 260, 261.

A statement in a bill of exceptions that "the parties respectively offered the following evidence" is not equivalent to an assertion that the evidence was introduced or admitted. *Lyon v. Davis*, 111 Ind. 384, 386, 12 N. E. 714; *National Bank of Battle Creek v. Lock*, 132 Ind. 424, 425, 81 N. E. 1115, 1116; *American Ins. Co. v. Gallahan*, 75 Ind. 168, 171; *Garrison v. State*, 110 Ind. 145, 148, 11 N. E. 2; *Peck v. Louisville, N. A. & C. Ry. Co.*, 101 Ind. 366.

The word "offered," in a bill of exceptions reciting that it contains all the evidence offered in the case, is not equivalent to the word "given," and therefore it does not purport to include all the evidence. *Baltimore, O. & C. R. Co. v. Barnum*, 79 Ind. 261, 263.

In *Goodwine v. Crane*, 41 Ind. 335, it was stated in the bill of exceptions that "the finding was all the evidence offered," and this was followed in the record by what purported to be the evidence. It was held that the evidence was not in the record. Of the evidence offered, the court said, "How much of it was admitted is not shown." *Fellenzer v. Van Valzah*, 95 Ind. 128, 133.

A record on appeal showing that a statement of evidence agreed upon by the parties was offered, together with a certificate of the judge that it was all the evidence given in the cause, should be construed to mean that such statement was introduced in evidence. *Ragsdale v. Barnett*, 37 N. E. 1109, 1115, 10 Ind. App. 478.

The word "offered," as used in a bill of exceptions showing that, in connection with each instrument given in evidence, the word "offered" is used instead of the word "introduced," which is usually used, should be construed to be synonymous with the word "introduced," and to mean that the evidence offered was introduced in evidence. *Harris v. Tomlinson*, 30 N. E. 214, 215, 130 Ind. 426.

#### OFFER FOR SALE.

In *United States v. Dodge* (U. S.) 25 Fed. Cas. 879, Mr. Justice Deady explains very aptly and concisely what may constitute an offer of sale under the internal revenue act, defining the business of a retail dealer as a person who shall sell or offer for sale spirits in quantities of three gallons or less. He says a license must be first obtained, and then, and not before, the party is at liberty to sell, or offer for sale, liquor in less quantities than three gallons. The liquor may be

offered for sale without a special or personal solicitation of any particular person to become a purchaser. It may be done by general advertisements in the press, or by exhibition of signs or symbols in the vicinity of the place of the alleged business, or by having the article unsealed with intent to dispose of it to any offering to purchase. Hence under Laws 1885, p. 128, making it criminal to offer for sale an oleaginous substance except under certain conditions, it includes the act of a merchant in keeping such articles in his storeroom, though he makes no offer to any individual to sell the same. *State v. Dunbar*, 11 Pac. 298, 299, 13 Or. 591, 57 Am. Rep. 33.

"Offered for sale," in Laws 1876, c. 90, § 2, as amended in 1877, providing for the inspection of illuminating oils offered for sale, means held for sale, though they had not been put on the market for sale. It does not require an actual proffer for sale to some particular person. *Willis v. Standard Oil Co.*, 52 N. W. 652, 653, 50 Minn. 290.

To constitute such an offering for sale of the seminary lands under Act Dec., 1840, by the Governor, as to subject the land, if not sold, to be entered at the graduation price, there must have been not only a proclamation published at the time and in the manner provided by law, but the land must have been regularly proposed for sale to the highest bidder by the crier of the sale on the day designated by the proclamation of the Governor. The proclamation of the Governor does not constitute an offering for sale, but is only a notice to all persons desirous of purchasing any of the seminary lands that an opportunity for the purpose will be afforded them. *Hardwick v. Reardon*, 6 Ark. 77.

#### OFFER OF PILOT SERVICE.

An offer of pilot service may be made by some arbitrary or established sign or demonstration, made from beyond earshot and addressed exclusively to the eye. There is a distinction between speaking or hailing a vessel and a mere offer of pilot service. The speaking or hailing a vessel implies that the parties are within speaking distance, and can only be done by word of mouth, supplemented, it may be, by some such device for projecting the sound of the voice as a speaking trumpet, or even personal gesticulation. The *Ullock* (U. S.) 19 Fed. 207, 208 (citing *Commissioners v. Ricketson*, 46 Mass. [5 Metc.] 412; 2 Pars. Shipp. & Adm. 109).

#### OFFER OF REWARD.

See "Reward."

#### OFFER TO BUY PEACE.

Admissions distinguished, see "Admission."

#### OFFER TO CONFESS JUDGMENT.

An offer to confess judgment, which is not accepted, cannot be treated as an admission of the cause of action or the amount to which plaintiff is entitled. *Kelley v. Combs*, 57 S. W. 476, 22 Ky. Law Rep. 363.

#### OFFER TO VOTE.

To offer to vote by ballot is to present one's self with proper qualifications at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. *Chase v. Miller*, 41 Pa. (5 Wright) 403, 419; *Morrison v. Springer*, 15 Iowa, 304, 348.

#### OFFERED LANDS.

Act Cong. June 3, 1878, c. 151, § 1, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545], providing that surveyed public lands of the United States within certain states, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States in quantities not exceeding 160 acres to any one person, should be construed as applying to lands which, at the date of the act, belonged to the class of unoffered lands, as contradistinguished from what, in the practice of the land department, are known as "offered lands"—that is, lands which are subject to private cash entry at the minimum price. *United States v. Budd* (U. S.) 43 Fed. 630, 631.

#### OFFERING PRIZE.

"Offering prizes," as used in Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], which provides that no letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, etc., "qualify and limit the words 'similar enterprises.' They indicate the nature of the similarity to lotteries and so-called gift concerts which must characterize other enterprises than lotteries and gift concerts to bring them also within the embrace of the statutes." *United States v. Noelke* (U. S.) 1 Fed. 426, 430.

#### OFFICE.

See "General Offices"; "Home Office"; "House"; "In His Office"; "Public House"; "Public Place."  
Of corporation, see "Chief Office."

Webster defines an office to be "the place where a particular kind of business or serv-

ice for others is transacted; a house or apartment in which public officers and others transact business; as a register's office, a lawyer's office." *Anderson v. State*, 17 Tex. App. 305, 310; *Bigham v. State*, 20 S. W. 577, 31 Tex. Cr. R. 244.

The word "office," in 2 Hill's Ann. Code, p. 662, § 46, which defines burglary as an unlawful entry, with intent to commit a felony, of an office, shop, store, warehouse, malthouse, stillhouse, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat and water craft, or any building in which goods, merchandise, or valuable things are kept for use, sale, or deposit, means any office, without regard to whether any valuable things are kept therein or not, as the latter clause of the statute only refers to buildings not specifically designated. *State v. Sufferin*, 32 Pac. 1021, 6 Wash. 107.

"Office" is the proper designation for an apartment or room in the corner of a hardware room, made of pickets four feet high, one inch square, and three inches apart, on top of which there was a plank, the door or gate of such place being made of the same material, in which the account books, money, etc., of a lumber company were kept, and where the business of such company was transacted by its agent or clerk; the place being partitioned off and used separately from any portion of the hardware house for a particular business. *Anderson v. State*, 17 Tex. App. 305, 310.

The inclosure where the books of a railroad corporation are kept, and where tickets are kept and sold, and where the business of the corporation is transacted, may with propriety be called an "office," but not the waiting room for passengers. *Commonwealth v. White*, 60 Mass. (6 Cush.) 181-183.

## OFFICE.

See "Annual Office"; "Army Officer"; "By Virtue of His Office"; "Civil Office"; "Color of Office"; "Constitutional Office or Officer"; "Corporate Office"; "De Facto Office"; "Disabled from Holding Office"; "District Officer"; "Elective Office"; "Fiducial Office"; "Government Office"; "Hanaper Office"; "Highest Office"; "Incompatible Office"; "Judicial Office"; "Land Office"; "Legislative Office"; "Local Office or Officer"; "Lucrative Office"; "Ministerial Office—Officer"; "Petty-Bag Office"; "Political Office"; "Post Office"; "Principal Office"; "Probate Office."

Particular positions held to be offices, see "Officer."

An "office," as defined by Cowell, is a function by virtue whereof a man has some employment in the affairs of another. Web-

ster defines it to be a duty, charge, or trust. *United States v. Fisher* (U. S.) 8 Fed. 414, 415; *Bradford v. Justices of Inferior Court*, 83 Ga. 332, 336.

Whether we look into the dictionaries of our language, the terms of politics, or the dictum of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be "in office." *Rowland v. City of New York*, 83 N. Y. 372, 375, 376.

An office is defined by the Century Dictionary as a post, the possession of which imposes certain duties on the possessor, and confers authority for their performance; and by Cochran as a position or appointment entailing certain rights and duties. *State v. Brennan*, 49 Ohio St. 33, 37, 29 N. E. 593.

An office has been defined to be a right to exercise a public function or employment and to take the fee belonging to it. *Olmstead v. City of New York*, 42 N. Y. Super. Ct. (10 Jones & S.) 481, 487 (quoting 7 Bac. Abr. [Ed. 1879] p. 279, tit. "Office and Officer"; *Bouv. Law Dict.*); *People v. Ridgley*, 21 Ill. 65, 68; *Miller v. Sacramento County Sup'rs*, 25 Cal. 93, 98; *People v. Stratton*, 28 Cal. 382, 388; *Quigg v. Evans*, 53 Pac. 1093, 1094, 121 Cal. 546 (quoting 3 Kent, Comm. 454); *People v. Harrington*, 63 Cal. 257, 260; *Hamlin v. Kassafer*, 15 Pac. 778, 779, 15 Or. 456, 3 Am. St. Rep. 176; *State v. Wilson*, 29 Ohio St. 347, 348; *State v. Brennan*, 49 Ohio St. 33, 37, 29 N. E. 593; *Territory v. Hopt*, 4 Pac. 250, 254, 3 Utah, 396; *Mitchell v. Nelson*, 49 Ala. 88, 89; *Leach v. Cassidy*, 23 Ind. 449; *Gosman v. State*, 106 Ind. 203, 204, 6 N. E. 349; *Commonwealth v. Christian* (Pa.) 9 Phila. 556, 558; *State v. Sellers* (S. C.) 7 Rich. Law, 368, 370.

An office is "the right to exercise a public or private employment, and take the fees and emoluments thereunto belonging, whether public, as those of magistrates, or private, as of bailiffs, receivers," etc. *Dailey v. State*, (Ind.) 8 Blackf. 329, 330 (quoting 2 Bl. Comm. p. 36); *People v. Wells*, 2 Cal. 198, 203; *City of New York v. Flagg* (N. Y.) 6 Abb. Prac. 296, 302 (citing 2 Bl. Comm. 36); *People v. Norstrand*, 46 N. Y. 375, 381; *Conner v. City of New York*, 4 N. Y. Super. Ct. (2 Sandf.) 355, 367; *Kendall v. Raybould*, 44 Pac. 1034, 1036, 13 Utah, 226; *Commonwealth v. Binns* (Pa.) 17 Serg. & R. 219, 232; *Pierson v. McCormick*, 2 Pa. Law J. 201, 202; *Faulkner v. Boddington*, 3 C. B. 412, 416 (citing 3 Cruise, Dig. p. 92); *State v. Ware*, 10 Pac. 885, 888, 13 Or. 380; *State v. Wilson*, 29 Ohio St. 347, 348; *Id.*, 62 N. E. 530, 532, 194 Ill. 125; *Ptacek v. People*, 94 Ill. App. 571, 577, 578; *Flemming v. Hudson County*, 30 N. J. Law (1 Vroom) 280, 281; *McCornick v. Thatcher*, 8 Utah, 294, 301, 30 Pac. 1091, 17 L. R. A. 243 (citing 4 Jac. Law Dict. 433).

An office consists in a right, and correspondent duty, to exercise a public trust and to take the emolument belonging to it. (Kent.) *Blair v. Marye*, 80 Va. 485, 495; *People v. Duane*, 55 Hun, 315, 318, 8 N. Y. Supp. 439, 440; *People v. Howland*, 17 App. Div. 165, 171, 45 N. Y. Supp. 347; *Wardlaw v. City of New York*, 19 N. Y. Supp. 6, 7, 61 N. Y. Super. Ct. (29 Jones & S.) 174; *Commonwealth v. Gamble*, 62 Pa. (12 P. F. Smith) 343, 349, 1 Am. Rep. 422; *McCornick v. Thatcher*, 8 Utah, 294, 301, 30 Pac. 1091, 17 L. R. A. 243 (citing 4 Jac. Law Dict. 433); *Ptacek v. People*, 94 Ill. App. 571, 577, 578.

An office is a right to exercise a public or private employment, and to take the fees and emoluments, in which one has a property, and to which there are annexed duties, and, with us, in public offices, oaths to support the Constitutions of the state and of the United States. *Worthy v. Barrett*, 63 N. C. 199, 202.

A public office is a permanent trust to be exercised in behalf of the government or all citizens who may need the intervention of a public functionary or officer. It means the right to exercise generally, and in all proper cases, the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law. Under this definition an officer of the United States army retired from active service, on three-quarters pay, on account of age, under Rev. St. U. S. §§ 1254-1259 [U. S. Comp. St. 1901, pp. 887-889], and Act June 30, 1882, c. 254, 22 Stat. 118 [U. S. Comp. St. 1901, p. 885], does not hold a "federal office," within the meaning of Laws 1888, c. 584, providing that the aqueduct commissioners appointed by the mayor of the city of New York shall hold no federal office. *People v. Duane*, 121 N. Y. 367, 375, 24 N. E. 845.

"An 'office,'" said Chancellor Sanford, "is a public charge or employment, and the term seems to comprehend every charge or employment in which the public are concerned. *Wood's Case* (N. Y.) 2 Cow. 30, note. Every office is considered public, the duties of which concern the public." *People v. Hayes* (N. Y.) 7 How. Prac. 248, 250 (citing 5 Bac. Abr. 180; 2 Toml. Law Dict.).

An office is simply an appointment or authority on behalf of the government to perform certain duties at and for a certain compensation. *People v. Rathbone*, 32 N. Y. Supp. 108, 109, 11 Misc. Rep. 98.

One of the earliest definitions of the word "officium" is "that function by virtue whereof a man hath some employment in the affairs of another, as of the king or another person." Again, it is said that the word "officium" principally implies a duty, and in the

next place the charge of such duty, and that it is a rule that, where a man hath to do with another's affairs against his will and without his leave, this is an office, and he who is in it an officer. *United States v. Trice* (U. S.) 30 Fed. 490, 494.

The terms "office or public trust" as employed in the Constitution, requiring an oath to be taken by persons occupying an office or public trust, "have no legal or technical meaning distinct from their ordinary signification. An 'office' is a public charge or employment, and the term seems to apprehend every charge or employment in which the public are interested. The words 'public trust,' still more comprehensive, appear to include every agency in which the public repose special confidence in particular persons, and appoint them for the performance of some duty or service." *In re Wood* (N. Y.) Hopk. Ch. 6, 8.

A public office has been well described to be when one man is specially set by law, and is compellable to do another's business against his will and without his leave, and can demand therefor such compensation, by way of salary or fees, as by law is assigned, to the doing of which business no other person but the officer, or one deputed by him, is legally competent. *Hoke v. Henderson*, 15 N. C. 1, 17, 25 Am. Dec. 677.

An office has been defined to mean public employment, and its legal meaning to be an employment on behalf of government, or any station of public trust, or place of trust by virtue of which a person becomes charged with the performance of certain public duties. *Smith v. Moore*, 90 Ind. 294, 297.

An office is a special trust or charge created by competent authority. *State ex rel. Cannon v. May*, 17 S. W. 660, 665, 106 Mo. 488 (citing *People v. Langdon*, 40 Mich. 673, 682). If not merely honorary, certain duties will be connected with it, the performance of which will be the circumstance for its being conferred upon a particular individual, who, for the time, will be the officer. *People v. Langdon*, 40 Mich. 673, 682.

A public office is a trust to be exercised on behalf of the government or of all citizens who may need the intervention of a public functionary or officer. It means the right to exercise generally and in all proper cases the functions of a public trust or employment, and to receive the fees and emoluments belonging to it, and to hold the place and perform the duty for the term and by the tenure prescribed by law. *People v. Duane*, 31 N. Y. St. Rep. 516, 520.

"An office is a public station or employment, conferred by the appointment of government, the term embracing the ideas of tenure, duration, emolument, and duties." *United States v. McCrory*, 91 Fed. 295, 296.

33 C. C. A. 515 (quoting *United States v. Hartwell*, 73 U. S. [6 Wall.] 393, 18 L. Ed. 832); *Territory v. Hopt*, 4 Pac. 250, 254, 3 Utah, 396; *In re Searls*, 48 N. Y. Supp. 60, 63, 22 App. Div. 140. See, also, *Vaughn v. English*, 8 Cal. 39, 41; *Vincenheller v. Reagan*, 64 S. W. 278, 284, 69 Ark. 460; *Wardlaw v. City of New York*, 19 N. Y. Supp. 6, 7, 61 N. Y. Super. Ct. (29 Jones & S.) 174; *State v. Brennan*, 49 Ohio St. 33, 37, 29 N. E. 593; *Ptacek v. People*, 94 Ill. App. 571, 577, 578; *Polk v. James*, 68 Ga. 128.

Burrill says the idea of office clearly embraces the ideas of tenure, duration, fees or emoluments, rights and powers, as well as that of duty. *United States v. Fisher* (U. S.) 8 Fed. 414, 415; *Olmstead v. City of New York*, 42 N. Y. Super. Ct. (10 Jones & S.) 481, 487; *People v. Nichols*, 52 N. Y. 478, 484, 11 Am. Rep. 734.

A public office exists, if at all, by a constitutional provision, or else by the fiat of the Legislature or by some body or board to which the Legislature has delegated power to create an office. *Meyers v. City of New York*, 69 Hun, 293, 23 N. Y. Supp. 484. And the employment of a day laborer, though he was taken from the civil service list, did not create an office, or him an office holder. *Eckerson v. City of New York*, 80 N. Y. Supp. 168, 169, 80 App. Div. 12.

An office embraces the ideas of tenure, duration, emoluments, and duties, and these ideas or elements cannot be separated, and each considered abstractly. All taken together constitute the office. *Kendall v. Raybould*, 44 Pac. 1034, 1036, 13 Utah, 226.

It is said to be impossible to give a definition of an office that will be applicable to all offices. *State v. Wilson*, 29 Ohio St. 347, 349.

The words "office" and "officer" are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used; and to determine it correctly, in a particular instance, resort must be had to the intention of the statute, and the subject-matter in reference to which the terms are used. *State v. Kitchell*, 53 Minn. 147, 155, 54 N. W. 1069, 1071, 19 L. R. A. 779.

The use in the Penal Code of any word expressive of office or trust includes both males and females. Pen. Code Tex. 1895, art. 22.

#### Agency, duty, or trust.

Public office is intended for the public good, and not for the particular gain of the incumbent. It is a mere agency or trust. *Wilson v. City of New York*, 65 N. Y. Supp. 328, 329, 31 Misc. Rep. 693.

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Speaking generally, it may be said that a public office is an agency for the state. *School Com'rs of Worcester County v. Goldsborough*, 44 Atl. 1055, 1057, 90 Md. 193.

Public offices are not incorporeal hereditaments, nor have they the character or quality of grants. They are agencies. With few exceptions they are voluntarily taken, and may be voluntarily resigned. They are created for the benefit of the public, and are not granted for the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the office holder. *Trimble v. People*, 34 Pac. 981, 985, 19 Colo. 187, 41 Am. St. Rep. 236 (citing *Conner v. City of New York*, 5 N. Y. [1 Seld.] 285).

A public office is an agency from the state, and the person whose duty it is to perform this agency is a public officer. *Clark v. Stanley*, 66 N. C. 59, 63, 8 Am. Rep. 488; *State Prison of North Carolina v. Day*, 32 S. E. 748, 749, 124 N. C. 362, 46 L. R. A. 295. See, also, *State v. Hocker*, 22 South. 721, 722, 89 Fla. 477, 63 Am. St. Rep. 174; *McCornick v. Thatcher*, 8 Utah, 294, 301, 30 Pac. 1091, 17 L. R. A. 243 (citing 4 Jac. Law Dict. 433).

An office is a trust created for the public. *Robb v. Carter*, 4 Atl. 282, 283, 65 Md. 821.

The word "office" imports a duty or trust. *Ex parte Faulkner*, 1 W. Va. 269, 297.

The terms "office" and "public trust" in the California Constitution are nearly synonymous; at least, the term "public trust" is included in the more comprehensive term "office." The terms have relation only to those persons and duties that are of a public nature. *Ex parte Yale*, 24 Cal. 241, 244, 85 Am. Dec. 62.

"It is said that the word 'officium' principally applies to a duty, and in the next place the charge of such duty; and that it is a rule that where one man hath to do with another's affairs against his will and without his leave, that it is an office, and he who is in it is an officer." *Bradford v. Justices of Inferior Court*, 33 Ga. 332, 336 (citing *Carth.* 478, 4 Jac. Law Dict.).

The Legislature has no power to deprive a constitutional officer of his fees by relieving him of the duties of his office, and providing that if he exercises such duties he shall be entitled to no compensation, for there can be no public office with no duties to be performed. *People v. Howland*, 17 N. Y. App. Div. 165, 171, 45 N. Y. Supp. 347.

In the text-books it is taught that the word "office" in its primary signification im-



plies a duty or duties, and secondarily a change of such duties—the agency from the state to perform the duties. The duties of the office are the first consequence, and the agency from the state to perform those duties is the next step in the creation of an office. It is the union of the two factors, duty and agency, which makes the office. An act purporting to abolish an office does not abolish it where it also requires the performance of all the duties previously performed by the incumbent of such office, though it requires the duties to be performed by three persons. *State Prison of North Carolina v. Day*, 32 S. E. 748, 749, 124 N. C. 362, 46 L. R. A. 295.

In *People v. Langdon*, 40 Mich. 673, it is said: "An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be consideration for its being conferred on a particular individual, who for the time will be an officer." *State ex rel. Kane v. Johnson* (Mo.) 25 S. W. 855, 856; *Id.*, 27 S. W. 399, 401, 123 Mo. 43; *State ex rel. Cameron v. Shannon*, 33 S. W. 1137–1144, 133 Mo. 139.

"Webster defines an 'office' to signify a particular duty, charge, or trust conferred by public authority and for a public purpose. In *Re Attorney's Oaths* (N. Y.) 20 Johns. 492, Platt, J., delivering an opinion of the court, defines the legal meaning of the word to be an employment on behalf of the government in any station of public trust not merely transient, occasional, or incidental." *State v. Kennon*, 7 Ohio St. 546, 556.

An office is a position to which certain duties are attached, a post, the position of which imposes certain duties upon the possessor, and confers upon him authority for the performance. *State v. Griswold*, 46 Atl. 829, 830, 73 Conn. 95.

An office is a particular duty, charge, or trust conferred by public authority and for a public purpose. *Waldo v. Wallace*, 12 Ind. 569, 572.

As a matter of law, "officers of the land department" of the government are agents of the law. They cannot act beyond its provisions, nor make any disposition of land not sanctioned by law. *Stimson Land Co. v. Rawson* (U. S.) 62 Fed. 426, 429.

#### Classes of offices.

Offices may be classed into two kinds—public and private. The incumbents of public offices perform duties for and owe obligations to the public, while the incumbents of private offices do not. *Commonwealth v. Christian* (Pa.) 9 Phila. 556, 558. See, also, *Bradford v. Justices of Inferior Court*, 33 Ga. 332, 336; *Polk v. James*, 68 Ga. 128.

Officers are civil or military, public or private, according to the nature of their trusts. A public officer is one who has a duty concerning the public, and is none the less a public officer where his authority is confined to narrow limits. Civil officers are political, judicial, or ministerial. *Ex parte Faulkner*, 1 W. Va. 269, 297 (citing 7 Bac. Abr. 279, 280, tit. "Office and Officers").

Officers are civil, judicial, ministerial, executive, political, municipal, military, ecclesiastical, etc. An office is a right to exercise a public function or employment, and may be classed into civil and military, and civil may be classed into political, judicial, and ministerial. *Waldo v. Wallace*, 12 Ind. 569, 572.

"Offices may be and usually are divided into two classes, civil and military. Civil offices are usually divided into three classes, political, ministerial, and judicial. Political offices are such as are not immediately connected with the administration of justice or the execution of the mandates of a superior, as the president or head of a department. Judicial offices are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose and not by deputies. Ministerial offices are those which give the officer no power to judge the matter to be done, and which require him to obey some superior, many of which are merely employments requiring neither a commission nor a warrant of appointment as temporary clerks or managers. *Fitzpatrick v. United States* (U. S.) 7 Ct. Cl. 290, 293.

Offices are civil and military, and the civil are divided into political, judicial, and ministerial. Of the former the President, the Governors of the states, heads of departments, members of Congress and Legislature, are examples. The judicial are those which relate to the administration of justice, and cannot be exercised by a deputy. The ministerial are those wherein the officer has no power to judge of the matter to be done, must act in obedience to the orders of the superior, and the duties of which can be performed by a deputy. All offices in this country are public. *People v. Ridgley*, 21 Ill. (11 Peck) 65, 68.

#### Compensation.

Webster defines the word "office" as "a special duty, trust, or charge conferred by authority and for a public purpose. An employment undertaken by a commission and authority of the government, as a civil, judicial, executive, legislative, or other office." *Burrill's Law Dictionary* defines the word to mean "a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, pub-

lic or private; a place of trust." From these definitions—and we think they are correct—it is quite apparent that compensation is not indispensable to the existence or creation of the office, within the meaning of Const. art. 15, § 2; Burns' Rev. St. 1894, § 224, providing that the General Assembly shall not create any office, the tenure of which shall be longer than four years. *Indianapolis Brewing Co. v. Claypool*, 48 N. E. 228, 230, 149 Ind. 193.

The right to the fees or compensation attached to an office does not grow out of contract between the government and the officer, but arises from the rendition of services. Therefore, an officer who has been kept out of his office and has not performed his duties cannot maintain an action against the government to recover the amount of his fees accruing from the office. *Smith v. City of New York*, 37 N. Y. 518, 520.

The oath, the salary, or fees are mere incidents, and they constitute no part of the office. *Clark v. Stanley*, 68 N. C. 59, 63, 8 Am. Rep. 488; *State Prison of North Carolina v. Day*, 32 S. E. 748, 749, 124 N. C. 362, 46 L. R. A. 295.

#### Continuance regardless of incumbency.

In the abstract, "office" signifies a place of trust. In legal idea an office is an entity, and may exist in fact, though without an incumbent. In this sense the word "office" is used in a number of instances in the Constitution and in the statutes. *People v. Stratton*, 28 Cal. 382; *Wardlaw v. City of New York*, 19 N. Y. Supp. 6, 7, 61 N. Y. Super. Ct. (29 Jones & S.) 174.

In *People v. Loeffler*, 175 Ill. 585, 51 N. E. 785, it is said: "An office is a position which does not end with the termination of the term of the person filling it, but its duties continue to be performed by the successors of such person, whether elected or appointed." *Ptacek v. People*, 62 N. E. 530, 532, 194 Ill. 125. See, also, *State v. Hocker*, 22 South. 721, 722, 39 Fla. 477, 63 Am. St. Rep. 174; *United States v. Maurice* (U. S.) 26 Fed. Cas. 1211, 1214.

#### Continuing employment.

An office "has been defined to be an employment on behalf of the government in any situation of public trust not merely transient, occasional, or incidental." *People v. Nichols*, 52 N. Y. 478, 484, 11 Am. Rep. 734; *Wardlaw v. City of New York*, 19 N. Y. Supp. 6, 7, 61 N. Y. Super. Ct. (29 Jones & S.) 174; *People v. Nostrand*, 46 N. Y. 375, 381; *Lewis v. Board of Public Works*, 17 Atl. 112, 51 N. J. Law (22 Vroom) 240; *Attorney General v. McCaughey*, 21 R. I. 341, 346, 43 Atl. 346, 648.

"Public office," as used in the Constitution, has respect to a permanent trust to be

exercised in behalf of the government and of all the citizens who may need the intervention of a public functionary or officer in any matters or duties pertaining to the character of the trust, and it does not include the appointment to meet special exigencies of the individual to perform transient, occasional, or incidental duties, such as are ordinarily performed by public officers, and as to such appointments the Legislature is at liberty to invest the courts with power to make them. *In re Hathaway*, 71 N. Y. 238, 244.

Within the ordinary acceptance of the term, one who is engaged to render service in a particular transaction is not an "officer." That word implies continuity of service, and excludes those employed for a special and a single transaction. *Clark v. Renninger*, 42 Atl. 928, 929, 89 Md. 66, 44 L. R. A. 413. See, also, *Shelby v. Alcorn*, 36 Miss. 273, 289, 72 Am. Dec. 169; *State v. Hocker*, 22 South. 721, 722, 39 Fla. 477, 63 Am. St. Rep. 174; *State v. Wilson*, 29 Ohio St. 347, 348; *Braithwaite v. Cameron*, 38 Pac. 1084, 1087, 3 Okl. 630.

"Officer" means one with public duties somewhat continuous in their nature. The merchant appraisers are appointed by collectors of customs for each case. The theory of the law is that the collector appoints a merchant appraiser for each occasion, and if two or three reappraisements are acted on at the same time, it is not because the merchant appraiser holds the office for a day or an hour or for a month, but it is because the same man may be appointed in two or three instances to act upon more than one appraisement, and he acts on several at the same time. He does not hold an office, but merely holds a designation for that one thing. *Auffmordt v. Hedden* (U. S.) 30 Fed. 360, 362.

Wis. Const. requiring that certain "officers" should be elected or appointed by the people of the district to which their offices appertain, cannot be construed to include commissioners appointed by the circuit judge to review certain actions by a board of supervisors of a county wherein a city or town is located, and determine what sum should be added or deducted from the aggregate valuation of the taxable property of the city, village, or town to produce a just relation between valuations. Such commissioners are merely appointed to do a specific act, and, when that is performed, their power ceases. They bear a strong analogy to the commissioners appointed by the justices of the peace in reviewing the action of town supervisors in laying out or discontinuing highways. There is a distinction between an office and a mere service or employment. *State v. Myers*, 9 N. W. 777, 778, 52 Wis. 628.

#### As a contract.

See "Contract."

**Created and duties prescribed by law.**

From the mass of learning displayed in cases determining the meaning of the term "office," it is almost impossible to deduce a definition of the term universally applicable. One of the requisites is that the office itself must be created by the Constitution of the state, or it must be authorized by some statute; but not all employments authorized by law are public offices, in the sense of the Constitution. The presidency of a private corporation may be spoken of as an office. An executor, guardian, a referee for the decision and the trial of an action, are all officers who derive their existence from statutes, but they are not public officers in the constitutional sense. It seems to be reasonably well settled that, where the Legislature creates and prescribes the duty and fixes the compensation, these duties pertain to the public, and are continuing and permanent, not occasional and temporary. Such compensation or employment is an office, and one who occupies it is an officer. In such a case there is a declaration by the Legislature that some portion, great or small, of the function of the government, was to be exercised for the benefit of the public, and the Legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed an office. *Patton v. Board of Health of City and County of San Francisco*, 59 Pac. 702, 703, 127 Cal. 388, 78 Am. St. Rep. 66.

The right to an office embraces the idea that the "office" has been created by adequate authority, that the manner of designation for, and the conditions of eligibility to, the office, as well as the tenure, duration, emoluments, and duties pertaining to it, have been prescribed. *Gosman v. State*, 106 Ind. 203, 204, 6 N. E. 349.

A public office is not a natural growth of the soil, and can be created only by the Legislature, or some municipal board or body authorized by the Legislature to create one. *Miller v. Warner*, 59 N. Y. Supp. 956, 957, 42 App. Div. 208.

A public office exists, if at all, either by a constitutional provision or by the fiat of the Legislature, or by some body or board to which the Legislature has delegated the power to create an office. *Eckerson v. City of New York*, 80 N. Y. Supp. 168, 169, 80 App. Div. 12 (citing *Meyers v. City of New York*, 69 Hun. 293, 23 N. Y. Supp. 484).

The true test of a public office seems to be that it is a parcel of the administration of government, civil or military, or is itself created by the lawmaking power. *Ellison v. Coleman*, 86 N. O. 235, 241.

An office is a place created, or at least recognized, by the laws of the state, and to

which certain public duties are assigned, either by the law itself or by regulations adopted under authority of the law. *Stewart v. Hudson County*, 38 Atl. 842, 61 N. J. Law, 117 (citing *Bownes v. Meehan*, 45 N. J. Law [16 Vroom] 189); *Peterson v. Salem County*, 42 Atl. 844, 845, 63 N. J. Law, 57; *Cramer v. Water Com'rs of New Brunswick*, 31 Atl. 384, 385, 57 N. J. Law (28 Vroom) 478; *O'Brien v. Thorogood*, 39 N. E. 287, 288, 162 Mass. 598.

An office is defined by the Constitution of Illinois as a public position created by the Constitution or by law, continuing during the pleasure of the appointing power or for a fixed time, with a successor elected or appointed. *People v. Loeffler*, 51 N. E. 785, 789, 175 Ill. 585; *People v. Bollam*, 54 N. E. 1032, 1033, 182 Ill. 528.

It may be stated that, where an employment or duty is a continuing one, which is defined by rules prescribed by law, and not by contract, such charge or employment is an office, and the person who performs it is an officer. *State v. Wilson*, 29 Ohio St. 347, 348. See, also, *State v. Hocker*, 22 South. 721, 722, 39 Fla. 477, 63 Am. St. Rep. 174; *Shelby v. Alcorn*, 36 Miss. 273, 289, 72 Am. Dec. 169; *United States v. Maurice* (U. S.) 26 Fed. Cas. 1211, 1214.

An office is a public position created by the Constitution or law, continuing during the pleasure of the appointing power or for a fixed time, with a successor elected or appointed. *Wilcox v. People*, 90 Ill. 186, 192 (citing Const. 1870, art. 5, § 24).

**Election or appointment.**

An office is a public station or employment conferred by the appointment of the government. *Polk v. James*, 68 Ga. 128.

A person in the service of the government, who derives his position from duly, legally authorized election or appointment is a public officer. *State v. Hocker*, 22 South. 721, 722, 39 Fla. 477, 63 Am. St. Rep. 174.

Certainly, where an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded as a public officer. It can make no difference whether he be commissioned by the chief executive officer with the authentication of the seal of state or not. Where that is given, it is but evidence of his title to the office. *Bradford v. Justices of Inferior Court*, 33 Ga. 332, 336.

Every office is an appointment or an employment, but it does not follow that every appointment is an office, and the words are not convertible terms. *Commonwealth v. Binns* (Pa.) 17 Serg. & R. 219, 220, 232.

An officer, within the meaning of the St. Louis charter provision forbidding the change of an officer's salary during the term for which he was elected or appointed, is one who by the local law enjoys either an annual salary or a definite term of office. *State ex rel. Bartraw v. Longfellow*, 69 S. W. 596, 597, 95 Mo. App. 660.

#### **Employment distinguished.**

"In every definition of the word 'office,' the features recognized as characteristic, and distinguishing it from a mere employment, are the manner of appointment and the nature and duties to be performed, and whether the duties are such as pertain to the particular official designation, and are continuing and permanent, and not occasional or temporary." *State v. Board of Public Works*, 17 Atl. 112, 51 N. J. Law (22 Vroom) 240.

"An officer is distinguished from an employé in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office; and usually, though not necessarily, in the tenure of his position." *State ex rel. Cameron v. Shannon*, 33 S. W. 1137, 1144, 133 Mo. 139; *State ex rel. Kane v. Johnson* (Mo.) 25 S. W. 855, 856; *City of Baltimore v. Lyman*, 48 Atl. 145, 146, 92 Md. 591.

The term "office" has no legal or technical meaning attached to it, distinguishing it from its ordinary acceptation. An office is a public charge or employment. But as every employment is not an office, it is sometimes difficult to distinguish between employments which are and which are not offices. 7 Bac. Abr. 280. Legislatures generally define "office" to be public employment on behalf of the government in any station of public trust. In common parlance, the term office has a more general signification; thus, we say the office of the executor, or the office of the president. In re *Attorneys' Oaths* (N. Y.) 20 Johns. 492, 494; In re *Ricker*, 66 N. H. 207, 232, 29 Atl. 559, 572, 24 L. R. A. 740.

Const. art. 5, § 24, defines an office as follows: "An office is a public position created by the Constitution or law, continuing during the pleasure of the appointive power or for a fixed time, with a successor elected or appointed. An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished." *Lasher v. People*, 55 N. E. 663, 666, 183 Ill. 226, 47 L. R. A. 802, 75 Am. St. Rep. 103.

The term "office" implies a delegation of a position of the sovereign power to, and possession of it by, the person filling the

office, while an "employment" does not comprehend a delegation of any part of the sovereign authority. *State v. Hocker*, 22 South. 721, 722, 39 Fla. 477, 63 Am. St. Rep. 174; *Montgomery v. State*, 18 South. 157, 159, 107 Ala. 372.

In *United States v. Maurice* (U. S.) 26 Fed. Cas. 1211, Chief Justice Marshall said: "An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer. \* \* \* Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act or to perform a service, without becoming an officer; but if the duty be a continuing one, which is defined by the rules prescribed by the government, and not by contract, which an individual is appointed by the government to perform, who enters upon the duties appertaining to his station without any contract defining them, if those duties continue though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer." *Vincenheller v. Reagan*, 64 S. W. 278, 284, 69 Ark. 460; *Ptacek v. People*, 94 Ill. App. 571, 577, 578.

#### **As franchise.**

See "Franchise."

#### **Investment with functions of government.**

There are various tests by which to determine who are officers in the meaning of the law, but at last, in a case of uncertainty, the intention of the lawmakers controls. To constitute an officer it does not seem to be material whether his term be for a period fixed by law or to endure at the will of the creating power; but, if an individual be invested with some portion of the functions of the government to be exercised for the benefit of the public, he is an officer. Per *Lewis, O. J.*, in *City of Louisville v. Wilson*, 36 S. W. 944, 99 Ky. 598 (cited with approval in *Pratt v. Breckinridge*, 65 S. W. 136, 137, 112 Ky. 1, and *Lowry v. City of Lexington*, 68 S. W. 1109, 1112, 24 Ky. Law Rep. 516).

A public office is defined to be the right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. *State ex rel. Walker v. Bees*, 36 S. W. 636, 637, 135 Mo. 325, 33 L. R. A. 616 (citing *Mechem, Pub. Off.* 1); *Hendricks v. State*, 49 S. W. 705, 20 Tex. Civ. App. 178; *Kimbrough v. Barnett*, 93 Tex. 301, 310, 55 S. W. 120, 122; *Attorney General v. McCaughey*, 43 Atl. 648.

648, 21 R. I. 341; Guthrie Daily Leader v. Cameron, 41 Pac. 635, 639, 8 Okl. 677.

Many efforts have been made to define a "public office," but it is easier to conceive the general requirements of such an office than to express them with precision in a definition that shall be entirely faultless. It will be found, however, by consulting the cases and authorities, that the most general distinction of a public office is that it embraces the performance by the incumbent of a public function delegated to him as part of the sovereignty of the state. The fact that a public employment is held at the will or pleasure of another as a deputy or servant, who holds at the will of his principal, is held in the state of Maine to distinguish a mere employment from a public office, for in such case no part of the state sovereignty is delegated to such employes. *State v. Jennings*, 49 N. E. 404, 405, 57 Ohio St. 415, 63 Am. St. Rep. 723.

The words "public office" are used in so many senses that it is impossible to give a precise definition covering all cases. It depends, not on what we call it, or even on what a statute may incidentally call it, but upon the powers wielded, the functions performed, and other circumstances manifesting the character of the position. *Mechem*, Pub. Off. § 4, says: "The most important characteristic which distinguishes an office from an employment or contract is that the creation of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public. \* \* \* Unless the powers conferred are of this nature, the individual is not a public officer." The test is that he should exercise something that can fitly be called a part of the sovereignty of the state. *Hartigan v. Board of Regents of West Virginia University*, 38 S. E. 698, 701, 49 W. Va. 14.

An office is a public station or position, to which a portion of the sovereignty of the country, either legislative, judicial, or executive, attaches for the time being, and which is exercised for the benefit of the public. *High*, Rec. § 625. The word itself implies a more or less permanent delegation of a portion of governmental power, coupled with legally defined duties and privileges, continuous in their nature, and which, upon the death, resignation, or removal of the incumbent, devolve upon his successor. *Commonwealth v. Murphey* (Pa.) 17 Montg. Co. Law Rep'r, 174, 176 (citing *Tied. Mun. Corp.* [Ed. 1894]).

An office is the right and duty conferred on an individual to perform any part of the functions of government, and receive such compensation, if any, as the law may affix to the service. *McArdle v. Jersey City*, 49

Atl. 1013, 1016, 66 N. J. Law, 590, 88 Am. St. Rep. 496.

The term "office" implies a delegation of a portion of the sovereign power, and a possession of it by the person filling the office. *State v. Hocker*, 22 South. 721, 722, 39 Fla. 477, 63 Am. St. Rep. 174.

An office is where, for the time being, a portion of the sovereignty, legislative, executive, or judicial, attaches, to be exercised for the public benefit. *United States v. Lockwood* (Wis.) 1 Pin. 359, 363.

A public office is one whose duties are in their nature public; that is, involving in their performance the exercise of some portion of the sovereign power, whether great or small, and in whose proper performance all citizens, irrespective of party, are interested, either as members of the entire body politic, or of some duly established division thereof. *Attorney General v. Drohan*, 48 N. E. 279, 281, 169 Mass. 534, 61 Am. St. Rep. 301.

In 2 Spell. Extr. Rem. § 1780, it is said: "There are three principal tests for determining whether one performing duties of a public nature is a public officer, in the sense of subjecting his incumbency or employment to a quo warranto proceeding: First, whether the sovereignty, either directly, as through legislative enactment or executive appointment, or indirectly, as through a municipal charter, is the source of authority; second, whether the duties pertaining to the position are of a public character—that is, due to the community in its political capacity; third, whether the tenure is fixed and permanent, for a definite period, by law, unless for neglect of duty or malfeasance, or subject to termination at the will of others without assignment of cause." "We apprehend that the term 'office' implies a delegation of a portion of the sovereign power, and the possession of it by the person filling the office, and the exercise of such power, within the legal limits, constitutes the correct discharge of the duties of such officer. And power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another. Still, it is a legal power, which may be rightfully exercised, and in its effects will bind the rights of others, and be subject to revision and correction only according to the laws of the state. An employment, merely, has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered necessary to give the act performed the authority and power of a public act or law, and if the act be such as not to require such subsequent sanction, still it is only a species of service performed under public authority, but not in execution of any standing laws. \* \* \* It appears, then, that every 'office,' in the constitutional meaning of the term, im-

plies an authority to exercise some portion of the sovereign power, either in making, administering, or executing the laws. *Montgomery v. State*, 18 South. 157, 159, 107 Ala. 372.

Every office implies an authority to execute a portion of the sovereign power of the state, either in making or executing or administering the laws. *Wardlaw v. City of New York*, 19 N. Y. Supp. 6, 7, 61 N. Y. Super. Ct. (29 Jones & S.) 174.

Public office is a right to exercise generally, and in all proper cases, the function of a public trust or employment, and to receive the fees and emoluments, and to hold the office and perform the duties for the term and by the tenure prescribed by law. In *re Rupp*, 59 N. Y. Supp. 997, 999, 28 Misc. Rep. 703.

An office is defined by good authority as involving the delegation to the individual of some of the several functions of government to be exercised by him for the benefit of the public, by which it is distinguished from employment or contract. *State v. Thompson*, 29 S. E. 720, 721, 122 N. C. 493 (citing *Mech. Pub. Off.* §§ 1, 4).

#### Limitations on powers as affecting.

Officers are public or private, and it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer because his authority is confined to narrow limits, since it is the duty, and the nature of that duty, which make him a public officer, and not the extent of his authority. *Commonwealth v. Binns* (Pa.) 17 Serg. & R. 219, 220, 232. See, also, *Polk v. James*, 68 Ga. 128; *Bradford v. Justices of Inferior Court*, 33 Ga. 332, 336.

Persons who, under an act of the General Assembly of October 17, 1870, had been appointed commissioners to purchase a tract of land at the place selected for a county site, to lay off the same into town lots, sell them, and to apply the proceeds to the building of a courthouse and jail for the county, were officers, under the law. *Polk v. James*, 68 Ga. 128.

#### Oath required.

The frame of the government of the state of North Carolina after its secession from the Union still existed, but there were no officers, as the officers had renounced their allegiance to the government of the United States, and had taken an oath to support the government of the Confederate States. The government of the United States could not recognize, as rightly officers of the state, men who were not bound by the oath required by the federal Constitution, but who, on the other hand, were bound by the oath to support another government. After the surrender of the state

to the federal government, the latter government had the right to call the convention for the establishment of a new state government, though certain persons were declared to be ineligible as delegates. Therefore, one elected to the office of governor of North Carolina pursuant to the Constitution adopted by that convention properly held the office. In *re Hughes*, 61 N. C. 57, 61, 63.

#### As occupation.

See "Occupation (Vocation)."

#### As property.

The purpose of creating public offices is the common good. Hence most of the rules regulating them have a reference to the discharge of the duties and the promotion of the public convenience. Hence they are not the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. They are only the subjects of property as far as they can be so in safety to the general interest involved in the discharge of their duties. This principle demands that different rights of property should be recognized in different offices. It is one of the ordinary rights of property to alien and dispose of it at pleasure; but that is inadmissible in public offices, because the public require a responsible person to answer for defaults. Besides, the power of alienation is not the test of property. Property in reference to a thing means whatever a person can possess and enjoy by right; and in reference to the person, he who has that right to the exclusion of others is said to have the property. That an office is the subject of property thus explained is well understood by every one, as well as distinctly stated in the lawbooks from the earliest times. *Hoke v. Henderson*, 15 N. C. 1, 17, 25 Am. Dec. 677.

"Offices" are classed by Blackstone among incorporeal hereditaments. An office may further be said to be a vested right. The officer has an estate in it as a property, of which he cannot be divested, except in the three ways pointed out by Lord Coke, viz.: First, by abuse; second, nonuser; third, refusal. Under our system of government it may be regarded as a contract between the state on one hand, and the individual on the other, whereby he assumes the performance of certain duties for a certain compensation. For these purposes he becomes seised of the office as of any other property in the right and enjoyment of which he cannot be disturbed or defeated, except by operation of law. *People v. Wells*, 2 Cal. 193, 203.

A public office is a mere public agency, revocable according to the will and appointment of the people as exercised in the Constitution and the laws enacted in conformity therewith, and is not property within the meaning of the constitutional provision that

no person shall be deprived of life, liberty, or property without due process of law. *State v. Crumbaugh*, 63 S. W. 925, 927, 26 Tex. Civ. App. 521. See, also, *Cameron v. Parker*, 38 Pac. 14, 19, 2 Okl. 277; *Donahue v. Will County*, 100 Ill. 94, 103; *Attorney General v. Jochim*, 58 N. W. 611, 613, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606; *Moore v. Strickling*, 33 S. E. 274, 276, 46 W. Va. 515, 50 L. R. A. 279; *State v. Owens*, 63 Tex. 261, 267; *Hawkins v. Roberts*, 27 South. 327, 332, 122 Ala. 130.

In New York public offices are not incorporeal hereditaments, nor have they the character or qualities of grants. *Conner v. City of New York*, 5 N. Y. (1 Seld.) 285, 296.

An office is not property, nor are the prospective fees thereof the property of the incumbent. The incumbent cannot sell his office, or purchase it or incur it. The Legislature, in the absence of constitutional prohibitions, may diminish or abolish the fees of the office at pleasure, or may render it a salaried office. *Smith v. City of New York*, 37 N. Y. 518, 520.

"A public office is a trust held for the benefit of the public. The incumbent, if he performs the duties, may be entitled to the emoluments, but he cannot have any property in the office itself. And hence, there being no property right involved in an inquiry as to one's right to an office, a jury cannot be had to try the title." *Mason v. State*, 50 N. E. 6, 10, 58 Ohio St. 30, 41 L. R. A. 291.

A public office is a mere right to exercise a public function or employment; a delegation of a portion of the sovereign power of the government to the person filling the office. The duties are to be performed for the benefit of the public and in the public interest. It is not property, nor are the prospective fees of an office the property of its incumbent. Therefore, section 12 of the civil service act (Act March 20, 1895), which provides for the trial by the civil service commission of charges against officers appointed under the act, and for their removal by the commission in case the charges are substantiated, does not violate the constitutional right of trial by jury, since a public office is not property. *People v. Kipley*, 49 N. E. 229, 238, 171 Ill. 44, 41 L. R. A. 775.

A public office is a public trust, and the incumbent has to some extent a property right in it, which he holds, not subject to barter and sale, but for the benefit of the political society of which he is a member. *State v. Wadhams*, 64 Minn. 318, 324, 67 N. W. 64.

While it is true that an officer *de jure* has a property right in the emoluments of his office, and may recover the same in an action at law from an officer *de facto* who has collected them while in his possession

(citing *Kreitz v. Behrensmeyer*, 149 Ill. 496, 36 N. E. 983), a public office is not property, but a mere public agency created for the benefit of the state. *People v. Barrett*, 67 N. E. 742, 745, 203 Ill. 99, 96 Am. St. Rep. 296.

An office is not regarded as property or as a vested right, and the Legislature may, in the absence of constitutional restrictions, make a provision for the abolition thereof. *State v. Common Council*, 90 Wis. 612, 618, 64 N. W. 304.

#### Place or position.

The intrinsic meaning of the word "office" is expressed by the old English word "place." *People v. Nichols*, 52 N. Y. 478, 484, 11 Am. Rep. 734.

Pamph. Laws 1882-83, p. 136, relating to the depositories of money, uses the words, "the Governor shall declare said office vacant," and in the same section the words used are, "and the Governor may declare the position vacant." As thus used, the words "position" and "office" are synonymous. The word "office" is used in the sense of place, position, and agency, and not in the sense that it is a public office. *Colquitt v. Simpson*, 72 Ga. 501, 510.

#### As public officer.

The word "office," as used in article 647 of the Code of Practice, which provides that "if a debtor has neither movables, nor slaves, nor immovable property the sheriff may seize the rights and credits which belong to him, and all sums of money which may be due to him, in whatsoever right, unless it be for alimony or salaries of office," means a public office. The commissioners appointed under the statute of March 14, 1842, providing for the liquidation of banks, are not public officers. *Conrey v. Copland*, 4 La. Ann. 307, 308.

#### Relates to functions to be performed, not place.

The word "office," as used in 14 Stat. 569, authorizing the payment of employés in the office of the coast survey, etc., "refers to the functions to be performed, and not to the place where they are performed." *Stone v. United States (U. S.)* 8 Ct. Cl. 260, 262.

#### Tenure required.

"Office" is defined as a public station or employment conferred by the government, and embraces the idea of tenure, duration, emolument, and duties. A professor of the University of West Virginia is not an officer. He has not what is called "tenure in office"; that is, a fixed term. That he is paid a compensation does not make him an officer; a mere employé is paid.

That an official oath is required by law is a sign of office, and the Code prescribing it as to "officers" does not require a university professor to take it. *Hartigan v. Board of Regents West Virginia University*, 38 S. E. 698, 704, 49 W. Va. 14.

An officer is one empowered to act in discharge of a duty or trust, under obligations imposed by the sanctions and restraints of legal authority in official life, and does not include one who receives no certificate of appointment, or has no term or tenure of office, but performs such duties as are required of him by the persons employing him, and whose responsibility is limited to them. *Wardlaw v. City of New York*, 19 N. Y. Supp. 6, 7, 61 N. Y. Super. Ct. (29 Jones & S.) 174.

A municipal officer subject to removal at the pleasure of the council is not an "officer" within Const. art. 14, § 8, prohibiting an increase in the salary of any officer during his term of office. *State ex rel. Kane v. Johnson* (Mo.) 25 S. W. 855, 856.

One who enjoys a definite term of office is an officer. *State ex rel. Bartraw v. Longfellow*, 69 S. W. 596, 597, 96 Mo. App. 660.

#### As term of office.

The words "incident to said office," as used in the official bond of a sheriff, reciting the fact that the sheriff has been elected for the term of three years, and that he has undertaken the obligations and duties "incident to said office," mean incident to said term of three years. *Baker v. Baldwin*, 48 Conn. 131, 137.

#### Yearly salary.

The meaning of the word "office" necessarily varies with its use in different statutes, and, to determine its meaning correctly in a particular instance, regard must be had to the intention of the act, and the subject-matter in respect to which the terms are used. The word "office," as used in Laws 1868, c. 854, § 4, prohibiting the board of supervisors for the county of New York from creating new offices, is to be construed in its ordinary and familiar signification as in general and popular use, for the intention of the act was to prohibit the board of supervisors from creating any new position with a regular yearly salary attached to it. *Ryan v. City of New York* (N. Y.) 50 How. Prac. 91, 93.

#### OFFICE COPY.

An "office copy" of a record or instrument is a copy made by an authorized officer. *Stamper v. Gay*, 23 Pac. 69, 70, 3 Wyo. 322.

The term "office copies" was used at common law to designate copies of judicial

records made by the officer in custody of the records. *West Jersey Traction Co. v. Board of Public Works*, 30 Atl. 581, 582, 57 N. J. Law (28 Vroom) 313.

#### OFFICE FOR WEIGHING OF MERCHANDISE.

Const. art. 5, § 8, provides: "All offices for the weighing, measuring, culling or inspecting of any merchandise, produce, manufacture or commodity whatever, are hereby abolished; and no such offices shall hereafter be created by law; but nothing in this section contained shall abrogate any office created for the purpose of protecting the public health, or the interests of the state in its property, revenue, tolls or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any office for such purpose hereafter." Act 1857, c. 405, reorganizes the wardens' office of the port of New York, the duties of the wardens involving the examination of vessels and cargoes. "The constitutional restraint on legislative power was without doubt suggested by, and was primarily aimed at, a system of laws which had grown up in this state, and which required a very large class of the productions of the soil and of manufacture and mechanical industry to undergo an inspection, or the determination, by weighing, measuring, or gauging, of the quantity contained in the parcels in which they are usually sold by public officers, preliminary to their being sold for the purpose of exportation, and, in regard to some articles, as a condition to being sold and trafficked in the state. Almost every species of property which was extensively dealt in had been subjected to these regulations. The officers created for the execution of this system were numerous, and their exactions were considerable in amount, and were complained of as vexatious in practice." Held, that the prohibition of the Constitution was against public officers for testing the quantity and quality of articles with a view to the security of trafficking in them, and the act was not in conflict with such provision. *Tinkham v. Tapscott*, 17 N. Y. 141, 147.

#### OFFICE FOUND.

"By the common law an alien cannot acquire real property by operation of law, but may take it by act of the grantor to hold it until 'office found'; that is, until the fact of alienage is authoritatively established by a public officer upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law as 'office found.' It proved the fact upon the existence of which the law divests the estate, and transfers it to the government, from the region of uncertainty, and makes



It a matter of record. It was devised, according to the old law-writers, as an authentic means to give the King his right by solemn matter of record, without which he, in general, could neither take nor part with anything; for it was deemed 'a part of the liberties of England, and greatly for the safety of the subject, that the King may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury.'" Strickley v. Hill, 62 Pac. 893, 895, 22 Utah, 257, 83 Am. St. Rep. 786 (quoting Phillips v. Moore, 100 U. S. 208, 212, 25 L. Ed. 603).

"Inquest of office" or "office found" was a summary inquest by the King's escheater, either by virtue of his office or by special royal writ, to ascertain whether in the particular case the sovereign has a right to the possession of lands in the hands of an alien. It was done under the King's officer by a jury of no determined number, either 12 or more or less. Baker v. Shy, 56 Tenn. (9 Helsk.) 85, 89.

By the civil law some proceeding equivalent in its substantial features to an "office found" was essential to take the fact of alienage from being a matter of mere surmise and conjecture and make it a matter of record. Such a proceeding was usually had before a local magistrate or council, and might be taken at the instance of the government, or on the denouncement of a private citizen. The sale of land in Texas, made before her separation from Mexico, by a citizen to a nonresident alien, passed title to the latter, who thereby acquired a defeasible estate in the land, which he could hold until deprived thereof by the supreme authority on the official ascertainment of the fact of his nonresidence and alienage by the government, or on the denouncement of a private citizen. Phillips v. Moore, 100 U. S. 208, 212, 25 L. Ed. 603.

#### OFFICE OF CORPORATION.

See "Corporate Office."

#### OFFICE OF HONOR.

Const. art. 8, § 29, providing that no person holding any "office of honor" or profit under the government of the United States shall hold "any office of honor" or profit under the authority of the state, should be construed to include the office of director of a state institution for the education of the deaf and dumb, appointed by the Governor with the advice of the Senate, though there are no fees, perquisites, profit, or salary. It is merely an honorable trust that is confided to the director of the institution. It is an office, and not merely an employment. It is an "office of honor," and, if not of great distinction, it is one of a high, benevolent, and important trust. Dickson v. People, 17 Ill. (7 Peck) 191, 193.

#### OFFICE OF PROFIT.

The term "office of profit" is frequently used to designate offices otherwise known as "lucrative offices." It describes an office to which salary, compensation, or fees are attached, and the amount of the salary or compensation is not material. Baker v. Board of Crook County Com'rs, 59 Pac. 797, 9 Wyo. 51.

An "office of profit" is property, as much so as any other article that can be possessed. It is a franchise, and, when the lawful owner of it is kept out of possession by an intruder, he has as much right through the courts to have himself placed in possession as to recover any other property unlawfully withheld from him. State v. Owens, 63 Tex. 261, 267.

Rev. St. § 6969, which makes it a crime for "an officer elected to an office of trust or profit in this state" to become interested in any contract for the purchase of any property or fire insurance for the use of the state, county, city, etc., applies to a person duly elected to and holding the office of member of the board of public works of the city of Cincinnati. There is no rule of construction which authorizes the court to say that the language, "any contract for the purchase of property for the use of the state, county, city," etc., means simply contracts for the purchase of property for the penal and benevolent institutions of the state, or that an officer elected to an office of trust or profit, etc., includes none but trustees, physicians, matrons, and stewards of such institutions. Doll v. State, 15 N. E. 293, 295, 45 Ohio St. 445.

As used in Rev. St. 1838, p. 208, prescribing, as a part of the punishment on the conviction of larceny, that the person convicted be disfranchised and rendered incapable of holding any office of trust or profit, the term "profit" was also included in the term "trust," as all offices of profit are necessarily offices of trust, and a verdict disfranchising a defendant from holding any office of trust was a substantial compliance with the statute. Doty v. State (Ind.) 6 Blackf. 529, 530.

The office of postmaster is an "office of profit or trust under the authority of Congress," so as to prevent a postmaster from holding an executive or judicial office while continuing to exercise the office of postmaster. McGregor v. Balch, 14 Vt. 423, 436, 39 Am. Dec. 231.

#### OFFICE OF PUBLIC TRUST.

See "Public Trusts."

#### OFFICE OF THE STATE.

See "State Officer."

**OFFICE PAPER.**

A written agreement between the parties to a pending case, bearing upon and affecting the disposition to be made of the same, and duly filed with the other papers in the case, is an "office paper," of which a copy may be established instantan on a motion made by one of the parties and supported by a proper showing. In such case a formal rule nisi with service on the opposite party is not essential, especially when that party is present and offers no valid objection to the establishment of the lost paper. *Watson v. Hemphill*, 25 S. E. 262, 99 Ga. 121.

**OFFICE WITHIN GIFT OF PEOPLE.**

The expression "office within the gift of the people," as used in Const. art. 3, § 2, declaring that all persons entitled to vote shall be eligible to any office within the gift of the people, means all offices, as well those filled by the Legislature as those filled by popular vote. *Black v. Trower*, 79 Va. 123, 128.

**OFFICER.**

See "Accounting Officer"; "Another Officer"; "Appointed Officers"; "City Officer"; "Civil Officer"; "Collection Officer"; "Commissioned Officer"; "Competent Officer"; "Constitutional Office or Officer"; "County Officer"; "De Facto Officer"; "De Jure Officer"; "Executive Officer"; "Fiscal Officer"; "General Officers"; "Government Officer"; "Informing Officer"; "Judicial Officer"; "Legal Officer"; "Legislative Officer"; "Local Office or Officer"; "Managing Officer"; "Ministerial Office—Officer"; "Municipal Officer"; "Noncommissioned Officer"; "Peace Officer"; "Presiding Officer"; "Principal Officer"; "Proper Officer"; "Railroad Officers"; "School Officer"; "Ship's Officer"; "State Officer"; "Subordinate Officer"; "Town Officer"; "United States Officer"; "Warrant Officers."

All officers, see "All."

All other officers, see "All Other."

Any officer, see "Any."

Any other officer, see "Any Other."

Other necessary officer, see "Other."

Other officer, see "Other."

Poundkeeper as public officer, see "Poundkeeper."

An "officer" is defined to be one who is lawfully invested with an office. *Brandt v. Godwin*, 3 N. Y. Supp. 807, 809; *Olmstead v. City of New York*, 42 N. Y. Super. Ct. (10 Jones & S.) 481, 487; *State v. Cobb*, 2 Kan. 32, 60; *Mitchell v. Nelson*, 49 Ala. 88, 89; *Braithwaite v. Cameron*, 38 Pac. 1084, 1087,

8 Okl. 630; *Commonwealth v. Christian* (Pa.) 9 Phila. 556, 558.

Chief Justice Marshall says: "He who performs the duties of that office is an officer." *Hamlin v. Kassafar*, 15 Pac. 778, 779, 15 Or. 456, 3 Am. St. Rep. 176.

An officer is one who holds an office. *State v. Griswold*, 46 Atl. 829, 830, 73 Conn. 95.

The individual who is invested with the authority and is required to perform the duties incident to an office is a public officer. *State ex rel. Walker v. Bus*, 36 S. W. 636, 637, 135 Mo. 325, 33 L. R. A. 616; *Attorney General v. McCaughey*, 43 Atl. 646, 648, 21 R. I. 341.

An officer is a part of the personal force by which the state acts, thinks, determines, administers, and makes its constitution and laws operative and effective. He is an arm of the state, and always on its side. *People v. Coler*, 59 N. E. 716, 723, 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605.

A public officer is every one who is appointed to discharge a public duty and receives a compensation for the same. *Conner v. City of New York*, 4 N. Y. Super. Ct. (2 Sandf.) 355, 367 (citing *Henly v. Mayor of Lyme*, 5 Bing. 91).

A public officer is one who hath any duty to perform concerning the public. *Piereson v. McCormick*, 2 Pa. Law J. 201, 202.

A public officer is one on whom the public have a right to call for the discharge or performance of certain duties. *In re A. B.*, 5 N. Y. Leg. Obs. 136, 138.

A public officer is an agent elected or appointed to perform certain political duties in the administration of the government. *State v. Trousdale*, 16 Nev. 357, 360.

A public officer is one who holds a public office, which is an agency of the state, and whose duty it is to perform the agency. *McCornick v. Thatcher*, 8 Utah, 294, 301, 30 Pac. 1091, 17 L. R. A. 243; 4 Jac. Dict. 433.

Best, C. J., in *Henly v. Mayor of Lyme*, 5 Bing. 91, said: "In my opinion, every one who is appointed to discharge a public duty, and receives compensation, in whatever shape, whether from the Crown or otherwise, is a public officer." *People v. Hayes* (N. Y.) 7 How. Prac. 248-250; *Dempsey v. New York Cent. & H. R. R. Co.*, 40 N. E. 867, 868, 146 N. Y. 290; *Foltz v. Kerlin*, 4 N. E. 439, 440, 105 Ind. 221, 55 Am. Rep. 197.

The thought running through every definition of an "officer" is that he shall perform some service or owe some duty to the government, state, or municipal corporation, and not merely to those who appoint or elect

him. His tenure must be defined, fixed, and certain, and not arising out of mere contract of employment. *Commonwealth v. Murphey*, 17 Montg. Co. Law Rep'r, 174, 176.

One of the earliest definitions of the word "officium" is that function by virtue whereof a man hath some employment in the affairs of another, as of the King or another person. Again, it is said that the word "officium" principally implies a duty, and in the next place the charge of such duty, and that it is a rule that, where a man hath to do with another's affairs against his will and without his leave, this is an office, and he who is in it an officer. *United States v. Trice* (U. S.) 30 Fed. 490, 494 (quoting Cowell).

"Public officers are the agents of the community which they represent, but a public officer is not the agent of each individual member of the community, and no citizen can be presumed to assent to an illegal or unauthorized act of a public officer; and hence, where a city charter authorized the city to make certificates, issued to persons making sewer improvements under contract with the city, bearing a different rate of interest from that prescribed by the Constitution, the interest would not be declared legal on the theory that the city was the agent of the property owner on whom the assessment was made, and that the certificate was a contract by him through such agent." *Bayha v. Carter*, 26 S. W. 137, 138, 7 Tex. Civ. App. 1.

A public officer is the person whose duty it is to perform the agency for the state of a public office. The essence of it is the duty of performing an agency; that is, of doing some act or acts or series of acts for the state. *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488. Similar definitions might be almost indefinitely multiplied. But, after all, it is rather a narrow view to lay down a general definition of the term "public officer," and then to measure by it the meaning of that same term, no matter under what conditions it may be used. The nature of the duties, the particular method in which they are to be performed, the end to be attained, the depository of the power conferred, and the whole surroundings, must be all considered when the question as to whether a position is a public office or not is to be solved. *Board of Worcester County School Com'rs v. Goldsborough*, 44 Atl. 1055, 1057, 90 Md. 193.

Under an act authorizing the acknowledgment of deeds before any mayor, chief magistrate, or officer of the cities, towns, or places where the deed was made, it is held that the word "mayor" refers to cities, "chief magistrate" to towns, and "officers" to places. *McIntire's Lessee v. Ward* (Pa.) 3 Yeates, 424, 426.

The term "officer," as used in Const. art. 18, § 1, applies and refers to such officers as have some degree of permanency, and are not created by a temporary nomination for a single and transient purpose. *Shurbun v. Hooper*, 40 Mich. 503, 505 (citing *Underwood v. McDuffee*, 15 Mich. 361, 366, 93 Am. Dec. 194).

"A public office is the right, authority, and duty created and conferred by law, by which for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by and for the benefit of the public. The individual so invested is a public officer." Attorney General v. McCaughey, 43 Atl. 646, 647, 21 R. L. 341.

#### All officers.

Pen. Code, § 55, makes any agent, officer, or collector guilty of larceny if he fraudulently converts to his own use money intrusted to him to apply to a municipal office. The statute itself does not undertake to define or restrict the word "officer," and we do not know by what authority or by what rule of construction the court would be warranted in announcing that the word "officer," as employed in the statute, refers to one character of officer more than another. *State v. Isensee*, 40 Pac. 985, 12 Wash. 254.

"Public officers," as used in Rev. St. 1889, § 8589, providing that the fiscal year of the state shall commence on January 1st and terminate on the 31st day of December of each year and the books, accounts, and reports of the public officers shall be made to conform thereto, includes county as well as state officers. *State ex rel. Exchange Bank v. Allison*, 56 S. W. 467, 468, 155 Mo. 325.

Under Act 1890, No. 78, § 1, providing that "any person who shall directly or indirectly offer or give any sum of money, bribe, present or reward \* \* \* to any officer, state, parochial or municipal, \* \* \* or to any member or officer of the General Assembly, \* \* \* with intent to induce such officer or member of the General Assembly \* \* \* to perform any duty of him required with partiality or favor \* \* \*, and the officer or member of the General Assembly so receiving \* \* \* any money, bribe, etc., \* \* \* with the intent or for the purpose or consideration aforesaid, shall be guilty of bribery," the words "officer or member of the General Assembly" must be taken to refer to all persons enumerated in the foregoing portion of the act; that is to say, a state, parish, or municipal officer, or member of the General Assembly. *State v. Callahan*, 17 South. 50, 59, 47 La. Ann. 444.

The word "officer," as used in Const. art. 7, declaring that "every male person of the age of 21 years or upwards, belonging to either of the following classes, who shall have resided in the United States one year and in this state four months next preceding any election, shall be entitled to vote at such election, in the election district in which he shall at the time have been for ten days a resident, for all officers that now are or hereafter may be elective by the people," etc., means the executive or administrative agents of the state or governmental subdivisions thereof. *State v. Johnson*, 91 N. W. 840, 841, 87 Minn. 221, 94 Am. St. Rep. 718.

Under a constitutional provision that the General Assembly, in cases not provided for in the Constitution, shall fix the term of office and the compensation of all officers, it is held that the term "officers" cannot be regarded as comprehending more than such offices as may be created to aid in the permanent administration of the government, and does not include all agencies which the General Assembly may authorize municipal and other corporations to employ for local and temporary purposes. *Walker v. City of Cincinnati*, 21 Ohio St. 14, 50, 8 Am. Rep. 24.

The Constitution adopted in 1846, art. 10, § 2, declared: "All county officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of the respective counties, or appointed by the board of supervisors or other county authorities, as the Legislature shall direct. All city, town and village officers whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities, towns, or villages, or of some division thereof, or appointed by such authorities thereof as the Legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this Constitution, and all officers whose offices shall hereafter be created by law, shall be elected by the people or appointed as the Legislature may direct." Held, that the officers and offices designated in the first two sentences of the section were those instituted and existing under actual laws of the state at the time of the adoption of the Constitution, and those embraced in the last clause, all officers of every description, both local and general, whose offices were to be thereafter created by law. *People v. Pinckney*, 82 N. Y. 377, 381.

The reference to any "officer" shall include any person authorized by law to perform the duties of such office. U. S. Comp. St. 1901, p. 3; *Ballinger's Ann. Codes & St. Wash.* 1897, § 4787.

"Officer," as used in the bankruptcy act, shall include clerk, marshal, receiver, ref-

eree, and trustee, and the imposing of a duty upon or the forbidding of any act, shall include his successor, and any person authorized by law to perform the duties of such officer. U. S. Comp. St. 1901, p. 3419.

#### Army or militia officer.

The position of colonel in the Fourth Regiment New Jersey Volunteers of the United States army is an "office" within the meaning of the statute creating the board of street and water commissioners, which provides that, if such commissioner shall accept any other appointment to "public office," his office of commissioner shall thereupon become vacant. *Oliver v. City of Jersey City*, 42 Atl. 782, 784, 63 N. J. Law, 96.

Although, by Rev. St. U. S. § 1094, an officer on the retired list is declared to be a part of the army, and though he may, by other provisions, be appointed to certain duties, under certain circumstances, in connection with the Soldiers' Home, he does not "hold office" within the meaning of Laws 1893, c. 584, § 1, providing that the person appointed to the office of aqueduct commissioner shall hold no other federal, state, or municipal office. His mere eligibility to the appointment as an officer of the Soldiers' Home is not equivalent to holding another office. From other sections of the Revised Statutes it appears that such retired officer is deprived of all the functions of the office previously held by him, and divested of all its authority, and wholly discharged from the performance of all its duties. *People v. Duane*, 55 Hun. 315, 318, 8 N. Y. Supp. 439, 440.

#### Assignee, receiver, or trustee.

Gen. St. 1872, c. 167, authorized the court to appoint a new trustee in case of the "vacancy in office thereof." It was held that, inasmuch as at the time the statute was enacted it had become common to speak of some trusts as "offices," where a trustee under a voluntary assignment for the benefit of creditors died, the court had power to appoint a new trustee. *Ex parte Ballou*, 11 R. I. 359, 360, 363.

An assignee under the insolvency law of Minnesota is recognized as an officer of the state district court, and, as long as he is in possession of the property, the marshal of the federal court cannot interfere with such possession, even to enforce a maritime claim. *McCaffrey v. The J. G. Chapman* (U. S.) 62 Fed. 939, 940.

"Officer," as used in Rev. St. § 5504 [U. S. Comp. St. 1901, p. 3710], providing that every clerk or other officer of a United States court who fails to deposit money belonging in the registry of the court, etc., with the treasurer, assistant treasurer, or a designated depository of the United States in the name

and to the credit of the court, or who retains or converts to his own use, etc., any such money, is guilty of embezzlement, etc., does not include an assignee in bankruptcy. While such a person is an officer of the court, the funds of the estate which come into his hands are not required to be deposited in any of the places designated in this section in the name of the court and to its credit. Hence, he is not an "officer" within the meaning of the statute. *United States v. Bixby* (U. S.) 6 Fed. 375, 376.

Officers appointed under an act of the Legislature to close up the affairs of the insolvent State Bank of Illinois were not "officers," but merely trustees. *People v. Ridgley*, 21 Ill. (11 Peck) 65, 68.

The commissioners appointed under the statute of March 14, 1842, providing for the liquidation of banks, are not public officers. *Conrey v. Copland*, 4 La. Ann. 307, 308.

A receiver is not a common-law officer, and his functions have no relation to the title to the exercise of a franchise, which is the sole question raised upon quo warranto. *Commonwealth v. Order of Vesta*, 27 Atl. 14, 15, 156 Pa. 531.

"Officer," as used in Code Iowa, § 3915, providing for the punishment of any person who knowingly annuls, and without authority of law takes, carries away, secretes, or destroys, any property or chattels while the same are in the lawful custody of any sheriff, coroner, marshal, constable, or other "officer," or rightfully held by such officer by virtue of any execution, writ of attachment, or other legal process issued under the law of Iowa, cannot be construed to include a receiver. *State v. Rivers*, 13 N. W. 73, 74, 60 Iowa, 381.

#### Attorney at law.

In Lord Coke's time and prior thereto an attorney was considered a public officer. Afterwards Lord Holt (1 Salk. 87) held that he was not compelled to appear for any one unless he takes his fee or backs his warranty. In *Seymour v. Ellison* (N. Y.) 2 Cow. 13, and *Merritt v. Lambert* (N. Y.) 10 Paige, 352, practitioners of the law are said to be public officers, but in other cases they are held not to be such, and as remarked by Platt, J., in *Re Attorneys' Oaths* (N. Y.) 20 Johns. 492: "As attorneys and counselors, they perform no public duties on behalf of the government; they execute no public trust. I am of the opinion that the law is with the negative of that question, nor do I think that Congress in the act of Congress of January 24, 1865, involving the subject of the oath to be taken by attorneys and counselors in the federal courts, considered them public officers." In Const. art. 1, § 6, cl. 2, it is declared that no person holding any office under the United States shall be a

member of either House during his continuance in office, and it has never been questioned that practicing as an attorney or counselor in the federal courts is inconsistent with holding at the same time the office of senator or representative in Congress. *Ex parte Law* (U. S.) 15 Fed. Cas. 3, 4, 35 Ga. 285.

An attorney at law is a public officer. In *re Leigh* (Va.) 1 Muntf. 468, 479; *Merritt v. Lambert* (N. Y.) 10 Paige, 352, 356; *Waters v. Whittemore* (N. Y.) 22 Barb. 593, 595; but the practice of law is not an office or place, under the statute to suppress duelling. In *re Leigh* (Va.) 1 Muntf. 468, 479.

An attorney at law is not an officer. In *re Bland & Giles County Judge* (Va.) 83 Grat. 443.

An officer is a person who performs any public duty, and an attorney at law is not an officer, and does not hold a public trust. *Maxey v. Wright*, 54 S. W. 807, 811, 3 Ind. T. 243.

A lawyer is a "public officer" in the sense of that clause of the Constitution requiring that all executive and judicial officers of the United States and of the several states shall be bound by oath or affirmation to support that Constitution. So far as the legal profession is an occupation open to all, there is no reason to consider a lawyer as a public officer. The exercise of his profession is in part an occupation in which every person is free to engage, but it is not so in respect to proceedings in the courts of justice, as the admission of an attorney is a general appointment to conduct cases before the courts, a station having its peculiar powers, privileges, and duties, and it thus becomes an office in the administration of justice. In *re Wood* (N. Y.) 2 Cow. 29, 30, note.

Attorneys are in a certain sense "public officers," but are not within the statute (1 Rev. St. 122, § 36) providing, among other things, that every "office" shall become vacant by the incumbent ceasing to be an inhabitant of a state. *Richardson v. Brooklyn City & N. R. Co.* (N. Y.) 22 How. Prac. 368, 369.

The term "public office," within the common-law rule which excludes women from government by withholding electoral and official power, does not include vocation of a member of the bar as an attorney and officer of the court. In *re Ricker*, 29 Atl. 559, 66 N. H. 207, 24 L. R. A. 740.

An attorney is an officer of the court, and is not a public officer of the state in such a sense as to be entitled to have his right to the office determined by a legal action. In *re Burchard* (N. Y.) 27 Hun, 429.

The word "officers," as used in Act 1863, c. 2, § 5, requiring the courts to administer the abjuration of the Ku-Klux to "all offi-

cers," does not apply to attorneys. *Ingersoll v. Howard*, 48 Tenn. (1 Heisk.) 247, 251.

Const. § 80, art. 16, provides that all terms of office not otherwise fixed by the Constitution are limited to two years. Held that, since the office of an attorney is one for life, he cannot be regarded as a constitutional officer. Neither can he be regarded as a public officer, for his duty appertains only to the court in which he is authorized to practice. *Ex parte Williams*, 20 S. W. 580, 581, 31 Tex. Cr. R. 262, 21 L. R. A. 783 (citing *Ex parte Garland*, 71 U. S. [4 Wall.] 333, 18 L. Ed. 866; *Ex parte Law*, 35 Ga. 285, 15 Fed. Cas. 3; *Ex parte Yale*, 24 Cal. 241, 85 Am. Dec. 62).

Const. art. 11, § 3, prescribes the form of oath to be taken by officers and persons executing public trusts, which is that such officer or person will discharge the duties of the office of ——— according to the best of his ability. Held, that the words "office" and "public trust" in such section were used in the same sense and applied only to persons whose duties and responsibilities were of a public nature. An attorney at law, is not an "officer" in the constitutional sense of the word, and he does not hold a public trust. *Ex parte Yale*, 24 Cal. 242, 244, 85 Am. Dec. 62.

"Officer," as used in Act 1827, authorizing the recovery of specific bank paper which has appreciated in value while in the possession of the officer collecting the same, includes attorneys at law. *Bank of Commonwealth v. Patton's Ex'r*, 27 Ky. (4 J. J. Marsh.) 190, 192.

An attorney at law is not, indeed, in the strict sense, a public "officer," but he comes very near it. As was said by Lord Holt, the office of an attorney concerns the public, for it is for the administration of justice. In *re White*, 6 Mod. 18. By our statutes he is required, upon his admission, to take and subscribe in open court the oaths to support the Constitutions of the United States and of this commonwealth, as well as the oath of office. This oath, the form of which has remained without substantial change since the time of Lord Holt, nearly 180 years, pledges him to conduct himself in the office of an attorney within the courts according to the best of his knowledge and discretion, and with all good fidelity, as well to the courts as to his clients, and he becomes by his admission an officer of the courts, and holds his office during good behavior, subject to removal by the court for malpractice. In *re Robinson*, 131 Mass. 376, 379, 41 Am. Rep. 239 (citing Gen. St. c. 121, § 80, 31).

"An attorney or counselor does not hold an 'office,' but exercises a privilege or franchise. As attorneys or counselors, they per-

form no duties on behalf of the government; they execute no public trust." In *re Attorneys' Oaths* (N. Y.) 20 Johns. 492, 493.

The term "office or public trust," in the clause of the Constitution providing that neither the chancellor nor justice of the Supreme Court, nor any circuit judge, shall hold any other office or public trust, includes an attorney or counselor. *Seymour v. Ellison* (N. Y.) 2 Cow. 13-29.

An attorney or counselor at law holds an "office or public trust," within the meaning of the terms as used in the Constitution. In *re Wood* (N. Y.) Hopk. Ch. 6, 8.

Attorneys at law belong properly to the class of judicial officers, and derive their office by appointment. *Ex parte Faulkner*, 1 W. Va. 269, 297.

A public officer is one who has a duty concerning the public, and is none the less a public officer where his authority is confined to narrow limits. Attorneys at law are public officers. *Ex parte Faulkner*, 1 W. Va. 269, 297 (citing 7 Bacon's Abr. 279, 280, tit. "Office and Officers").

Counselors and attorneys are not "public officers" within the meaning of the Constitution, prohibiting certain courts from appointing public officers to office. In *re A. B.*, 5 N. Y. Leg. Obs. 136, 138.

The power of a court to appoint attorneys as a class of public officers was conferred originally, and has been from time to time regulated and controlled, in England by statute. In this state it seems that attorneys, prior to the Revolution, were appointed by the Governor of the colony. The Constitution of 1846 provided that judges "shall not exercise any power of appointment to public office. Any male citizen of 21 years of good moral character, etc., shall be entitled to admission to practice in all the courts of this state." The object of this provision is plain. Attorneys, solicitors, etc., were public officers; the power of appointing them had previously rested with the judges, and this was the principal appointing power which they possessed. In *re Cooper* (N. Y.) 20 How. Prac. 1, 11, 13, 14.

While it is true that an attorney is in some sense an "officer" of the court, he is certainly not a public officer, so that while he may be required, as incident to the privilege of practicing, to discharge certain duties imposed upon him by statute, as, for instance, to defend a criminal, he is under no obligation to give his services to the public without compensation; and hence, under Code, § 825, providing that proceedings to remove an attorney may be commenced by direction of the court, who must direct some attorney to draw up the accusation, an attorney appointed to prosecute disbarment pro-

ceedings may recover from the county a reasonable compensation for his services, though there is no statutory provision for compensation. *Hyatt v. Hamilton County*, 96 N. W. 855, 856, 121 Iowa, 292, 63 L. R. A. 614.

In *Re Wood* (N. Y.) Hopk. Ch. 6, Chancellor Sandford held that a solicitor in chancery was an "officer" within the meaning of the new Constitution, and therefore could not be compelled to take any other oath than that prescribed therein. And in *Seymour v. Ellison* (N. Y.) 2 Cow. 13, Chief Justice Savage, in a concurring opinion, held that an attorney was an "officer" within the meaning of the phrase prohibiting chancellors and justices of the Supreme Court and circuit judges from holding any other office. The opinion of the court, as delivered by Justice Woodworth, however, was decided on other grounds. In *Re Leigh* (Va.) 1 Munf. 468, it was decided that an attorney was not an "officer" within a statute requiring every person appointed to any office to take an anti-dueling oath. In *Re Dorsey* (Ala.) 7 Port. 293, it was held that the provision of the statute empowering the General Assembly to disqualify from office for dueling did not extend to attorneys and counselors at law. And it was held in *Re Cooper*, 22 N. Y. 67, 84, 92, that the provision of the statute forbidding judges to exercise any power of appointment to public office did not prohibit the appointment of attorneys. Under these authorities an attorney at law is not an "officer" within the meaning of the Constitution, providing that a certain oath therein set forth shall be the only oath or test required as a qualification for any office or public trust, and could therefore be compelled by the Legislature, before being admitted to practice, to take another and more comprehensive oath. *Cohen v. Wright*, 22 Cal. 293, 301, 315, 320.

If a statute excluded from "office" one convicted of a particular offense, and used no other term or designation, the profession of a lawyer would not be included within the meaning of the term as generally used, because he can no more be said to hold an "office" than one who follows the profession of a physician, the avocation of a teacher, or who discharges the function of an administrator. In *Re Dorsey* (Ala.) 7 Port. 293, 365.

An attorney at law is not a public officer; he is not appointed by the Legislature, nor is he amenable to it, nor does he possess any portion of the public authority, and can be construed in no other light than that of a private agent for the citizens of the country who might employ him to do their legal business in the court; and though the law requires of him certain qualifications, and he receives a license from the judges, yet his office is no more a public one than would be any other profession or trade which the

Legislature might choose to subject to similar regulations. *Byrne's Adm'r's v. Stewart's Adm'r's* (S. C.) 3 Desaus. 466, 478.

Members of the bar are officers of the court, and in a sense officers of the state, for which the court acts. Officers charged with the general business of the state within the state must be residents of the state. Under ordinary circumstances, members of the bar of other states are permitted to argue causes in the Supreme Court without any general license to practice. In *re Mosness*, 39 Wis. 509, 510, 20 Am. Rep. 55.

The word "office," in the constitutional clause providing that "neither the chancellor nor justices of the Supreme Court, nor any circuit judge shall hold any office or public trust," does not apply to an attorney or counselor. *Seymour v. Ellison* (N. Y.) 2 Cow. 13, 28.

#### Candidate for office.

St. 1884, c. 299, § 43, prescribing a punishment for any person who shall alter a ballot cast for "any officer," includes the alteration of a ballot cast for one who was merely a candidate for office and was not elected, and cannot be limited to existing officers who might be candidates for re-election. *Commonwealth v. McGurty*, 14 N. H. 98, 101, 145 Mass. 257.

#### Commissioner of highways.

Commissioners appointed by the act of the Legislature to lay out and build a road for the use of the public are public officers. *People v. Hayes* (N. Y.) 7 How. Prac. 248, 250.

Commissioners appointed by a board of aldermen to lay out a highway under Gen. Laws R. I. c. 71, § 2, providing that for the due marking out of any highway the town council shall appoint three suitable and disinterested men, are not public officers, but mere statutory servants and agents of the board appointing them. *Attorney General v. McCaughey*, 43 Atl. 646, 647, 21 R. I. 341.

"An office is a public employment conferred by appointment of government, and in the performance of its functions the citizen selected to represent the sovereign is in the exercise of both a private right, or privilege, and a public duty." *United States v. Patrick* (U. S.) 54 Fed. 338, 349.

The term "office" has reference to functions conferred by public authority and for a public purpose. *Moll v. Sbisá*, 25 South. 141, 142, 51 La. Ann. 290.

The position of commissioner, under Laws 1869, c. 905, relating to the construction of a highway in the county of Queens, is an office, and hence vacated by the commissioner's acceptance of the office of sheriff, Const. art. 10, § 1, declaring that sheriffs

shall hold no other office. *People v. Nostrand*, 46 N. Y. 375, 381.

Road commissioners, as established by Acts 1871, c. 158, Pub. St. c. 27, § 75, while engaged in making improvements and alterations on an existing way for the purpose of rendering it safe for travelers, are public officers, and not servants of the town, although the work was ordered by the county commissioners upon petition by the town. *McManus v. Inhabitants of Weston*, 41 N. E. 301, 302, 164 Mass. 263, 31 L. R. A. 174.

#### Corporation.

Sess. Laws 1895, p. 47, § 25, providing that all printing, binding, etc., which is paid out of the territorial treasury shall be done and furnished by the State Capitol Printing Company, of Guthrie, does not make the State Capitol Printing Company a public officer. *Guthrie Daily Leader v. Cameron*, 41 Pac. 635, 636, 8 Okl. 677.

#### County officer or employé.

The term "officer" held not to include commissioners of a county, in a statute against bribery, reading "any member of the General Assembly, or any officer of this commonwealth, judge, juror, justice, referee or arbitrator," who shall accept a bribe shall be punished (Pen. Code, § 48), the phrase being evidently intended to include none but state officers or officers of the commonwealth, as distinguished from merely local or county officers. *Commonwealth v. Neely* (Pa.) 3 Pittsb. R. 527, 530.

A member of the county board of education is a public officer under Const. art. 14, § 7, providing that no person holding an office or place of trust shall hold or exercise any other. *Barnhill v. Thompson*, 29 S. E. 720, 721, 122 N. C. 493.

Under an act regarding honorably discharged soldiers and sailors, and which declares that no person of that description who holds a position or office within the state shall be removed except for cause, it is held that a janitor of the county courthouse does not hold an office. *State v. Board of Chosen Freeholders of Salem County*, 42 Atl. 844, 645, 63 N. J. Law, 57.

The right to exercise the duties, and take the compensation therefor, of county recorder, is an office; and equally so the right to the employment and pay of a county commissioner. *Dailey v. State* (Ind.) 8 Blackf. 329, 330.

A law authorizing the appointing of a practicing physician for a certain county, fixing the term for which he shall be appointed, providing for his salary, and prescribing his duties, creates an office. *People v. Harrington*, 63 Cal. 257, 260.

6 Wds. & P.—5

The term "public officer," in Rev. Code, § 183, which authorizes the discharge of sureties upon the official bond of any public officer required to be approved by the judge of the circuit court or judge of probate or chancery, does not include the public administrator of a county. "A public officer is a person who exercises the functions of a public office, while under our law an administrator is a trustee whose duty it is to be employed wholly about private affairs." *Mitchell v. Nelson*, 49 Ala. 88, 89.

The word "officer," as used in Const. art. 8, requiring officers to take an oath of office, includes a county treasurer. *Riddle v. Bedford County* (Pa.) 7 Serg. & R. 386-391.

The post of deputy warden of a county almshouse is not an office, but a position. *State v. Board of Chosen Freeholders*, 38 Atl. 842, 61 N. J. Law, 117.

The term "office," within the meaning of the Constitution, does not include a levee inspector. *State v. Green*, 9 South. 42, 43, 43 La. Ann. 402.

The exercise of the duties of the clerk of the poor-law commissioners materially affects a great body of persons, and the public within his district have an interest in such exercise. The office is therefore one of a public nature. *Reg. v. Guardians of Poor of St. Martin's in the Fields*, 17 Q. B. 149, 160.

The board of supervisors of a county is not a "public officer" within the statute in reference to double costs. *People v. Niagara County Sup'rs* (N. Y.) 50 How. Prac. 353, 354.

Any man is a public officer who is appointed by the government and has any duty to perform concerning the public; nor is he any the less a public officer because his authority or duty is confined to narrow limits. Persons who, under an act of the General Assembly of October 17, 1870, had been appointed commissioners to purchase a tract of land at the place selected for a county site, to lay off the same into town lots, sell them, and to apply the proceeds to the building of a courthouse and jail for the county, were "officers" under the law. *Polk v. James*, 68 Ga. 128.

A stationery storekeeper charged with the purchase and safe-keeping of the stationery required by a county is a public officer. A public officer is one who exercises, in an independent character, a public function in the interest of the people by virtue of law, which is only saying in another form that he exercises a portion of the sovereignty of the people delegated to him by law. *State v. Jennings*, 49 N. E. 404, 405, 57 Ohio St. 415, 63 Am. St. Rep. 723.



**Court officer or employé.**

The post of a president judge is within the common-law definition of an "office." *Commonwealth v. Gamble*, 62 Pa. (12 P. F. Smith) 343, 349, 1 Am. Rep. 422.

An attendant upon the Supreme Court, to attend upon it and to perform the duties required to be performed by him at a fixed salary, is "in office," within the meaning of the statute providing that "the board of supervisors of the county of New York are hereby prohibited from creating any new office or department, or increasing the salaries of those now in office or their successors." *Rowland v. City of New York*, 83 N. Y. 372, 375, 376.

An attendant of the Marine Court of the City of New York holds an "office," within the meaning of that term as used in section 3 of chapter 382, Laws of 1870, prohibiting any increase in the salaries "of persons then in office or their successors." *Moser v. City of New York* (N. Y.) 21 Hun, 163, 164.

Const. art. 5, § 3, which declares that the jurisdiction of the Supreme Court shall extend over the state, and the judges thereof shall have original jurisdiction of quo warranto as to all "officers of the commonwealth" whose jurisdiction extends over the state, includes judges and associate judges of the court of common pleas. *Commonwealth v. Dumbauld*, 97 Pa. 293, 295.

"Public officers," within the rule that statutes directing the mode of proceedings by public officers are directory, and are not regarded as essential to the validity of the proceedings themselves unless it be so declared in the statutes, includes a judge of a court. In *re Hennesy*, 58 N. E. 446, 447, 164 N. Y. 393.

The municipal court of the city of Wilmington, under 17 Laws, c. 207, § 14 et seq., creating it and defining its jurisdiction, being an "inferior court" within the meaning of Const. art. 4, § 30, the judge of such court is a "public officer" within Const. art. 3, § 9. *State v. Churchman* (Del.) 49 Atl. 381, 385, 3 Pennewill, 167.

The term "public officer," in Cr. Code, § 3931, providing that any public officer who deals in claims against the county shall be fined, includes a probate judge's clerk appointed in pursuance of Acts 1893, p. 1190. *Scruggs v. State*, 20 South. 642, 643, 111 Ala. 60.

**De facto officer.**

The word "officer" is defined in Webster's Dictionary as one who holds an office; a person lawfully invested with an office. The latter branch of this definition would seem to embrace only officers de jure, but the first is clearly comprehensive enough to in-

clude officers de facto. An officer de facto as clearly holds an office as an officer de jure. The term "officer" is generic, and when used in the statute, and there is nothing in the context or authority to indicate that it is used in a different sense, it should be held to include all classes of officers, officers de facto as well as officers de jure, and there is no good reason why an officer de facto should not be punished for embezzlement as well as an officer de jure. *State v. Goss*, 69 Me. 22, 28.

**Depository.**

See "Depository."

**Deputy.**

The bond of a deputy sheriff was conditioned that he should well and faithfully perform "all the duties of the said office as deputy sheriff." It was objected that there was no such office as deputy sheriff. The court said that a "deputy sheriff performs the functions of the office of sheriff. He occupies the place and performs the duties of an officer, and it does not matter whether he in fact is an officer, or only occupies the place and performs the duties. Such deputies are generally known and designated as officers, \* \* \* but the word 'office,' used in the condition, may refer as well or better to the office of sheriff as to that of deputy." *Gradle v. Hoffman*, 105 Ill. 147, 153.

The office of deputy sheriff, appointed by the sheriff under Rev. St. 1889, §§ 8181, 8182, requiring them to take the oath of office and to perform the duties prescribed by law to be performed by the sheriff, is a public office. *State ex rel. Walker v. Bus*, 36 S. W. 636, 637, 135 Mo. 325, 33 L. R. A. 616.

A deputy sheriff is an officer of the government, within a statute punishing embezzlement by officers of the government. *State v. Brooks*, 42 Tex. 62, 66.

Acts 1847, c. 40, § 3, providing that all redemptions that shall hereafter be made on or after the last day of the 15 months by any creditor shall be made at the sheriff's office of the county in which the sale took place, and it shall be the duty of the "officer making such sale" to attend at such office during the last day, etc., applies either to the sheriff, the undersheriff, or to a deputy sheriff. *People v. Lynch*, 68 N. Y. 473, 478 (cited and approved in *Wilson v. Russell*, 31 N. W. 645, 652, 4 Dak. 376); *Livingston v. Arnoux*, 56 N. Y. 507, 517.

A special deputy sheriff is not an officer, but is merely the agent of the sheriff. *Prince v. Dickson*, 18 S. E. 33, 34, 39 S. O. 477; *Kavanaugh v. State*, 41 Ala. 399.

A deputy county clerk is not an "officer" within the meaning of Const. art. 11, § 5, requiring the Legislature to provide for the

election of county officers, to prescribe their duties, and regulate their compensation. *Nelson v. Troy*, 11 Wash. 435, 442, 39 Pac. 874.

"Office," as used in Const. art. 7, § 6, providing that no person except a qualified elector shall be elected or appointed to any civil or military office in this state, does not include deputy clerkships of county courts, and hence women may hold such deputy clerkships. *Jeffries v. Harrington*, 17 Pac. 505, 506, 11 Colo. 191.

"Office," as used in Const. art. 15, § 4, providing that no person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector, does not include the office of the deputy clerk of the probate court, and therefore a female is eligible to that clerkship. *Warwick v. State*, 25 Ohio St. 21, 24.

Deputy clerks of counties in New Jersey are public officers, though they have no term of office, and though they are employes of the county clerk, so that their employment is a mere matter of private contract. *Gibbs v. Morgan*, 39 N. J. Eq. (12 Stew.) 126, 128.

In Rev. Laws, p. 206, providing for proceedings on information in the nature of a quo warranto where any person usurps, intrudes into, or unlawfully holds or executes any "office" within the state, the word "office" should be construed to include the office of deputy adjutant general of a brigade of militia, it being provided that, whenever the commander in chief of the militia should consider that the service required, he could appoint a deputy adjutant general to each brigade or division, for such office is a public office concerning the public, and is a valuable as well as an honorable office. *Miller v. Utter*, 14 N. J. Law (2 J. S. Green) 84, 87.

**As employé, laborer, or workman.**

See "Employé"; "Laborer"; "Workman."

**Ex-officer or officer elect.**

"County officers," as used in the constitutional provision that such officers, under the laws of the territory when the Constitution shall take effect, shall continue in office until a certain date fixed, means officers who may be exercising the functions of the office when the Constitution takes effect. Those who have been elected but not inducted into office are, properly speaking, "officers elect." Those in office are simply "officers." Those who have been in office but have gone out are properly "ex-officers." But where the term "officer" is used in a sentence where there is nothing to qualify or control its meaning, it refers to an officer then holding and enjoying the office. It means neither an ex-officer nor an officer elect. *Cordell v. Frizell*, 1 Nev. 130, 132.

#### **Irrigation district officers.**

An irrigation district organized under the Wright act is a public corporation, and its officers are public officers of the state. *Hertle v. Ball* (Idaho) 72 Pac. 953, 954 (citing *In re Madera Irrigation Dist.*, 92 Cal. 296, 28 Pac. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106).

#### **Jailer or other prison keeper.**

In Bac. Abr. "Offices and Officers," it is said: "An office is a right to exercise a public function or employment, and to take the fees and emoluments belonging to it." Every part of this definition applies to the place of jailer. No public employment is more clearly marked by these distinguishing traits of an office than the ordinary functions of a jailer. *State v. Sellers* (S. C.) 7 Rich. Law, 368, 370.

The superintendent of the Albany County Penitentiary is a public officer, inasmuch as he has charge of a public institution, and the position is denominated an "office" in the statute establishing the penitentiary. *Porter v. Pillsbury* (N. Y.) 11 How. Prac. 240, 241.

The office of keeper of the workhouse is an "office" within the meaning of the authorities, as the employment was not transient, occasional, or accidental, and the salary fixed was by the year. The position was not a menial one, such as a janitor or servant, nor was the incumbent a per diem laborer, whose employment might be evidenced by a mere verbal direction to go to work at prevailing rates. *Stenson v. City of New York*, 82 N. Y. Supp. 946, 947, 40 Misc. Rep. 533.

#### **Juror or jury commissioner.**

The term "public officers" includes grand jurors and listers. *State v. Rollins*, 27 Atl. 498, 499, 65 Vt. 608.

A grand juror is a public officer. *State v. Rollins*, 27 Atl. 498, 499, 65 Vt. 608.

The term "public officers," as used in the Constitution and statutes, does not include jurors, although they serve the public, and perform important duties in the administration of justice. *State v. Bradley*, 48 Conn. 535, 536.

A grand juror is a public officer. *State v. Noyes*, 87 Wis. 340, 346, 58 N. W. 336, 27 L. R. A. 776, 41 Am. St. Rep. 45 (citing *Jac. Law Dict.*, Bac. Abr. tit. "Office and Officers").

As used in St. U. S. March 22, 1882, c. 47, § 8, providing that no polygamist, bigamist, or any other person cohabiting with more than one woman should be entitled to vote at any election held in any territory or place over which the United States has exclusive jurisdiction, or be eli-

gible for election or appointment to, or be entitled to hold, any "office" or place of public trust, honor, or emolument in, under, or for any such territory or place, or under the United States, "office" cannot be construed to include the right to sit on a jury. An office is a public station or employment conferred by the appointment of government, and embraces the ideas of tenure, duration, employment, and duties. It is the right to exercise a public function or employment, and to take the fees and emoluments belonging to it. Jury duty is in the nature of service due from the citizen to the government, necessarily required in the administration of its laws. Its character has but little similarity to tenure, duration, power, and the right to exercise powers conferred by the appointment of government, which are essential characteristics of office, and not mere transient, occasional, or incidental. It is true a person summoned to appear as a juror has a duty of a public nature to perform, and for it he is compensated out of the public treasury; but in no other respect does his position or his duties correspond with the essential elements of office. He has no certain term of office. He has no right to, and has no power to enforce a right to, the performance of any act or service which constitutes the performance of official duty. He is liable at any moment to be discharged by the court from all service, and to be excused by either party from serving in the trial of any cause, without consulting his wishes or interests. The oath he takes, in its terms and scope, limits his duty to the facts of the particular case then on trial, and is not the oath required by the laws of this territory, or by the Constitution and laws of the United States, to be taken by public officers." *People v. Hopt*, 4 Pac. 250, 254, 3 Utah, 396.

Police jurymen are the officers of a political corporation, and they continue in office, after the expiration of their terms, until their successors are chosen and inducted into office, under Rev. St. 1870, § 2608, providing that "all officers, whether appointed or elected, shall hold their offices and discharge the duty thereof until their successors are elected or appointed, as the case may be, and duly qualify." Because the office of a police juror is not a constitutional office, it by no means follows that it is no office at all. *State ex rel. Gorham v. Montgomery*, 25 La. Ann. 138, 139.

The term "officers" includes county commissioners charged with a duty of electing jurors for the courts of the counties, within the meaning of Act June 16, 1836, restricting the powers of the several courts to issue attachments and to inflict summary punishments for contempts of court, as without such officers a court could not discharge its functions, and their disobedience or neglect

of its legal orders would arrest the course of justice and produce infinite inconvenience to the community. Such commissioners are chosen by the people to execute this duty, among others. They undertake to perform it by accepting the office, and become thereby public officers, and as such assigned, like other officers, to the proper discharge of their duty. *In re Hummell (Pa.)* 9 Watts, 416, 431.

#### **Justice of the peace.**

A public officer is one who has "the right, and corresponding duty, to execute a public or privileged trust, and to take the emoluments belonging to it." 3 Kent, Comm. 454. Justices of the peace and constables are "public officers" within the meaning of Const. art. 3, § 13, providing that "no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment." *Rupert v. Chester Co.*, 13 Pa. Co. Ct. R. 342, 343.

#### **Magistrate.**

The general term "officers" includes both magistrates and peace officers. *Code Cr. Proc. Tex.* 1895, art. 61.

#### **Minister.**

It was decided in *Commonwealth v. Cuyler (Pa.)* 5 Watts & S. 275, that a minister in an unincorporated society is not an officer whose salary is liable to taxation. Conceding that he may be in some senses an "officer," it is plain that he is not an officer within the meaning of the law regulating taxation. *Miller v. Kirkpatrick*, 29 Pa. (5 Casey) 226, 230.

#### **Municipal officer or employé.**

It cannot be doubted, as a general proposition of law applying to the construction of statutory and constitutional provisions alike, that the word "offices" or "officers," taken by themselves, in a statute or Constitution, means state or county offices or officers only, and cannot be construed to mean the offices or officers of municipal or other corporations, unless there be language, expressly or by necessary implication, extending their meaning to corporation officers. Thus Const. 1897, art. 3, § 9, requiring the consent of the Senate to the appointment by the Governor of such "officers" as he is authorized by law to appoint, does not require the appointment of a city officer, required by the city charter to be made by the Governor, to be confirmed by the Senate. *State v. Churchman*, 51 Atl. 49, 50, 3 Pennell, 361.

An officer of a municipal corporation is a "public officer," within 2 Rev. St. 696, § 38, punishing delinquency of a public officer as a misdemeanor. *People v. Bedell (N. Y.)* 2 Hill, 196, 199.

"Officer," as used in Const. c. 2, § 11, providing that the Governor shall have power to commission all officers, and section 24, providing that every "officer" of the state, whether judicial or executive, shall be liable to be impeached by the General Assembly, and section 29, providing that every "officer," whether executive, judicial, or military, in authority under this state, shall take and subscribe the oath of office prescribed therein, has reference only to such officers of the state as are either elected by the freemen at large or required to be commissioned by the Governor. Municipal officers are not included therein. *Rowell v. Horton*, 3 Atl. 906, 907, 58 Vt. 1.

"Public officer," within the meaning of Gen. St. c. 257, § 7, providing for the punishment of any public officer, being a receiver of public money, who shall fraudulently convert the same to his own use, includes a selectman. *State v. Boody*, 53 N. H. 610, 611.

Within the meaning of Pen. Code, § 72, providing that any judicial officer, or any person who executes the functions of a public office, who receives a bribe, shall be punished, the expression of "person who executes any of the functions of a public officer" includes a member of the common council or other municipal officer. *People v. Jaehne*, 8 N. E. 374, 377, 103 N. Y. 182.

A chief engineer of a city fire department, appointed by the council and subject to removal by it, is not an "officer" within Const. art. 14, § 8, prohibiting an increase in the salary of any officer during his term of office. *State ex rel. Kane v. Johnson*, 27 S. W. 399, 401, 123 Mo. 43.

"Public office," as used in Rev. St. § 6770, authorizing an action in quo warranto to be brought against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, includes the presidency of a city council. *State v. Anderson*, 12 N. E. 656, 657, 45 Ohio St. 196.

The charter of a village authorized the election of certain officers, giving power to the trustees to appoint an attorney, street commissioner, fire wardens, and such other officers as authorized by the act. The office of village collector was not named in any class of officers in the act, but one section provided that the collector should collect all moneys that shall be ordered by the corporation to be raised by taxes. The board of trustees appointed a collector. Held, that he was a "public officer" within Rev. St. c. 120, § 7, declaring that, if a public officer embezzles any money in his position, he shall be punished, etc. *State v. Walton*, 62 Me. 106, 111.

A collector of city taxes is a "public officer" within Bankr. Act U. S. 1841, § 1,

which extends to all persons owing debts which shall not have been created in consequence of a defalcation, as a public officer, or an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity. *Morse v. City of Lowell*, 48 Mass. (7 Metc.) 152, 154.

A messenger to the president of the board of aldermen in New York City, whose duties were to carry messages and run errands, and who was clothed with no power to perform any official duty of the office, was not a public officer, there being no statute creating such an office, or defining the duties to be performed officially. *Smith v. City of New York* (N. Y.) 67 Barb. 223, 224.

Laws 1897, c. 108, constituting the sheriff and other county officers of Richmond county a board to appoint police commissioners for the county, does not violate the provision of Const. 1895, art. 10, § 1, providing that sheriffs shall hold no other office, a membership in the board of police commissioners being held not to constitute an office. *People v. Howland*, 45 N. Y. Supp. 347, 350, 17 App. Div. 165.

Under Code, § 124, providing that causes against a public officer for an act done by him in virtue of his office must be tried in the county where the cause, or some part thereof, arose, one appointed by Laws 1870, c. 382, to audit certain accounts against the city of New York, became the incumbent of an office. *People v. Tweed* (N. Y.) 13 Abb. Prac. (N. S.) 419, 420, 424.

The commissioners of the funded debt of San Francisco are not "officers" within the meaning of Const. art. 11, § 7, which provides that the duration of any office not fixed by the Constitution shall never exceed four years, and the term during which the commissioners are authorized to act is not limited to four years. *People v. Middleton*, 28 Cal. 603.

"Public offices" are in general, if not always, directly created by the Legislature itself, the municipal authorities selecting the persons to perform their functions. The term cannot be applied to the general superintendent of waterworks, employed by the water commissioners of a city for a term of years, the position being the creature of the board of commissioners, and entirely unknown to the statute. *Cramer v. Water Com'rs of New Brunswick*, 31 Atl. 384, 385, 57 N. J. Law (28 Vroom) 478.

St. 1865, c. 153, being an act for supplying the city of Cambridge with water, provides, in section 6, that the powers therein granted shall be exercised by such agents as the city council shall direct. A water board is not provided for by any subsequent act, but subsequent ordinances of the city, in designating its agents, use the phrase

"water board." St. 1891, c. 384, amending such charter, recognizes the existence of the water board, and makes no provision for the election of its members, except in section 9, which provides that all officers not elected by voters shall be appointed by the commissioners, subject to confirmation by the board of aldermen. Held, that the members of the water board are "officers" within the meaning of the latter section, and therefore an ordinance providing for their appointment in such manner is valid. *O'Brien v. Thorogood*, 39 N. E. 287, 288, 162 Mass. 598.

A health inspector appointed by the board of health of the city of San Francisco, whose duties are to inspect and report concerning the premises on which nuisances are situated, and to serve notice for their abatement, is a public officer. *Patton v. San Francisco Board of Health*, 59 Pac. 702, 703, 127 Cal. 388, 78 Am. St. Rep. 66.

Members of the board of public works of the city of Detroit are "officers" within the meaning of Const. art. 15, § 14, providing that "judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time, and in such manner as the Legislature shall direct," though they are not officers required or designated by name in the Constitution itself. *People v. Hurlbut*, 24 Mich. 44, 59, 9 Am. Rep. 103.

The term "officers," whenever used in the articles relating to cities of the first and third classes, shall include all persons holding any situations under the city government or its departments, with an annual salary or for a definite term of office. *Rev. St. Mo. 1899*, §§ 5333, 5777.

The terms "officers," "clerks," "subordinate officers," and "employés," in Act June 1, 1885, relating to cities of the first class, in reference to the appointment of officers, clerks, subordinate officers, and employés, do not include the medical staff, or the board of visiting physicians of the Philadelphia Hospital, consisting of specialists or experts in the various departments of medical science, who perform gratuitous services. *Commonwealth v. Fitler*, 23 Atl. 568, 571, 147 Pa. 288, 15 L. R. A. 205.

The governor of an almshouse is one of the heads of departments, and an officer of the city of New York, prohibited by chapter 187 of Act 1894, § 19, from being interested in the purchase of any real estate belonging to the corporation. *Roosevelt v. Draper*, 23 N. Y. 318, 319.

A position as organist, to which one was appointed and continued at the pleasure of the vestry, was not a "public annual office." *Rex v. Inhabitants of St. George's, Hanover Square*, 5 Barn. & Adol. 571.

The position of chief clerk in the office of the assessor of the city of Detroit is not an officer. *People v. Langdon*, 40 Mich. 673, 682.

A poundmaster appointed from time to time by the common council of a city does not hold an "office" within the meaning of the city charter, providing that every person chosen or appointed to any office or place of trust shall take and subscribe an oath. *Wilcox v. Hemming*, 58 Wis. 144, 145, 15 N. W. 435, 46 Am. Rep. 625.

A person appointed by the board of police of the city of Rochester as superintendent of the police telegraph system of that city, there being no office of that name or nature known to the law, is merely an employé of the city, and the proper authorities of the city have the same power to discharge him that a private employer would have. *Miller v. Warner*, 59 N. Y. Supp. 956, 957, 42 App. Div. 208.

A person employed by the city council to trim lights in its electrical light department is not a "public officer." There is no more reason for calling him such than there would be to call a person employed in the public streets to shovel dirt a "public officer." *State v. Anderson*, 49 N. E. 406, 407, 57 Ohio St. 429.

By Laws 1895, p. 518, c. 371, amending the New York City Charter, tit. 2, §§ 4, 5, p. 10, the chamberlain is a public officer. *In re Haase*, 83 N. Y. Supp. 932, 933, 41 Misc. Rep. 114.

#### Notary public.

Every man is a public officer who has any duty concerning the public, and it is held that a notary public is a "public officer" within Const. art. 13, § 5, providing that any public officer who shall travel on a free pass shall forfeit his office. *People v. Rathbone*, 32 N. Y. Supp. 108, 109, 11 Misc. Rep. 98.

A notary public is not an "officer" in view of Const. art. 10, § 2, providing that no one can hold an office within the state who is appointed or chosen in the manner as therein provided. *In re Searls*, 48 N. Y. Supp. 60, 63, 22 App. Div. 140.

The powers conferred by *Rev. St. § 5252*, 5254, on an officer taking depositions, to punish for contempt by a witness, extend to a notary public. *In re Rauh*, 61 N. E. 701, 702, 65 Ohio St. 128.

#### Officer authorized to execute process.

The word "officer," used in *Rev. St. § 4296*, declaring that any person who shall knowingly and willfully resist or oppose any officer of the state, or any person authorized by law, in serving or attempting to execute

any legal writ, rule, order, or process, or who shall knowingly or willfully resist any such officer in the discharge of his duties without such writ or process, shall be punished, means only such officers as are authorized to execute legal processes. Therefore a road supervisor is not an "officer" within the meaning of the statute. *State v. Putnam*, 35 Iowa, 561, 562.

#### **Officer of political party.**

The fact that the Legislature has by statute regulated the election and conduct of political committees, the members of which are the officers of the party which selects them, and whose duties are confined to the party to which they belong, does not make the office of committeeman a public one. *Attorney General v. Drohan*, 48 N. E. 279, 281, 169 Mass. 534, 61 Am. St. Rep. 301.

#### **Pilot.**

See "Pilot."

#### **Police officer, marshal, or other peace officer.**

After quoting *Henley v. Mayor*, 5 Bing. 91, and *Case of Wood* (N. Y.) 2 Cow. 29, it was said that a railroad policeman employed by a corporation is a "public officer" within Const. art. 13, § 5, providing that no public officer shall receive a pass over any railroad. *Dempsey v. New York Cent. & H. R. R. Co.*, 40 N. E. 867, 868, 146 N. Y. 290.

A policeman of an incorporated town or city is an officer. *Proctor v. Blackburn*, 67 S. W. 548, 549, 28 Tex. Civ. App. 351.

A policeman appointed by the board of trustees of Brooklyn Bridge, in pursuance to Laws 1875, c. 300, § 8, authorizing the board to appoint an adequate police force, and to regulate and direct the same for the protection of the bridge and persons, etc., passing over the same, and conferring on the policemen so appointed all the powers of the policemen of the cities of New York and Brooklyn, is a public officer, for whose torts the cities are not responsible. *Woodhull v. City of New York*, 44 N. E. 1038, 1039, 150 N. Y. 450.

The position of assistant superintendent of police in the city of Chicago is an office, and title thereto may accordingly be tested by quo warranto. *Ptacek v. People*, 62 N. E. 530, 194 Ill. 125.

A policeman appointed by the board of trustees of the Brooklyn Bridge, in pursuance of Laws 1885, c. 300, § 8, authorizing the board to appoint an adequate police force, and to regulate and direct the same for the protection of the bridge and persons passing over the same, and conferring on the policemen so appointed all the powers of policemen for the cities of New York and Brooklyn, is not a public officer. *Woodhull*

*v. City of New York*, 44 N. E. 1038, 1040, 150 N. Y. 450.

A policeman is an "officer," under Cr. Code, art. 488, providing that an assault becomes aggravated when committed on an officer in the lawful discharge of the duties of his office. The statute was intended to punish any one who had assaulted any officer of the state while in the discharge of his official duty as an officer. It matters not by what name such officer is called; though he might be no more than a taxgatherer in the lawful discharge of his humble duties, yet the interests of the state require that he should be protected. *Sanner v. State*, 2 Tex. App. 458, 459.

A village marshal is a public officer. *State v. Schram*, 85 N. W. 155, 82 Minn. 420.

Persons appointed to the detective department of the district police force of the commonwealth under Pub. St. c. 103, and amendments thereof, are public officers. *Brown v. Russell*, 43 N. E. 1005, 1010, 168 Mass. 14, 32 L. R. A. 253, 55 Am. St. Rep. 357.

By "officer," as used in the chapter on offenses relating to the arrest and custody of prisoners, is meant any peace officer, as sheriff, deputy sheriff, constable of a beat, marshal, constable, or policeman of a city or town, any jailer or guard, or any person specially authorized by warrant to arrest. Pen. Code Tex. 1895, art. 243.

#### **Road commissioner.**

A "public office" is a trust or charge, created and defined by the public authority. A road commissioner elected under the provisions of Pub. St. c. 27, §§ 74-77, is not an officer of the town from which he is elected, but is a "public officer," for whose acts the town is not responsible. *Clark v. Easton*, 146 Mass. 43, 45, 14 N. E. 795.

#### **School district officer.**

A trustee of a school district is intrusted with a part of the sovereign function of the state, hence his must be a public office, and he would be subject to removal under Rev. St. 1895, art. 3531, providing for removal for incompetency, etc., of all district attorneys, etc., and, "all other county officers." *Hendricks v. State*, 49 S. W. 705, 20 Tex. Civ. App. 178 (quoting *Mechem*, Pub. Off.).

School trustees are officers, recognized as such by the law of the land, and as such are embraced by Const. art. 3, § 6, which requires all persons entering upon the discharge of any functions as officers of the state to take and subscribe an oath or affirmation before entering upon their duties. *Childrey v. Rady*, 77 Va. 518, 530.

The term "officer," as used in Crim. Act, § 198, making it criminal to bribe any officer

or any other person, is not limited to officers of a state or county, but is broad enough to include the officers of a school district, or any other officer referred to in the preceding sections of the crimes act. In re Bozeman, 22 Pac. 628, 630, 42 Kan. 451.

#### **Sheriff or constable.**

The word "office," as used in Virginia statutes prohibiting the sale of any office or deputation of office touching the administration or execution of justice or the receipt of payment of the public revenues, or any clerkship in a court of record, includes the office of sheriff, and therefore prohibits the sale by the sheriff of his office. *Salling v. McKinney* (Va.) 1 Leigh, 42, 44, 19 Am. Dec. 722.

Article 14 of the amendments to the federal Constitution, disqualifying certain persons from holding offices, includes a sheriff and other officers required by Rev. Code, c. 77, to take and subscribe the oath to support the federal and state Constitutions. *Worthy v. Barrett*, 63 N. C. 199, 202.

The word "officer," as used in the chapter relating to attachments, is meant to apply to constables when the proceedings are in a justice's court, or the like officer of any other court. Code Iowa 1897, § 3934.

The word "officer," as used in the act in relation to attachments issued out of justices' courts, shall be construed to mean the sheriff, constable, or other officer executing the process of the court of justice. *Mills' Ann. St. Colo.* 1891, § 2745.

#### **State officer or employé.**

The office of governor, created by Const. art. 5, providing that the executive power shall be vested in a governor, who shall hold his office for two years, declaring that no person except a citizen of the United States and a qualified elector of the state shall be qualified to the office of governor, is an "office," within the meaning of the term as used in Rev. St. c. 126, providing for the filing of an information in the nature of quo warranto against any person usurping and intruding into or unlawfully holding or exercising any public office; the word "office," as used in the Constitution and in the statute, not being used in its restricted sense, but in its most popular and general acceptance, and applying to any place which imposes upon him who occupies it the performance of duties of a public nature. *Attorney General v. Barstow*, 4 Wis. 567, 661, 745.

Under Const. art. 5, § 24, declaring that an office is a public position, created by the Constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or ap-

pointed, factory inspectors provided for in Act June 7, 1893, must be regarded as state officers or officers of the government. Their duties are continuing, and prescribed by statute and not by contract, and some portions of the functions of government are committed to their charge. They seem to come within the definition of "officers" as given in the Constitution and as laid down in the decisions of court. *Ritchie v. People*, 40 N. E. 454, 461, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315.

The term "public officers," in Rev. Code, p. 138, art. 194, providing that the official acts of any person in possession of any public office and exercising the functions thereof are valid and binding as lawful official acts in regard to all persons intrusted therewith or affected thereby, whether such person be lawfully entitled to hold such office or not, etc., was construed to include members of the Legislature during the War of Secession. *Hill v. Boyland*, 40 Miss. 618, 625.

Persons appointed by an act of the Legislature as managers to conduct and execute a lottery grant for the benefit of a college, although required to enter into bonds and render important services from which the state derives a benefit, are not public officers, but trustees. *State v. Platt* (Del.) 4 Har. 154.

"Officer," as used in the Revision of 1838, providing for the punishment of any officer, clerk, or other person employed in the treasury of any county, or in any other public office within the state, who commits any fraud or embezzlement therein, should be construed to include the state treasurer. *People v. McKinney*, 10 Mich. 54, 85.

The clerks of the different departments of the state are "officers," within Act April, 1856, providing that the act shall not apply to reduce the salary of incumbents in office, but only to every such officer thereafter elected. *Vaughn v. English*, 8 Cal. 39, 41.

A stenographer employed temporarily, and not in pursuance of any law providing for his employment in permanent or continuous discharge of his duties, is not an "officer" within Rev. St. U. S. § 1855, providing that no law of any territorial legislature shall be made or enforced by which the governor or secretary of a territory, or the members or officers of any territorial legislature, are paid any compensation other than that provided by the laws of the United States. *Braithwaite v. Cameron*, 38 Pac. 1084, 1087, 3 Okl. 630.

The term "officer," as used in the act to restrain officers in the charge of the fiscal affairs of state institutions from contracting indebtedness beyond certain limits, shall

be taken to include members of the various boards created by law to govern or supervise the respective state institutions. *Miller v. Ann. St. Colo. 1891, § 4116.*

The term "officer," as used in the act relating to the accounting for money received and expended by certain officers, shall be construed to include all commissioners, boards of commissioners, trustees, boards of trustees, inspectors, boards of inspectors, regents, boards of regents, agents, or other person or board, of whatever denomination or character, receiving or disbursing money for the state for or on account of any building or work for the state, or for the maintenance or for the use or benefit of any state, educational, charitable, reformatory or penal, or other institution or organization, or for or on account of any purpose whatsoever, under any act of appropriation or other law of the state. *Comp. Laws Mich. 1897, § 1210.*

Act March 10, 1892, § 5, appropriated \$65,000 for colleges, which sum should be expended under the direction of the board of construction, which board was to be appointed, giving bonds, etc. *Const. § 7*, declares that the Governor shall nominate, and, by and with the advice and consent of the Legislative Assembly, appoint all officers not otherwise provided for. Held, that the members of the board were officers. *McCornick v. Thatcher, 8 Utah, 294, 301, 30 Pac. 1091, 17 L. R. A. 243 (citing 4 Jac. Dict. 433).*

Pharmacy commissioners appointed under Laws 18th Gen. Assem. c. 75, which authorized them "to make by-laws necessary for the proper fulfillment of their duties without expense to the state," elected a treasurer as provided by by-laws they had adopted, and fixed the tenure of his office, and his compensation. Held, that he was a mere employé of the commission, and not a "public officer" within Code 1873, § 3908, providing that a public officer converting money given to him by virtue of his office is guilty of embezzlement, since the Constitution and statutes neither created nor authorized the creation of his office, nor prescribed nor authorized any one to prescribe his duties, nor delegated to him sovereign functions of government to be exercised by him for the benefit of the public. *State v. Spaulding, 72 N. W. 288, 289, 102 Iowa, 630.*

Code Md. art. 72, regulating the oyster fishery in the waters of the state, charges the board of public works with the duty of keeping in repair the vessels of the state fishery force; and Act Md. 1886, c. 296, provides for the appointment of commanders for such vessels by the board. These commanders are required by law to take an oath and give bond to the state. Held, that such a commander is himself a public officer, and hence the members of the board are not personally liable for injuries resulting from

his negligence to a workman repairing such vessel, especially where there is nothing to show that the commander is incompetent. *Riggin v. Brown (U. S.) 59 Fed. 1005, 1006.*

#### **Tax collector.**

A person who collects taxes is a "public officer," within the constitutional provision that no law shall diminish the salary of a public officer after his election or appointment. *Donohough v. Roberts (Pa.) 15 Phila. 144, 148.*

#### **Superintendent or employé of state institution.**

It is held that a person appointed for a definite term, and required to take an oath prescribed by the Constitution of the state, and to reside in the institution that he superintends, performing the duties prescribed by law, and clothed with the right and correspondent duty to execute a public trust and receive a salary attached to the office, is an officer. *State v. Wilson, 29 Ohio St. 347, 348.*

The word "officer," within the meaning of Act 1882, c. 410, § 59, prohibiting any member of the common council, head of department, chief of bureau, or other officer of the city of New York from becoming directly or indirectly interested in the performance of any work or business, the expense or price or consideration of which is payable from the city treasury, does not include the medical superintendent of the asylum for the insane at Ward's Island, who receives, as such superintendent, his salary payable out of the appropriations for the salaries of the officers and employés of the department of charities and corrections, and therefore such superintendent may properly be employed for a consideration by the district attorney of New York to examine the sanity of one on trial for crime. *Macdonald v. City of New York (N. Y.) 32 Hun, 89.*

A fireman at the State Soldiers' and Sailors' Home is not employed by the state or any "officer" thereof, within the meaning of Laws 1889, c. 380, § 1, providing that a laborer so employed shall receive not less than \$2 per day. *Drake v. State, 39 N. E. 342, 144 N. Y. 414.*

#### **United States officer or employé.**

"Public officers," as used in Rev. St. § 3639 [U. S. Comp. St. 1901, p. 2422], requiring the Treasurer of the United States, assistant treasurer, and those performing the duties of assistant treasurer, collector of customs, surveyor of customs, acting also as collectors, receivers of public moneys at the several land offices, postmasters, and all "public officers" of whatsoever character, to keep safely all public money collected by them, or otherwise at any time placed in their possession and custody, until the same is ordered by the proper department to be



transferred or paid out, means officers of the United States, and does not include a clerk of a collector of customs, for he is not an officer of the United States. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an "officer" of the United States in the sense of the Constitution. *United States v. Smith*, 8 Sup. Ct. 595, 597, 124 U. S. 525, 31 L. Ed. 534.

A representative in Congress holds a "public office" within the meaning of the charter of the city of Brooklyn, which prohibits an alderman from holding any other public office save as excepted, etc. *People v. Common Council of City of Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659.

An examining surgeon appointed by the Commissioner of Pensions is not an "officer" of the United States. *United States v. Van Leuven* (U. S.) 62 Fed. 62, 65; *United States v. Germaine*, 99 U. S. 508, 510, 25 L. Ed. 482.

Act Cong. May 15, 1820 (3 Stat. 592), § 2, providing for the issuance of a distress warrant from the treasury department against any collector of the revenue, receiver of the public money, or any other "officer who shall have received the public money before it is paid into the treasury of the United States," describes a person who holds an office under government, to whose hands the public money comes before it reaches the treasury, and includes no other person than one who was properly designated by the term "officer," and hence does not include a purser in the navy. *Ex parte Randolph* (U. S.) 20 Fed. Cas. 242, 254.

Letter carriers in the postal service, being appointed by the Postmaster General under authority of the acts of Congress, practically during good behavior, sworn and giving bond for the fulfillment and performance of their duties, paid their moneys appropriated by the Congress, their salaries fixed by law, having regulated and prescribed services to perform, and their duties being continuing and permanent, not occasional or temporary, are "officers" of the United States within the meaning of the amendment to section 2 of the judiciary act of March 3, 1887 [U. S. Comp. St. 1901, p. 753], taking away from the Circuit Courts and District Courts jurisdiction of suits against the United States by such officers to recover fees or compensation. *United States v. McCrory* (U. S.) 91 Fed. 295, 296, 33 C. C. A. 515.

A clerk in the United States pension agency, serving by appointment for a period not exceeding three months, and compensat-

ed with money of the United States appropriated for that purpose by Congress, having no duties defined by law, nor discretion to act independently of the direction of the pension agent, is not "holding an office under the authority of the United States," within the meaning of article 2, § 4, of the Constitution of the state, which renders persons so holding office ineligible to membership in the General Assembly, his position not being an office, but merely an employment. *State v. Mason*, 55 N. E. 167, 61 Ohio St. 62.

The situation of paymaster of the United States army is an office, and hence it follows that where a clerk of a county court, which is likewise an office, accepts the position of paymaster, he thereby vacates his clerkship. *Taylor v. Commonwealth*, 28 Ky. (3 J. J. Marsh.) 401, 407.

An internal revenue supervisor's clerk, appointed pursuant to the authority of the internal revenue commissioner, under Rev. St. § 3160, giving such commissioner power to allow supervisors their necessary expenses, was held not a "government officer" within Rev. St. § 1756, requiring all such officers to take the oath prescribed thereby. *Hedrick v. United States* (U. S.) 16 Ct. Cl. 88, 100.

A post office is an office of profit or trust under the authority of Congress, so as to prevent a postmaster from holding an executive or judicial office while continuing to exercise the office of postmaster. *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231.

#### OFFICER (Of Corporations).

The term "officers," applied to a corporation, refers to those in regular and continual service. Within the ordinary acceptance of the term, one who is engaged to render service in a particular transaction is not an "officer." It implies continuity of service, and excludes those employed for a special and single transaction. *Lewis v. Fisher*, 30 Atl. 608, 610, 80 Md. 139, 26 L. R. A. 278, 45 Am. St. Rep. 327; *Louisville, E. & St. L. R. Co. v. Wilson*, 11 Sup. Ct. 405, 407, 138 U. S. 501, 34 L. Ed. 1023.

The officers of a corporation not shown to be stockholders, prima facie, are mere agents or servants, having no direct interest in a suit by or against the corporation which prevents them being witnesses at common law. *Gantt v. Cox*, 48 Atl. 992, 199 Pa. 208.

In a case involving a statute requiring certain returns to be made by the officers of banks, it was said: "When the law requires an act to be done, it includes the power of performance and makes it a duty; and where such duty is imposed on the officer of the corporation as an official act,

and for a public purpose, they are thereby constituted officers for that purpose, and willful disobedience on their part will be a misdemeanor." *Commonwealth v. Dunham* (Mass.) 1 Thacher's Cr. Cas. 519, 578.

Rev. St. c. 126, § 29, providing that any "officer, agent, clerk or servant of any incorporated company" embezzling any money or property of another coming into his possession by virtue of his employment shall be deemed to have committed simple larceny, should be construed to include a treasurer in a railroad corporation, for he is an officer distinctly recognized by law, chosen by the directors, and required to give a bond for the faithful discharge of his trust. *Commonwealth v. Tuckerman*, 76 Mass. (10 Gray) 173, 187.

The term "officers," as used in Act 1885, p. 127, providing that the officers of any fair or agricultural joint-stock company or association shall not rent or devote any portion of their grounds for gambling purposes, and imposing a fine on officers who violate any of its provisions, should be construed to designate and include any person or persons duly invested with authority to grant privileges on the society's grounds. *State v. Johnson*, 17 N. E. 910, 912, 115 Ind. 467.

The "officers," agents, or clerks mentioned in article 3, § 42, of the act concerning crimes and punishments, which provides a punishment for any officer, agent, clerk, or servant of any incorporated company for embezzlement, etc., means officers, agents, or clerks of corporations, and the statute only authorizes a conviction in cases where the embezzlement is committed by such officers, agents, or clerks while exercising their corporate employment. *Hamuel v. State*, 5 Mo. 260, 264.

In an action on an insurance policy after the death of the assured, the testimony of a clerk in the office of the agent of the company was admissible as to the terms of an agreement between insured and the agent for a change in the policy, as she was not an "officer" of the company within the meaning of the statute excluding testimony by interested parties in actions by or against a corporation, and declaring that officers of the corporation should be considered interested parties. *Krause v. Equitable Life Assur. Soc.*, 105 Mich. 329, 334, 63 N. W. 440.

#### **As agent, employé, etc.**

See "Agent"; "Employé"; "Laborer"; "Servant."

#### **Director or trustee.**

In Laws 1875, c. 611, § 21, providing that, if any certificate or report made or public notice given by an officer of a corporation shall be false in any material representation, all the "officers" who have signed the same

shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof, "officers" should be construed to include the directors of the corporation, for, in a strict sense, the directors of a corporation are its officers. *Torbett v. Eaton*, 1 N. Y. Supp. 614, 616, 49 Hun, 209. See, also, *Brand v. Godwin*, 15 Daly, 456, 460, 8 N. Y. Supp. 339.

A director of a corporation is an "officer," within the meaning of Laws 1875, c. 611, § 21, requiring that the annual report shall be signed by the president and a majority of the directors. *Brand v. Godwin*, 15 Daly, 456, 458, 460, 8 N. Y. Supp. 339.

By the words "officers of a corporation" is meant the president, vice president, secretary, and others who are invested with a part of the executive authority. The trustees of a corporation are no doubt in one sense "officers," and, when that term is used in some connections, it would embrace all who participate in the exercise of the corporate functions. The word "officers," as used in Laws 1881, c. 122, relating to the incorporation of building, mutual loan, and equitable associations, is used in the former sense only, for the act itself points out the distinction between officers and trustees, and therefore the trustees of such corporations are not "officers" within the intent of the act. *Second Manhattan Bldg. Ass'n v. Hayes*, \*41 N. Y. 192, 193.

The offices pertaining to a private corporation are, as a general rule, defined in its charter and by-laws. Trustees of an insurance company, one of whom was its solicitor and the other its traveling agent, and not designated in the charter or by-laws as officers, are not "officers" within Act March 3, 1860, relating to officers of private corporations. *Commonwealth v. Christian* (Pa.) 9 Phila. 556, 558.

The word "officer," as used in Rev. St. c. 126, § 27, providing for the punishment of embezzlement committed by any cashier or other officer of the bank, includes embezzlement committed by the president and directors of the bank. *Commonwealth v. Wyman*, 49 Mass. (8 Metc.) 247, 253.

A director is an "officer," within Code Civ. Proc. § 525, allowing verification of the pleading of a domestic corporation by one of its officers. *Eastham v. York State Telephone Co.*, 83 N. Y. Supp. 1019, 86 App. Div. 562.

The term "officer," as used in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], includes directors of a national bank. *United States v. Means* (U. S.) 42 Fed. 599.

#### **Family of officer.**

The terms "officers" or "employés," in the exception to the provision of the inter-

state commerce act forbidding the giving of passes, that nothing in the act shall be construed to prevent railroads from giving free carriage to their own officers and employes, cannot be construed to include the families of officers or employes. *Ex parte Koehler* (U. S.) 31 Fed. 315, 321.

Under a statutory provision (Rev. St. c. 120, § 27) providing for the punishment of embezzlement committed by any cashier or "other officer" of a bank, it is held that the phrase "other officer" includes the president and directors of the bank. *Commonwealth v. Wyman*, 49 Mass. (8 Metc.) 247, 253.

#### **General agent or attorney.**

Code, § 525, providing that the petition for condemnation of property, where the petitioner is a domestic corporation, shall be verified in its behalf by an "officer of the corporation," does not mean a general officer, but should be construed to include a duly authorized attorney and agent appointed by the corporation to verify petitions and pleadings in its behalf for the institution of condemnation proceedings and otherwise, and who was its agent for the purpose of acquiring real estate by condemnation proceedings. His relation to the company was that of a general agent in respect to those matters, acting under an appointment from the corporation. He was not simply an attorney acting under an ordinary retainer, but was engaged in a special department of the corporate business, having the general management thereof. *In re St. Lawrence & A. R. Co.*, 31 N. E. 218, 220, 133 N. Y. 270.

#### **Manager or managing director.**

Code Civ. Proc. § 525, subd. 1, providing that, where the party is a domestic corporation, pleadings must be verified by an "officer" thereof, does not mean a general manager or managing agent, since the word "manager" is not synonymous with "officer." *Thomas F. Meton & Sons v. Isham Wagon Co.*, 4 N. Y. Supp. 215, 216, 15 Civ. Proc. R. 259.

The managing director of a foreign corporation is an "officer" within Code, § 258, providing that, when a corporation is a party, the verification of pleadings may be made by an officer thereof. *Best v. British & American Mortg. Co.*, 42 S. E. 456, 131 N. C. 70.

#### **Minister or teacher.**

The term "office under a corporation," in a statute authorizing the assessment of a tax on the salary of any one holding office under a corporation, does not include ministers of incorporated congregations or teachers in the common schools. *Commonwealth v. Cuyler* (Pa.) 5 Watts & S. 275, 276.

Professors and instructors are not members of the corporation of a college, but are "officers" of the college, within the meaning of the statute exempting from taxation the real estate of the college when occupied by it or by its officers. From the nature of the institution, the members of the board of trustees, except the president, usually would not occupy real estate in person for the purpose of instruction. Professors or instructors impliedly are called "officers" of the college in the charter, and, when they occupy real estate for the purposes of the college, the occupation may be said to be by the college, or by them as its officers. *Williams College v. Assessors of Williamstown*, 48 N. E. 394, 395, 167 Mass. 505.

A professor in a college is not properly an "officer" of the corporation, but a person in its employment, within Act April 29, 1849, regulating the taxation of officers of a corporation. *Union County v. James*, 21 Pa. (9 Harris) 525.

A professor in the University of Wisconsin is not a "public officer" in such a sense as prevents his employment as such creating a contract relation between himself and the board of regents. He stands in the same relation to the board that a teacher in a public school occupies with respect to the school district by which such teacher is employed, and that is purely a contract relation. *Butler v. Regents of the University*, 32 Wis. 124, 131.

#### **As public officer.**

The office of the chief engineer of a railroad company is not a public office, though the power to make all necessary by-laws and regulations is invested in the company by its charter, and the stockholders have, under its authority, created the office and declared the salary. *Eliason v. Coleman*, 86 N. C. 235, 240.

A director of an ordinary business corporation is not a public officer, but is merely an agent of the shareholders, selected, conformably to the organic law of the company, to represent them in the management of its affairs. Unless there is some provision in the charter or by-laws to the contrary, like the agent of an ordinary partnership, he can renounce his agency at will, and can manifest his purpose by oral notice as well as by a formal written resignation, and can terminate the relation without the consent of his principal. A statute giving stockholders authority in general meeting to remove any director to fill the vacancy, and providing that, unless so removed, the directors shall continue in office until the next annual meeting of the stockholders and until their successors shall be appointed, does not prevent a director from resigning at any time. *Fearing v. Glenn* (U. S.) 73 Fed. 116, 119, 19 C. C. A. 388.

**Secretary.**

A secretary is not necessarily an "officer" of the corporation. He may hold such position and yet be without authority to bind the corporation. *Karsch v. Pottier & Styms Mfg. & Imp. Co.*, 81 N. Y. Supp. 782, 783, 82 App. Div. 230.

**OFFICER, CIVIL OR MILITARY.**

The court of claims is not an "officer, civil or military," within the meaning of Rev. St. U. S. § 5438 [U. S. Comp. St. 1901, p. 3674], prohibiting every person from presenting for payment or approval to or by any person or officer in the civil, military, or naval service of the United States any claim against the government of the United States, knowing the same to be false, etc. *United States v. Moore* (D. C.) 3 MacArthur, 226, 235.

**OFFICER MAKING SALE.**

"Officer making such sale," as used in statutes in reference to execution sales, which speaks of the "officer making such sale," "refers to an officer legally authorized to sell." It does not include a deputy sheriff, as the latter cannot act in his own right, but only for the sheriff. *Wilson v. Russell*, 31 N. W. 645, 650, 4 Dak. 376.

**OFFICER OF COURT.**

Attorney at law as, see "Attorney at Law."

Clerk of court as, see "Clerk of Court."

Executor as, see "Executor."

**OFFICER OF THE CUSTOMS.**

See "Customs Officer."

**OFFICER OF THE LAW.**

Receiver as, see "Receiver."

"Officers of the law," as used in Pub. Laws, c. 508, § 31, which gives permission to officers of the law to bring complaints for the violation of said chapter (508) without giving recognizance for costs, refers only to such officers as are designated in other sections of the same chapter, and does not include a deputy chief of police. *State v. Collins*, 12 R. I. 478.

An "officer of the law" is any magistrate, peace officer, or clerk of a court. Pen. Code, art. 351. A sheriff is a peace officer. Code Cr. Proc. art. 53. Therefore a sheriff is included in the phrase "officer of the law" as used in Pasch. Dig. art. 348a, providing that if any officer of the law shall willfully or negligently fail to perform any duty imposed on him, etc., he shall be guilty of a misdemeanor. *Gordon v. State*, 2 Tex. App. 154, 158.

By an "officer of the law," as used in an article designating all offenses committed by officers of the law as "malfeasance in office," unless otherwise designated, is meant any magistrate, peace officer, or clerk of the court. Pen. Code Tex. 1895, art. 297.

A magistrate is included under the term "officer of the law." *Gordon v. State*, 2 Tex. App. 154, 158 (citing Pen. Code, art. 351).

**OFFICER OF THE POLICE.**

See "Police Officer."

**OFFICER OF THE REVENUE.**

See "Revenue Officer."

**OFFICER OF SCHOOLS.**

See "School Officers."

**OFFICIAL.**

While the term "official" sometimes applies to persons holding fiduciary positions, to distinguish their transactions in such relations from their purely private business, yet in the statutes relating to official bonds the word is clearly confined to the bonds of public officers. *Bissell v. Durfee*, 24 N. W. 886, 887, 58 Mich. 237.

Statutes, in speaking of the "official who levies" executions or attachments, "refer to an officer authorized by law to levy upon property. It does not include a deputy sheriff, as the latter can only act for and in the name of the sheriff." *Wilson v. Russell*, 31 N. W. 645, 650, 4 Dak. 376.

Public officials are merely agents of the state for the carrying out of public purposes, and their selection and the fixing of the time for which they shall serve are matters of public convenience, and do not fall within the scope of the term "contract" as applied to individuals. *Duer v. Dashiell*, 47 Atl. 1040, 1041, 91 Md. 660.

**OFFICIAL ACT.**

"Official act," within the object of a bond given by a deputy sheriff to make the sureties responsible for the due performance of his official acts, does not mean a lawful act of the officer in the service of process. If so, the sureties would never be responsible. It means any act done by the officer in his official capacity under color and by virtue of his office. *Turner v. Sisson*, 137 Mass. 191, 192.

By an official act is not meant the lawful act of an officer in the service of process, for if this were so the sureties who became liable for his official acts would never be responsible. It means any act done by the

officer in his official capacity, under color of title and by virtue of his office. *Turner v. Sisson*, 137 Mass. 191. The distinction originally made between acts done by virtue of an office and acts done by color of office has been entirely disregarded by leading authorities within the last few years. *Lammon v. Feusler*, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. Ed. 337. The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes; and that which is done under color of office, and which would obtain no credit, except for its appearing to be a regular official act, is within the protection of the bond. *Hall v. Tierney*, 95 N. W. 219, 220, 89 Minn. 407 (citing *Murfree*, Off. Bonds, § 211).

Under Rev. St. art. 4897, making the sheriff responsible for the official acts of their deputies, the Legislature, in the use of the term "official," will be presumed to have had knowledge of the well-defined distinction between official acts and acts done *colore officii*—a distinction on which many of the apparently conflicting cases may perhaps be reconciled—and to have intended to include responsibility for mere usurpation of authority on the part of the deputy. *Mad-dox v. Hudgons*, 72 S. W. 414, 415, 81 Tex. Civ. App. 291.

#### OFFICIAL ACTION.

Separate individual action on the part of the members of a municipal board, even though all might concur, is not an official action, and does not bind a municipality. *Burkett v. City of Athens (Tenn.)* 59 S. W. 667, 668.

#### OFFICIAL BALLOT.

In statutes relative to elections the term "official ballot" shall mean a ballot prepared for any election or caucus by public authority at public expense. *Rev. Laws Mass.* 1902, p. 104, c. 11, § 1.

#### OFFICIAL BOND.

A bond taken in pursuance of a public statute falls under the description of an "official bond." *Faurote v. State*, 11 N. E. 472, 474, 110 Ind. 463.

An official bond is an obligation under which the sureties may, on default of their principal, become liable to pay money to another. *Connor v. Corson*, 83 N. W. 588, 591, 13 S. D. 550.

The term "official bond," as used in Act March 21, 1871, providing that the remedy against the sheriff for failure to collect and pay over the tax listed to him by the tax collector shall be by motion or suit on his "official bond," should be construed to include every bond executed by the sheriff in obedience to law, by which his sureties un-

dertake that he shall discharge a public duty imposed on him by law as sheriff, and is not limited to the bond executed by him at the time he takes the oath of office. *Anderson v. Thompson*, 73 Ky. (10 Bush) 132, 136.

#### OFFICIAL CAPACITY.

The commissioner of pensions has the authority to appoint examining surgeons and to organize boards of surgeons. Therefore the person thus appointed acts under or by virtue of the authority lawfully exercised by the pension office through its head, the commissioner, the same being an office of the government. The authority under which they act is derived from the office of pensions, and their action is official in that they act on behalf of an office of the government; and they act in an official capacity because they are representatives of the pension office, and their services are in aid of the official duties committed to that office. A person may act in an official capacity because he is an officer lawfully appointed and qualified and acts as such, or he may act in an official capacity because he lawfully performs duties which are of an official character. Therefore members of boards of surgeons come within the provisions of section 5501, Rev. St. [U. S. Comp. St. 1901, p. 3709], which impose a penalty on any one accepting a bribe while acting in an official capacity. *United States v. Van Leuven (U. S.)* 62 Fed. 62, 65.

Code, § 92, subd. 1, requiring actions against a sheriff in respect to liabilities incurred by reason of acts in his official capacity to be brought within three years, construed to include a trespass by the sheriff in levying on property not belonging to the judgment debtor, though the liability arises in tort. *Cumming v. Brown*, 43 N. Y. 514, 515.

Code Civ. Proc. § 385, which provides that an action against a sheriff or coroner upon a liability incurred by him by doing an act in his official capacity, or by the omission of an official duty, except the nonpayment of money collected upon an execution, must be brought within one year, refers to a liability incurred by official malfeasance or misfeasance, but not to a liability arising out of a mutual contract voluntarily entered into by a sheriff or coroner, for his own convenience, with another. *Rice v. Penfield*, 2 N. Y. Supp. 641, 49 Hun, 368.

The fact that a schedule of fees has been prescribed for the services of an officer is not an invariable test that the enumerated services are the only ones rendered in his "official capacity," within the meaning of an act providing that his salary shall be in full for all services rendered in his "official capacity." *Hennepin County Com'rs v. Dickey*, 90 N. W. 775, 776, 86 Minn. 331.

**OFFICIAL CERTIFICATE.**

The certificate of an invoice for the convenience and security of the collector of customs and the government, which was a memorandum between the officers in the customhouse as a part of their system of checks and authentications, and was not an official document required by the merchant, nor given to him, is not an official certificate, for which the collector is entitled to fees. *Cochran v. Schell*, 2 Sup. Ct. 801, 307, 107 U. S. 617, 27 L. Ed. 490.

**OFFICIAL DEED.**

A certificate of the county auditor executed under section 19, c. 2, Gen. Laws 1874, assigning the right of the state to lands bid in at tax sale, is an "official deed," within the meaning of Gen. St. 1878, c. 75, § 15. *Pfefferle v. Wieland*, 58 N. W. 824, 55 Minn. 202.

**OFFICIAL DUTY.**

Official duties are the duties imposed on officers of the government. In *Owners of Land v. People*, 113 Ill. 296, it is said official duties are supposed to be susceptible of classification under three heads—of legislative, executive, and judicial, corresponding to the three departments of government bearing the same designation; but the classification cannot be very exact, and there are many officers whose duties cannot be properly, or at least exclusively, arranged under either of these heads. *People v. Hoffman*, 5 N. E. 596, 603, 116 Ill. 587, 56 Am. Rep. 793.

The phrase "faithful performance of official duty," as used in a bond requiring a faithful performance of official duty, should be construed as equivalent to a recital of all the statutory duties of the officer in the bond, and is as binding on the principal and sureties as if such duties were inserted. *State v. Nevin*, 7 Pac. 650, 651, 19 Nev. 162, 3 Am. St. Rep. 873.

Where a law requires surveyors to give bond for the faithful disbursement of public money, it is evident that it contemplates such surveyors as disbursing officers. Nevertheless, where the statute requires that bond be given both for the disbursement of money and for the faithful discharge of the duties of the office, and in fact the bond is conditioned only on the latter, a serious question arises as to whether it was not open to prove that the disbursement of money was not known as one of the "duties of the office," and included in the general words. *Farrar v. United States*, 30 U. S. (5 Pet.) 373, 388, 3 L. Ed. 159.

An act requiring a bond by the cashier of a bank, conditioned for "the faithful per-

formance of the duties of his office," was complied with by a bond conditioned that he should "faithfully perform all the duties of his office according to law and the by-laws of the institution," as the condition required nothing which could not have been required under the statutory bond. *Bank of Carlisle v. Hopkins*, 17 Ky. (1 T. B. Mon.) 245, 246, 15 Am. Dec. 113.

The words "duties" and "duties of their office" as used in the act of 1868 relating to elections and electors—section 18 providing for the punishment of any person who, without just and reasonable cause, neglects or refuses to perform any of the duties required of him by the act, and section 3 providing that all registrars and deputy registrars shall, before entering on the duties of their office, take the oath by law provided for executive and judicial officers—have the same meaning, and comprehend only official acts to be done by the officer after being duly sworn, and do not include the taking of the oath by a registrar of election, the refusal to take which does not render him liable to the penalty. *State v. Maynard*, 41 Conn. 540, 541.

**OFFICIAL FUNCTION.**

A secret service operative, employed by the Secretary of the Treasury to aid in the detection, prosecution, and suppression of crimes against revenue laws, with which duty the secretary is charged while in the performance of such service, is acting, on behalf of the United States, in an "official function" of the Secretary, within Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], making it a criminal offense to bribe, or attempt to bribe, any officer of the United States or any person acting for or on behalf of the United States in an official function under or by authority of a department or office of the government thereof. It does not require that one who exercises an official function should be an officer of the United States. The official function is not necessarily a function belonging to the office, held by the person acting on behalf of the United States. It may also be a function belonging to the office held by his superior, which function has been committed to the subordinate, whether to a lower officer or to a mere employé for the purpose of being executed. *United States v. Ingham* (U. S.) 97 Fed. 935, 936.

**OFFICIAL MISCONDUCT.**

See, also, "Misconduct in Office."

Const. art. 5, § 8, provides that the district court shall have original jurisdiction in cases of misdemeanor involving official misconduct. Rev. St. art. 3393, declares that "by 'official misconduct,' as used in this title

with reference to county officers, is meant any unlawful behavior in relation to the duties of his office, willful in its character, of any officer intrusted in any manner with the administration of justice or the execution of the laws; and under this head of official misconduct are included any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law." In construing these provisions as applied to an indictment of a sheriff that charged him with negligently permitting the escape of persons in his legal custody, who were charged or convicted of felonies less than capital, the court said: "The Legislature having defined 'official misconduct,' such definition materially restricts the general signification of the term as used in the Constitution, if it was so used in its common acceptation, and thus limits the jurisdiction of the district court to that class of misdemeanors which involve unlawful official behavior on the part of a county officer, willful or corrupt in its character, no matter whether it is an act or omission. It was not the intention of the Constitution to burden the district court with every possible act or omission of the officer for which the law fixed no penalty, and the omission of which may have been prompted by casual inadvertence instead of corrupt or willful design or negligence"—and held that the indictment did not charge an offense of which the district court had any jurisdiction. *Watson v. State*, 9 Tex. App. 212, 214, 216, 217.

By "official misconduct," as used in the title relating to the removal of officers, with reference to county officers, is meant any unlawful behavior in relation to the duties of his office, willful in its character, of any officer intrusted in any manner with the administration of justice or the execution of the laws; and under this head of official misconduct are included any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law. *Rev. St. Tex.* 1895, art. 3534.

Where a jailer, being an officer, is charged with the custody and safe-keeping of a person who has been accused or convicted of a capital offense, he is charged with the performance of a duty imposed by law, and, if he negligently permits such person to escape, he is guilty of a violation of the law, constituting a misdemeanor involving "official misconduct," within the meaning of the Constitution, declaring that the district court shall have original jurisdiction in cases of misdemeanors involving official misconduct. *Hatch v. State*, 10 Tex. App. 515, 517.

Under such statutory definition of "official misconduct" an officer who willfully demands fees not allowed by law is guilty of official misconduct, willful in its character, and a conviction of that offense is a con-

viction involving misconduct which not only warrants, but demands, his removal from office. *Brackenridge v. State*, 11 S. W. 630, 633, 27 Tex. App. 513, 531, 4 L. R. A. 360.

The words "official misconduct," as used in Code, § 305, which provides that only public officials who shall be guilty of any official misconduct shall be liable to indictment, must be construed as not to embrace the case provided for in section 308, providing that any judge of probate who shall willfully fail or neglect to discharge the duties and perform all the services which are required of him by law shall be indicted. *State v. Green*, 30 S. E. 683, 684, 52 S. C. 520.

The phrase "official misconduct," in *Rev. St. arts.* 3388, 3389, authorizing removal from office on account of official misconduct, does not include drunkenness, inasmuch as drunkenness in itself does not indicate corruption or neglect of duty. *Craig v. State*, 31 Tex. Cr. R. 29, 30, 19 S. W. 504.

#### OFFICIAL NEWSPAPER.

Official newspapers are those designated by state or municipal legislative bodies, or agents empowered by them, in which the public acts, resolves, advertisements, and notices are required to be published. *Albany County Com'rs v. Chaplin*, 37 Pac. 370, 372, 5 Wyo. 74.

#### OFFICIAL RECORDS.

Certificates of death filed in the health department are "official records," within Code Civ. Proc. § 959, providing that certain official records shall be presumptive evidence of their contents. *Robinson v. Supreme Commandery, Order of Golden Cross*, 79 N. Y. Supp. 13, 16, 77 App. Div. 215.

#### OFFICIAL SERVICE.

The term "official service," as used in acts of Congress and the regulations of United States consuls, and providing that only the prescribed fees may be collected for official service, includes only such services required by law or by the regulations, and such services specified in any tariff of fees or official service. *United States v. Mosby*, 10 Sup. Ct. 327, 330, 133 U. S. 273, 33 L. Ed. 625.

#### OFFICIAL STENOGRAPHER.

An official stenographer is an officer of the court charged with the duty of carefully reporting all the proceedings on the trial, and his certificate is entitled to the same force and credit as that of any other officer. The transcription of his notes, when certified to by him and filed by the clerk of the court where the cause was tried, becomes a part

of the record, and prima facie a correct statement of the testimony and proceedings on the trial, and is entitled to effect and credit as such in the Appellate Court. *Tallmadge v. Hooper*, 61 Pac. 349, 352, 37 Or. 503.

### OFFICIAL TERM.

Const. art. 4, § 19, forbidding the increase or diminution of the salary of any executive officer during his "official term," means the term for which the officer is chosen or the whole period of time during which the officer may occupy or hold his office. *Carlile v. Henderson*, 31 Pac. 117, 118, 17 Colo. 532.

### OFFICIAL TITLE.

Under the occupying claimant's act (Gen. St. 1878, c. 75, § 15), providing for two classes of occupants, to wit: "First. . . . Second, those who have taken possession of any land under the official deed of any person or officer employed by law . . . to sell land," etc.—the second class may be defined as those who go into possession under color of what may be called "official title." *Pferferle v. Wieland*, 55 Minn. 202, 209, 56 N. W. 824, 825.

### OFFICINA JUSTITIÆ.

In the ordinary or legal court the officina justitiæ is kept, out of which issue all original writs that pass under the great seal. Those writs that related to the subject were originally kept in a hamper, and those that related to the interests of the crown were kept in a little bag. Hence arose the distinction between the "hanaper office" and the "petty-bag office." Those offices are at all times open to the subject, who may at any time demand and have, ex debito justitiæ, any writ that he may call for. The denomination "officina justitiæ" was adopted to signify that all justice between man and man proceeded from that source; it being, as it is styled in the books, the shop, mint, or manufactory of justice. *Yates v. People* (N. Y.) 6 Johns. 337, 363.

### OFFSET.

An offset does not deny the existence or the merits of a claim, but is a contrary sum or claim, by which a given claim may be lessened or canceled. *Leonard v. Charter Oak Life Ins. Co.*, 33 Atl. 511, 513, 65 Conn. 529.

The word "offset," in an answer which first denied the allegations of the complaint, and then set out facts showing the breach of a contract on the plaintiff's part, separate and distinct from the one sued upon, by reason of which defendants suffered dam-

ages, as a separate and distinct defense by way of offset to plaintiff's claim, was construed to be used as equivalent to the word "counterclaim," as the facts set forth in the answer show a counterclaim, within the definition given in Code Civ. Proc. § 501, subd. 2, providing that a counterclaim must tend to diminish or defeat the plaintiff's recovery. *Cable Flax Mills v. Early*, 76 N. Y. Supp. 191, 193, 72 App. Div. 213.

The word "offsets," as used in a mechanic's lien law requiring the notice or statement of the demand for a lien to state the sum demanded over and above all credits and offsets, is substantially the same as "effects," as used in the notice or statement of the demand for a sum over and above all credits and effects. *Merchant v. Humeston*, 7 Pac. 903, 904, 2 Wash. T. 433.

"Offset," as used in a negotiable note purporting on its face to be payable without offset, should be construed to mean "without offset as against the holder by indorsement." The sole purpose and effect of offsets is to give negotiability and credit to the paper. They are not treated by the courts as having any effect between the maker and the original payee of the paper. *Harmanson v. Bain* (U. S.) 11 Fed. Cas. 539, 541.

### OFFSPRING.

The term "offspring," in a mortgage on mares and their offspring, includes increase. *King v. Lacrosse*, 44 N. W. 517, 518, 42 Minn. 488.

The word "offspring," by the common-law interpretation, embraces any heirs of a given description collectively as a class of persons, unless there is a direct intention plainly and clearly expressed to the contrary. *Powell v. Brandon*, 24 Miss. (2 Cushman) 343, 365.

"Offspring," as used in a will making a certain disposition of property in case of testator's daughter dying without offspring by her husband, is a synonym for "issue," and issue cannot be lawful without marriage. *Mitchell v. Pittsburgh, Ft. W. & C. Ry.*, 31 Atl. 67, 68, 165 Pa. 645.

In a devise to a girl of five years, of certain lots, and providing that in the event of her dying unmarried, or, if marrying, dying without offspring, then these lots were to be sold and the proceeds to be divided equally among certain other persons, the word "offspring" here used is but a synonym for "issue." *Barber v. Pittsburgh, Ft. W. & C. R. Co.*, 17 Sup. Ct. 488, 494, 166 U. S. 83, 41 L. Ed. 925.

The word "offspring," in a will devising testator's real estate to his son during his



natural life, and, at his decease, to his legitimate offspring forever, but, in case the issue of the son should become extinct, then over to other devisees in fee, is used interchangeably with the word "issue"; but, even if it had not been defined by the use of the word "issue," it would still have been a term of limitation, and not of purchase. *Allen v. Markle*, 36 Pa. (12 Casey) 117, 118.

"Offspring" is a word of limitation, not of purchase. As used in a devise of certain lots to a party, declaring that in the event of such party's dying unmarried, or, if married, dying without offspring by her husband, such lots should be sold, and the proceeds divided among other persons designated, did not create merely a defeasible fee, and, if it did not vest in the devisee a fee simple, it at least gave her an estate tail. *Barber v. Pittsburgh, Ft. W. & C. R. Co.* (U. S.) 69 Fed. 501, 504.

## OFTEN.

A testator directed that the whole of his property, real and personal, be equally divided between his wife and children, and be kept together by his executor and executrix during the widowhood of his wife, or until his children became of age or married, and then, and not till then, "dividends take place as often as they become of age or marry." It was held that the word "often" implied a repetition of the act of division, and hence that the period of division was not to be delayed till all the children became of mature age or all were married. *Charles v. Stickney*, 50 Ala. 86, 88.

The words "often or daily" in an application for a life policy, requiring the applicant to state whether he uses intoxicating stimulants often or daily, is an inquiry as to his habit in that regard; not whether he uses such stimulants at all, but whether he uses any of them habitually. *Ætna Life Ins. Co. v. Davey*, 8 Sup. Ct. 331, 332, 123 U. S. 739, 31 L. Ed. 315.

## OHIO.

"Ohio," as used in descriptions of the surveys of the townships of land in Indiana bordering on the Ohio, means the Ohio river. *City of Madison v. Hildreth*, 2 Ind. (2 Cart.) 274, 283.

## OIKEI MANIA.

Oikei mania is a form of insanity manifesting itself in a morbid state of the domestic affections, as an unreasonable dislike of wife or child without cause or provocation. *Ekin's Heirs v. McCracken* (Pa.) 11 Phila. 534, 540.

## OIL.

See "Coal Oil."

See, also, "Mineral"; "Petroleum."

Oil is a mineral. *Jennings v. Bloomfield*, 49 Atl. 135, 136, 199 Pa. 638 (citing *Blakley v. Marshall*, 174 Pa. 425, 34 Atl. 564; *Marshall v. Mellon*, 179 Pa. 371, 38 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601).

Oil is a mineral, and, being a mineral, is part of the realty. *Funk v. Haldeman*, 53 Pa. (3 P. F. Smith) 229. In this it is like coal or any other natural product which in situ forms part of the land. It may become, by severance, personalty, or there may be a right to use or take it originating in custom or prescription, as the right of a life tenant to work opened mines, or to use timber for repairing buildings or fences on a farm. Nevertheless, whenever conveyance is made of it, whether that conveyance is called a lease or a deed, it is, in effect, the grant of part of the corpus of the estate, and not of a mere incorporeal right. *Appeal of Stoughton*, 88 Pa. 198, 201.

"Oil," as used in a lease of property to be occupied and worked for petroleum, rock or carbon oil, and not for any other purpose, and, if no oil was found in paying quantities within four years, the lease should be null and void, is not synonymous with "gas." *Truby v. Palmer* (Pa.) 6 Atl. 74.

## OIL IN BARRELS.

Where a fire policy was on refined "oil in barrels" at a refinery, such phrase could not by any construction be held to include oil in a cooling and settling tank. *Weisenberger v. Harmony Fire & Marine Ins. Co.*, 56 Pa. (6 P. F. Smith) 442, 444.

## OIL LEASE.

An oil lease investing the lessee with the right to remove all the oil in place in the premises was said by Chief Justice Sterrett, in *Blakley v. Marshall*, 34 Atl. 564, 174 Pa. 425, to be in legal effect a sale of a portion of the land. To the same effect are *Kier v. Peterson*, 41 Pa. (5 Wright) 357, and *Appeal of Stoughton*, 88 Pa. 198; *Jennings v. Bloomfield*, 49 Atl. 135, 136, 199 Pa. 638; *Southern Oil Co. v. Colquitt*, 69 S. W. 169-171, 28 Tex. Civ. App. 292.

## OIL REFINERY.

As building, see "Building (In Lien Laws)."

## OIL TANKS.

As building, see "Building (In Lien Laws)."

**OIL WELL.**

The term "oil well," as used in the pleadings in an action for a mechanic's lien for material furnished for an oil well, etc., will be construed to embrace not only the mere hole in the earth, in the drilling of which the plaintiffs performed labor or furnished material, but also the derrick engine, boiler pump, piping, and appliances attached thereto. *Haskell v. Gallagher*, 50 N. E. 485, 488, 20 Ind. App. 224, 67 Am. St. Rep. 250.

The term "oil well," in Rev. St. § 8184, giving a mechanic's lien on oil wells, consists, in addition to the excavation or hole in the ground, of the drive pipe which is inserted in the ground, and the casing and iron tubing, but does not include the derrick or other things used in connection with the well. *Devine v. Taylor* (Ohio) 4 O. C. D. 248, 250.

There is no failure of consideration good as a defense against notes given for an oil well, by reason of the fact that the oil well does not produce oil sufficient to pay for its operation. *Penniman v. Winner*, 54 Md. 127, 135.

**OILCLOTH FOUNDATION.**

The terms "oilcloth foundations" and "floor cloth canvas," as used in Act June 6, 1872, § 4, imposing a duty on such materials, are convertible terms designating the same article. *Arthur v. Cumming*, 91 U. S. 362, 364, 23 L. Ed. 438.

**OLD.**

"Old," as used in 1 Rev. St. p. 502, § 2, authorizing commissioners of highways to lay out new roads and discontinue old ones, does not necessarily mean an ancient or long existing road. The phrase "new road" means a road newly laid out where one was not, and the words "old road" are opposite thereto, and mean one laid out and used, whether long ago or of more recent date. *People v. Griswold*, 67 N. Y. 59, 61.

The words "old road," as used in 1 Rev. St. p. 517, § 81, authorizing the discontinuance of an old road where it has become useless and unnecessary, implies a road for a time open to the public for its use, but by change of circumstances, and of local needs and habits of trade and intercourse, losing its usefulness. It does not mean a uselessness existing at the laying out of it. *People v. Griswold*, 67 N. Y. 59, 62.

Extrinsic evidence is admissible, in the construction of a building contract, to show that a clause in it requiring "old style roofing tin," had acquired a peculiar significance in the trade. *Storck v. Mesker*, 55 Mo. App. 26, 35.

**OLD COUNTRY.**

"Old country" is a term in common use to designate a country occupied by civilized man before the American continent was. It plainly means a different country from our country, just as the "old continent" means the continent of Europe as distinguished from our continent. It is both a geographical term and a term in common use to designate a country, and therefore it cannot be used as a trade-mark. *Allen B. Wrisley Co. v. Iowa Soap Co.* (U. S.) 122 Fed. 796, 797, 59 C. C. A. 54.

**OLD METAL.**

In an action on a fire policy against loss on a junk dealer's stock of old metals, etc., it was proper to admit evidence that the phrase "old metals" had acquired a broader signification than belonged to such words ordinarily, and to permit plaintiff to prove that old metals, in the understanding of the trade, included old rubber and old glass. *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277.

**OLDEST IN OFFICE.**

Hill's Code, § 2601, providing that the "oldest in office" of the school directors present shall be chairman of all school meetings, means the director who has held office for the longest time under an election. *State v. McKee*, 25 Pac. 292, 293, 20 Or. 120.

**OLEINE.**

In *Tilghman v. Proctor*, 102 U. S. 707, 26 L. Ed. 279, the court said: "It was discovered by Chevreul, an eminent French chemist, as early as 1813, that ordinary fat, tallow, and oil are chemical compounds consisting of a base which has been termed glycerin, and of different acids, termed generally fat acids, but specifically stearic, margaric, and oleic acids. These acids, in combination severally with glycerin, form stearin, margarin, and olein. They are found in different proportions in the various neutral fats and oils; stearin predominating in some, margarin in others, and olein in others. When separated from their base (glycerin), they take up an equivalent of water, and are called free-fat acids." *Tilghman v. Proctor*, 8 Sup. Ct. 894, 895, 125 U. S. 136, 31 L. Ed. 664.

**OLEOMARGARINE.**

Oleomargarine is a product or compound made wholly or partly out of any fat, oil, or oleaginous substance. *Cook v. State*, 20 South. 360, 362, 110 Ala. 40.

The term "oleomargarine" is used to designate compounds resembling butter in ap-

pearance and flavor, put on the market as a substitute for it. A statute requiring oleomargarine to be distinctly marked is within the police power of the state. *Butler v. Chambers*, 30 N. W. 308, 809, 36 Minn. 69, 1 Am. St. Rep. 638.

The word "oleomargarine," as defined in section 4 of Act May 16, 1894 (91 Ohio Laws, p. 274), does not include butter made from pure milk or cream without any adulteration, though it may be deficient in butter fats. *State v. Ransick*, 56 N. E. 1024, 1025, 62 Ohio St. 283.

Oleomargarine is usually made of leaf lard and beef fat, and churned in milk and cream, or milk, cream, and butter, to give it flavor, with the vegetable dye annatto; and a product known as "fruit of the meadow," which is composed of leaf lard and beef fat bathed in salt ice water for the purpose of taking away the fat and lard odor, and containing no mixture of cream, milk, or butter to give it a butter flavor, and no coloring matter to give it a butter appearance, is not oleomargarine, and is not taxable as such under Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228]. *Braun & Fitts v. Coyne* (U. S.) 125 Fed. 331.

For the purpose of the statutory provisions relative to the sale of oleomargarine, the word "oleomargarine" shall, in addition to its ordinary meaning, include "butterine," "imitation butter," and any article, substance, or compound made in imitation or semblance of butter or as a substitute for butter, and not made exclusively and wholly of milk or cream, or containing any fats, oils, or grease not produced from milk or cream. Rev. Laws Mass. 1902, p. 547, c. 56, § 35.

For the purposes of an act relating to oleomargarine, certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter. U. S. Comp. St. 1901, p. 2228.

## OLOGRAPHIC WILL.

See "Holographic Will."

## OLOGY.

"Ology" is derived from a Greek word which means a discourse or treatise, and in the English language it is used as a termination of the name of a science, or of the subject indicated by the prefix. *Stockham v. Western Union Tel. Co.*, 63 Pac. 658, 659, 10 Kan. App. 580.

## OMISSION.

See "Willful Omission."

The term "omission or mistake" in the statute giving the court power in any stage of the proceedings to permit amendments by changing or adding the name or names of any party plaintiff or defendant, whenever it shall appear to them that a mistake or omission has been made in the name or names of any party, means "something done or left undone in the bringing of the suit, that will prevent a trial of the cause upon its merits." *McLoney v. Edgar*, 7 Pa. Co. Ct. R. 27, 29.

Failure to appoint commissioners for more than seven years is an "omission to appoint," within the meaning of Pub. St. c. 44, § 59, providing that the omission to appoint commissioners to allow claims against the estate of a deceased person will not prevent the prosecution of the claims against the executor, etc. *Wilkinson v. Winne's Estate*, 15 Minn. 159, 167 (Gil. 123, 128).

The meaning of the word "omissions," in a building contract which provides that if the owner, at any time during the progress of certain buildings, desires any alterations, deviations, additions, or omissions, he shall be at liberty to do so, and the same shall in no way affect or make void the contract, but will be added to or deducted from the contract, as the case may be, is limited to things which, upon the conditions specified, may be entirely left out of the building, and does not extend to anything within the specifications which the owner may elect to take off the contractor's hands and perform himself. *Shaver v. Murdock*, 36 Cal. 293, 296.

Code, § 1900, making it criminal for public officers to willfully "omit or neglect to discharge" any of the duties of their office, will be construed not to include the acts of the county commissioners in auditing accounts for and receiving a greater amount of mileage than was due them. *State v. Norris*, 16 S. E. 2, 111 N. C. 652.

### As concealment.

"Omission," as used in a policy of insurance which contained a condition that any omission to make known every fact material to the risk should avoid the policy,

is equivalent to "concealment." *Rumsey v. Phoenix Ins. Co.* (U. S.) 1 Fed. 396, 398; *Ramsey v. Same* (U. S.) 2 Fed. 429, 431.

#### As error or mistake.

Act 1854, providing that notwithstanding any mistake in the name or names, or omission to name the real owner, an assessment shall be valid, etc., does not mean an entire omission of the owner's name, but means a mistaken name or the substitution of a wrong owner for the real owner. *Tindall v. Vanderbilt*, 33 N. J. Law (4 Vroom) 33, 39.

"Omission," as used in Rev. St. c. 6, § 142, providing that any error, mistake, or omission by the assessors, collector, or treasurer shall not render the tax void, but any person paying such tax may bring his action against the town, and recover the sum not raised for a legal object, should be construed in connection with the words "error" and "mistake," which precede it, and be interpreted with reference to the rule of *ejusdem generis*. It was intended to signify an absence of the requisite formalities in assessments and commitments, and a failure to observe the regulations of the statute which were intended to promote method, system, and uniformity in the mode of proceeding. It was clearly never in the contemplation of the Legislature that it would be extended to apply to cases of omission to include in the assessment all the property which ought to be taxed. *Emery v. Inhabitants of Sanford*, 43 Atl. 116, 118, 92 Me. 525.

#### OMIT.

The term "omit," in an insurance policy providing that, if insured shall omit to communicate any circumstances which are material to the risk, the insurance shall be of no force, has reference solely to the time when the insurance is effected, and therefore the policy is not avoided by the subsequent omission of the insured to notify the company that the risk has become more hazardous by reason of a more hazardous occupation being carried on therein. *Pim v. Reid*, 6 Man. & G. 1, 13.

"Omission to make known," as used in a policy of fire insurance, providing that it should be void for "omission to make known a fact material to the risk," cannot be construed to include a failure to make a full disclosure of the insured's interest in the premises when he applied for insurance. *Ramsey v. Phoenix Ins. Co.* (U. S.) 2 Fed. 429, 431.

The words "omit to provide" in Civ. Code Cal. § 1307, providing that when any testator omits to provide in his will for any child, etc., means simply an omission to

make provision in the will, and has no reference to the pecuniary value of such provision. In *re Callaghan's Estate*, 119 Cal. 541, 51 Pac. 860. Any provision which afforded evidence that the child had not been forgotten is sufficient to prevent the application of the statute relating to pretermitted children. The statute not being intended to produce equality or diminish the power of the testator, but merely to regulate its exercise, a vested remainder carrying with it a vested right to property, though postponing its actual enjoyment, does not show an omission to provide for the child to whom it is devised. *Allison v. Allison's Ex'rs* (Va.) 44 S. E. 904, 917, 63 L. R. A. 920.

#### OMNIBUS.

An omnibus is a very large kind of coach, "which serves to carry passengers, newspapers, and furniture." *Cincinnati, L. & S. Turnpike Co. v. Neil*, 9 Ohio (9 Ham.) 11, 13.

An ordinance providing for the licensing of omnibuses, or vehicles in the nature thereof, applies to passenger street railway cars, as they are omnibuses, or, if not, they are vehicles in the nature of omnibuses. They are open to all and intended for all, and the change of form from that of anything known when the act of assembly was passed is not a change in the nature of the vehicle. In one city, at least, of Europe, large conveyances intended for indiscriminate public use run sometimes upon a railroad track and at other times on the common pavement. The form of the wheels or the character of the roadway over which a vehicle runs does not determine its nature so much as do the uses to which it is put and for which it was designed. *Frankford & P. Pass. Ry. Co. v. City of Philadelphia*, 58 Pa. (8 P. F. Smith) 119, 125, 98 Am. Dec. 242.

#### OMNIBUS BILL.

Bills of a multifarious character are not inappropriately called "omnibus bills." *Parkinson v. State*, 14 Md. 184, 193, 74 Am. Dec. 522.

Bills joining a number of different subjects in one, thereby putting the executive under compulsion to accept some enactments that he cannot approve, or to defeat the whole, including others that he thinks desirable or even necessary, are popularly called "omnibus bills." *Commonwealth v. Barnett*, 48 Atl. 976, 977, 199 Pa. 161, 55 L. R. A. 882.

The term "omnibus bills" is used to designate legislative bills which include in one act various separate and distinct matters.

Yeager v. Weaver, 64 Pa. (14 P. F. Smith) 425, 428.

### OMNIBUS COUNT.

An omnibus count, in the law of pleading, is a count which combines in one all the money counts, with one for goods sold and delivered, work and labor, and an account stated. It is indorsed by Mr. Chitty in his work on pleading in volume 1, pp. 343, 349, and approved in Webber v. Tivill, 2 Saund. 122, and Inhabitants of Cape Elizabeth v. Lombard, 70 Me. 396, 400. Griffin v. Murdock, 34 Atl. 30, 88 Me. 254.

### OMNIBUS LINE.

"'Omnibus line' means a line of coaches for the carriage of passengers and their baggage." Parmelee v. McNulty, 19 Ill. (9 Peck) 556, 557.

### ON—UPON.

See "And so on."

The meaning of the word "upon" in any particular case must depend on the circumstances. In agreements to do a certain thing upon the happening or the doing of an act, it sometimes means before, sometimes concurrently, sometimes after. Scott v. Parker, 1 Adol. & E. (N. S.) 809, 813.

The word "upon" may mean at a certain time or before or after it. In re Hofmann (Pa.) 14 Wkly. Notes Cas. 563, 565 (citing Reg. v. Humpherey, 10 Adol. & E. 335).

The statement in a contract of sale that the above cargo "is accepted on the report and samples of" a certain firm amounts to a warranty that the bulk was equal to the report and samples, and not merely a representation that the report was a genuine report of such firm and the samples taken by them. Russell v. Nicolopulo, 8 C. B. (N. S.) 362, 367.

An act giving a lien for labor or work done on a railroad does not include materials furnished and work and labor done in laborers' machine shops upon locomotive engines. Chattanooga, R. & C. R. Co. v. Evans (U. S.) 66 Fed. 809, 818, 14 C. C. A. 116.

Webster defined the word "on" as meaning, among other things, in reference or in relation to; and hence where plaintiff let a contract to one M. to do the stone work on a building, providing for monthly payments not to exceed 80 per cent. of the estimated value of the work "performed on the building," the contract should be construed as meaning that payments to M. should be based on the stone prepared for the building, as well as that actually put in. Smith

v. Molleson, 26 N. Y. Supp. 653, 658, 74 Hun. 606.

### Along synonymous.

"Upon," as used in Laws 1890, c. 565, § 4, permitting a railroad company to construct its road across, along, or upon any highway, means only a casual or incidental occupation and use of the highway, and does not authorize a company to build its entire railway along the highway. Burt v. Lima & H. F. R. Co., 21 N. Y. Supp. 482, 483.

"Along and upon," as used in Code 1887, c. 54, § 50, relating to the use of public streets by railroad companies, means along in the street, at, above, or below the common level of the existing or changed surface of the street, according as the particular facts and circumstances may require, but does not authorize an occupancy by the railroad, for its exclusive use, of the entire street, or of such considerable portion of it as would substantially prevent the use of it by the public. The word could not mean "along the side of the street," because such meaning would confer no right whatever in respect to the street, but would leave the railroad to make its way through adjoining lots owned by private individuals without the consent of the city or any aid of the statute. Arbenz v. Wheeling & H. R. Co., 10 S. E. 14, 17, 33 W. Va. 1, 5 L. R. A. 371.

"On," "over," and "along," as used in an ordinance authorizing a railroad company to construct a switch on, over, and along a certain alley, are all synonymous, and the word "along" does not necessarily mean "by the side of." We say "the troops marched along the highway," by which we mean that they marched on or over, not by the side of it. Heath v. Des Moines & St. L. Ry. Co., 15 N. W. 573, 574, 61 Iowa, 11.

"Upon," within the meaning of Laws 1899, c. 152, § 2, declaring that no bicycle sidepaths shall be constructed upon or along any regularly constructed or maintained sidewalk, is synonymous with the word "along" as so used, the provision being intended to prevent the appropriation of any portion of a regularly constructed sidewalk for a bicycle path, and not to forbid the construction of a bicycle path at the side of or adjoining any such sidewalk. Ryan v. Preston, 66 N. Y. Supp. 162, 163, 32 Misc. Rep. 92.

### As as soon as.

"Upon receipt thereof," in a covenant to pay over certain proceeds upon receipt thereof, means as soon as such proceeds are realized and the covenantor has power to receive them, regardless of whether he receives them in fact, it being his duty to collect them. Smith v. Nesbitt, 2 Man., G. & S. 286, 287.

**As across.**

Gen. St. c. 64, § 2, 'providing that incorporated telegraph companies may, under the provisions of certain sections, construct lines of electric telegraph upon the highways and public roads, etc., includes crossing a way by the wires. *Banks v. Highland St. Ry. Co.*, 136 Mass. 485, 486.

**Actual contact.**

The word "upon" does not always, in legal or other phrase, import actual contact; so the word "upon," as used in a declaration alleging that defendant unlawfully and negligently drove its locomotive engine upon the plaintiff, does not necessarily import actual contact, and therefore there is no variance between the allegation and the proof showing that the train, without signal, ran at a high rate of speed very close to plaintiff's horse and wagon, thereby frightening the horse, though not actually striking either the horse or wagon. *Beyel v. Newport News & M. V. R. Co.*, 84 W. Va. 538, 546, 12 S. E. 532.

**Adjacent.**

The words "in and on the alley," in a declaration averring that plaintiff's injury resulted from an excavation in and on an alley, while taken in the strictest sense, would not cover the case if the excavation were shown to be adjacent to, and immediately along the side of, the alley, yet, taken in the ordinary acceptance of the phraseology, they would. We speak of a town or city as situated on a lake or river. The subject-matter defines the language, so that everybody understands at once that the place is on the bank or shore of the lake or stream—is hard by or adjacent to it; so that in the present instance the language of the declaration, especially when taken in connection with the other descriptive circumstances, fairly means that the excavation was along the side of and adjacent to the alley, just as the church would be referred to as situated on the alley, or on Church street, yet no one understanding it to be anywhere but adjacent to the street or alley, or along the side of one or the other. *Niblett v. City of Nashville*, 59 Tenn. (12 Heisk.) 684, 686, 27 Am. Rep. 755.

In the phrase "upon, along, or off the Atlantic seaboard," the word "upon" refers to the waters adjacent to and easily reached from the coast line. It relates to any given spot or place. *American Fisheries Co. v. Lennen* (U. S.) 118 Fed. 869, 873.

**As after.**

"On," as used in a statutory provision that the court may grant alimony on any such decree, means "after." The word is an elastic expression, and does not exclude the

idea of after. *Bradley v. Bradley*, 3 Prob. Div. 47, 50, 32 Moak, Eng. R. 36, 39.

A covenant in a lease providing that on the expiration of the said lease the lessee would deliver up the possession of the premises to the lessor should not be construed as contemplating any other thing than the full term for keeping the covenant. *Reed v. Snowhill*, 16 Atl. 679, 680, 51 N. J. Law (22 Vroom) 162.

As used in St. 59 Geo. III, c. 134, § 139, providing that an order for stopping paths through a churchyard is to be made with consent of two justices, on notice being given in the manner prescribed by St. 55 Geo. III, c. 68, which act provides that the stopping up was to be by an order of two justices, providing that notices were given in the form announced, which form stated that the order had been signed, the words "on notice being given" must, with reference to such an order, be read "after notice given." *Reg. v. Arkwright*, 12 Adol. & E. (N. S.) 960, 966.

"Upon each payment," as used in an agreement and receipt by a pledgee of stock providing that upon each payment by the pledgor a proportionate amount of the shares of stock should be given up to the pledgor, meant that the shares were to be returned after the money was paid—that delivery was to take place on payment and as a result of it. *Scott v. Parker*, 1 Adol. & E. (N. S.) 809, 813.

**As at the time of.**

The word "on," in a will devising property to certain persons on the death of testator's son, was construed to mean at the death of the son or upon the death of the son, and not in the event of the death of the son, and therefore not to imply a contingency requiring the death of the son during testator's life in order to constitute a valid devise to the persons to take at the death of the son. *Cromwell v. Cromwell*, 66 N. Y. Supp. 1063, 1065, 55 App. Div. 103.

"Upon" or "on" the death of a certain party means at the time of, and such a reference to the devolution of an estate points as clearly to the time of the death as the word "after." "Upon" does not imply an estate before the death. *In re Melcher*, 54 Atl. 379, 380, 24 R. I. 575.

The phrase "upon her decease," as used in a will devising property in trust to a person, and in further trust to convey the same during the natural life of the said S. A., from time to time, to such persons, in such portions, and on such considerations as she may in writing bequest, and in further trust, upon her decease, to make such disposition of said property as she may, by any writing of a testamentary character, direct, is used in opposition to the expression in the preceding sen-

tence, "during the natural life of said S. A.," and empowers her, when she comes to die, to give the property by will to whomsoever she pleases. *Weed v. Knorr*, 1 S. E. 167, 173, 77 Ga. 636.

"On," as used in a life insurance policy providing that the assured should be entitled to a paid-up policy after the payment of three annual premiums, on the surrender to the company on or before it shall expire by the nonpayment of the fourth or any subsequent premium, should be construed as referring to the time before and at the expiration of the policy, and not after the expiration. "Before it shall expire" includes all of the time up to the instant of the expiration of the policy by the nonpayment of the premiums, and "on" must, to have any effect, mean the instant of the nonpayment of the premium. *Sheerer v. Manhattan Life Ins. Co. (U. S.)* 16 Fed. 720, 723; *Id.*, 20 Fed. 886.

The words "upon his admission" as used in 9 Geo. IV, c. 17, §§ 2, 3, requiring every person who shall be elected to the office of alderman within one calendar month next before or upon his admission into such office to make and subscribe a certain declaration, mean at the time of his admission, and not within a reasonable time thereafter, so that the authorities who admit him may prescribe the order in which the ceremony forming parts of the admission shall take place. *Reg. v. Humphrey*, 10 Adol. & E. 335.

#### Condition precedent.

Where a contract provides that a payment shall be made on the doing of some particular thing, the word "on" implies that the doing of such thing is a condition precedent to the payment. *Adams v. Williams (Pa.)* 2 Watts & S. 227, 228; *Welch v. Matthews*, 98 Mass. 131.

"On," as used in a contract which provides that on a certain payment one of the parties shall deliver to the other certain stock, means that the delivery is dependent on the payment. *Powell v. Dayton, S. & G. R. Co.*, 12 Pac. 665, 667, 14 Or. 356.

The word "upon," as used in a contract of subscription, "provided that upon such payment there shall be delivered a certificate of stock," etc., indicates a state of dependence; a tender of the stock would be prerequisite to a suit for the subscription. *Courtright v. Deeds*, 37 Iowa, 503, 508.

Under an order giving judgment for plaintiff on a demurrer by the defendant, with leave to the defendant to withdraw his demurrer and plead "on payment of costs," such payment was a condition precedent to the act of pleading. *Sands v. McClellan (N. Y.)* 6 Cow. 582.

In an order setting aside a verdict and ordering new trial "on payment of costs" by

the plaintiff, such payment should be construed to be a condition precedent to any further proceeding in the case, without the performance of which, or until demand and tender, the cause could not be noticed for trial. *Sloan v. Somers*, 18 N. J. Law (3 Har.) 46, 47, 35 Am. Dec. 526.

An order declaring a nonsuit to be set aside "on payment of costs" has no other effect than to impose an obligation on the plaintiff to pay the costs occasioned by his default, and, if he does not, may furnish a good cause for attachment. The payment of costs is not a condition precedent to be performed before the full operation of the order. *Dana v. Gill*, 28 Ky. (5 J. J. Marsh.) 242, 243, 20 Am. Dec. 255.

The plaintiff agreed to supply the defendant with a quantity of bricks upon the following terms: "Terms of payment, four months' account, and at the end of four months a settlement shall be made, and eight months longer will be given on your paying interest on the amount at the rate of 5 per cent.; and, if a further three months is required, it will be given on your paying the current rate of interest on the amount." Held, that the payment of the interest was not a condition precedent to the defendant's having the eight-months and three-months further credit. *Dodd v. Ponsford*, 6 C. B. (N. S.) 324, 333.

"Upon," as used in a will in which certain property is left in trust as follows: "The same is hereby declared to be held in trust for the said R. W. during his life, and for his heirs after his decease, upon the said R. W. complying with and fulfilling certain covenants"—is equivalent to "on condition that." *Little v. Wilcox*, 13 Atl. 468, 474, 119 Pa. 439.

In construing a certificate of deposit payable "on return of this receipt," the court said: "These words do not make it payable upon a contingency, or constitute a condition precedent to any payment. If they did, no recovery could be had without a return of the certificate. This restriction would be implied, if not expressed. It is implied in every promissory note, and there is also an implied exception on account of mistake or accident. When this occurred, courts of equity formerly enforced the obligation upon such terms of indemnity as was deemed just, and now courts of law may enforce it upon required observance of the statutory indemnity." *Frank v. Wessels*, 64 N. Y. 155, 158.

The expression "upon the return of a citation," where it is used in a provision requiring an act to be done in the surrogate's court, relates to the time and place at which the citation is returnable, or to which the hearing is adjourned; includes a supplemental citation issued to bring in a party who ought to be, but has not been, cited; and implies that, before doing an act specified, due

proof must be made that all persons required to be cited have been duly cited. Code Civ. Proc. N. Y. 1899, § 2514, subd. 10.

The word "upon," in a trust declaring certain lands to be held upon fulfilling certain covenants, held to be the equivalent of "on condition that," etc. *Little v. Wilcox*, 13 Atl. 468, 474, 119 Pa. 439.

#### As contiguous or near to.

Where a statute requires certain improvements to be made on the street, the word "on" will be construed to mean at, near, adjacent to. Such is the meaning of the word "on" when used to designate a place. *Hempstead v. City of Des Moines*, 3 N. W. 123, 126, 52 Iowa, 303.

"On the south side of the street" is not equivalent to the expression "south of the street," but, when used as part of the description of a lot, properly refers only to a lot actually bordering on a street on its south side, so that a complaint in ejectment describing the premises sued for as "lot nine, on the south side of O street," is not supported by evidence as to a lot not bordering on the street but south of the street. *Illinois Cent. R. Co. v. Baldwin*, 28 South. 948, 949, 77 Miss. 788.

"On a railroad," as used in a deed describing certain land as lying on the L. & M. Railroad, which land lay near to, but did not border on, the road, meant "near to," and hence the deed was not void for misdescription. *Burnam v. Banks*, 45 Mo. 349, 351.

"On" does not always mean on top of or resting upon, for sometimes, but less frequently, it means contiguous to, as when we say a house on Main street, or a man stood on either side of the house. Hence the word "on," as used in a contract of reinsurance limiting the risk to resin, turpentine, etc., in barrels while awaiting shipment in or on certain warehouses or sheds, creates an ambiguity in the meaning of the policy which the court has to settle. *London Assur. Corp. v. Thompson*, 62 N. E. 1066-1068, 170 N. Y. 94.

The phrase "on the side of the road," as used in a complaint in trespass against highway surveyors for breaking and entering plaintiff's closes and cutting down and destroying his hedges, the statement that the trees were "on plaintiff's farm and on the side of the road" was equivalent to a statement that he was the owner of the "land next adjoining the road." *Jenney v. Brook*, 6 Q. B. 323, 342.

*Sess. Laws 1861*, p. 67, § 1, providing that all persons having claims "on the bank, margin, or neighborhood" of any stream of water, creek, or river shall be entitled to use the water thereof, includes all lands in the

immediate valley of the stream. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 451.

The words "on the western boundary of Iowa," as used in an act of Congress authorizing and requiring the Union Pacific Railroad Company to construct a single line of railroad and telegraph from a point on the western boundary of Iowa, are not technical words, and should be construed in their ordinary signification, which is a point in Iowa at the eastern shore of the Missouri river. It is common usage to speak of the boundary of a state or county as a river, though the legal boundary may be the middle of the river, and particularly when anything has to be constructed on such a boundary, which from its nature must be constructed on dry land, and no one would understand the place of construction as any other than the shore of the river. It is perfectly legitimate and in accordance with everyday usage to say that a house built in Illinois on the eastern shore of the Mississippi stands on the western boundary of the state, though the legal boundary of the state is the midchannel of the river. The company was therefore authorized to construct a bridge across the Missouri, to be used for the purposes of the road as a part of its line. *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 346, 23 L. Ed. 428.

#### As denoting beginning

The word "on," in the condition on a railroad ticket stating that it is good for one continuous passage on and from the date stamped on the back, signifies that it is good for the passage on the day named. *Texas & O. R. Co. v. Powell*, 35 S. W. 841, 842, 13 Tex. Civ. App. 212.

"On," as used in a railroad ticket containing the statement that it is good for one continuous passage on and from the date stamped on the back, was employed for the purpose of connecting the phrase "good for one continuous passage" with the words "date stamped on the back," and the meaning of the word "on," as so used, explains the time at which the passage is to begin. *Texas & N. O. R. Co. v. Demille* (Tex.) 41 S. W. 147, 148; *Demille v. Texas & N. O. R. Co.*, 42 S. W. 540, 91 Tex. 215.

#### As center of highway in boundaries.

Where a conveyance describes land as bounding on or upon the road, highway, or street, without further description, the words "on the road" will be construed to mean the center of the road. *Smith v. Slocumb*, 75 Mass. (9 Gray) 36, 37, 69 Am. Dec. 274; *Peck v. Denniston*, 121 Mass. 17, 19; *Hollenbeck v. Rowley*, 90 Mass. (8 Allen) 473, 475; *Dodd v. Witt* (Mass.) 29 N. E. 475, 476; *Baltimore & O. R. Co. v. Gould* (Md.) 8 Atl. 754, 756; *Hunt v. Brown* (Md.) 23 Atl. 1029; *Trustees of Hawesville v. Lander*, 71 Ky. (8 Bush) 679,



680; *Lee v. Lee* (N. Y.) 27 Hun, 1, 4; *Dunham v. Williams*, 37 N. Y. 251, 252; *Anderson v. James*, 27 N. Y. Super. Ct. (4 Rob.) 35, 37; *Holloway v. Southmayd*, 18 N. Y. Supp. 700, 703, 64 Hun, 632; *Jackson v. Hathaway* (N. Y.) 15 Johns. 447, 453, 8 Am. Dec. 263; *Cochran v. Smith*, 26 N. Y. Supp. 103, 105, 73 Hun, 597; *Fraser v. Ott*, 30 Pac. 793, 794, 95 Cal. 661; *Moody v. Palmer*, 50 Cal. 31, 37; *Buck v. Squiers*, 22 Vt. 484, 489; *Henderson v. Hatterman* (Ill.) 34 N. E. 1041, 1043; *Snider v. Snider* (Pa.) 3 Phila. 153, 159 (citing *Union Burial Ground Soc. v. Robinson* [Pa.] 5 Whart. 18); *Witter v. Harvey* (S. C.) 1 McCord, 67, 71, 10 Am. Dec. 650. But this presumption, like all other presumptions, may be rebutted; and if it plainly appears from the language used and the nature of the property that the grantor meant to limit the grant to the line of the road, and reserve for himself the fee in the roadbed, subject to the use of it by the public as a highway, then, of course, this plainly expressed intention must prevail. *Hunt v. Brown* (Md.) 23 Atl. 1029; *Moody v. Palmer*, 50 Cal. 31, 37.

"Where land is sold bounded on a highway, or upon or along a highway, the thread or center line of the same is presumed to be the limit and boundary of such land, in strict analogy with the case of a stream of water not navigable; and the same rule applies to a private street as well in the city as in the country, opened by the grantor, upon which he sells house lots bounding upon it." *Trustees of Hawesville v. Lander*, 71 Ky. (8 Bush) 679, 680 (citing *Washb. Real Prop.* p. 636). But this doctrine does not extend to a case where the courses and distances in a description of land brings it only to the north side of a road, and therefore the land does not extend in such cases to the middle of the highway. *Jackson v. Hathaway* (N. Y.) 15 Johns. 447, 453, 8 Am. Dec. 263.

By a general and now well established rule of construction, a boundary "on the country road" includes the fee in the land to the middle of the road, if owned by the grantor, even though the deed fixes the call as beginning on the southerly side of the road. *O'Connell v. Bryant*, 121 Mass. 557.

But when it appears that the road was in fact owned by another, the terms of the deed are satisfied by a title extending to the roadside. *Dunham v. Williams*, 37 N. Y. 251, 252.

Where a deed describes the land as bounded as follows: "Commencing on the road" at a certain point; thence west, etc.—the presumption is that the measurements commenced from the side of the road instead of the center; but the acts of the parties contemporaneous with the delivery of the deed in fixing the monument and fencing the lot as if the measurements commenced from the center of the road are admissible in evi-

dence upon the question of construction to be given the deed. *Dodd v. Witt*, 29 N. E. 475, 139 Mass. 63, 52 Am. Rep. 700.

Where land is conveyed and described by a lot number as indicated on a map, and the land fronts on a road or highway, the boundary will be the center, and not the side, of the road. *Lee v. Lee* (N. Y.) 27 Hun, 1, 4.

So a deed conveying land by metes and bounds, where one of the boundary lines is described as extending to a post standing on the south side of the road, thence bounding the road north, 87 degrees west, establishes a boundary at the side, and not at the center of the highway. *Hunt v. Brown*, 23 Atl. 1029, 75 Md. 481.

#### As center of stream in boundaries.

A boundary "on a stream" or "by a stream" or "to a stream" includes the flats, at least to the low-water mark, and in many cases to the middle thread of the river. *Thomas v. Hatch* (U. S.) 23 Fed. Cas. 946, 949.

The words "on a stream," when used to designate a boundary of land on a nonnavigable stream, will be construed to mean the thread of the stream. *Indiana v. Milk* (U. S.) 11 Fed. 389, 395.

In construing a deed describing certain land as bounding on a brook, Chief Justice Shaw says: "The court are of the opinion that this description 'bounding on' the brook, in the absence of other words to control and modify the natural and legal effect of such description, carried the grant to the center of the brook only, and did not include the entire bed of the brook. In some of the earlier deeds this brook is described as a stream, dividing the land from that on the other side. We say the natural construction—the construction most likely to conform to the intent of the parties—because such division would be most beneficial to both parties by affording to both a watering place for cattle, the use of the water for irrigation and other useful purposes." *Newhall v. Ireson*, 79 Mass. (13 Gray) 262, 263.

"On the canal" may be used to designate the line of the excavation to the line of the water, or the water course generally, according to circumstances; and where, in an exchange of land between farmers, the expression was used to indicate a permanent boundary between them, it carried the boundary to the center of the canal. *Agawam Canal Co. v. Edwards*, 36 Conn. 476, 501.

#### As grant of right of way rather than title.

The word "upon," when used in a grant of a right of way "in, upon, and through lands of U.," speaks an intent to concede a mere passage, and not to convey title to the

land itself. *Uhl v. Ohio River R. Co.*, 41 S. E. 340, 341, 51 W. Va. 106.

**As in case of.**

As used in a will providing that, upon the death of either of the testator's children leaving issue, the principal of such child's share should go to and be distributed among the issue of such deceased, "upon" is equivalent to the phrase "in case of." Appeal of Roberts, 59 Pa. (9 P. F. Smith) 70, 98 Am. Dec. 312. It is intended to fix the time of the vesting of devises by deceased children of their shares. Appeal of Conrow (Pa.) 3 Atl. 13, 14.

**As on surface of.**

"The court in *Arbenz v. Wheeling & H. R. Co.*, 10 S. E. 14, 33 W. Va. 1, 5 L. R. A. 371, in holding that a statute giving a railroad company the right to construct its railway across, along, or upon any street, highway, road, or turnpike, but requiring such corporation to restore the street, highway, road, or turnpike to its former state, or to such state as not to have impaired its usefulness, did not preclude the railroad company from making a cut or excavation in the street in such a manner as to appropriate a portion of the street to its exclusive use, if the excavation did not occupy the entire street or such substantial portion thereof as would substantially prevent the use of the street by the public as a highway, said, in answer to the contention that by the use of the words 'across, along, or upon,' the Legislature intended to limit the road to a surface use of the street in a manner not precluding the use of the entire street by the public, that the word 'upon' in the statute does not necessarily mean upon the common grade of the street, and that the words 'upon and along' must be construed with reference to the context and the subject in controversy. They must be understood to mean along, in the street, at, above, or below the common level of the existing or changed surface of the street, according as the particular facts and circumstances may require." *Cleveland, C., C. & St. L. R. Co. v. City of Cincinnati*, 1 Ohio Probate, 269, 276.

**As over.**

The word "on," as used in the compact entered into between Pennsylvania and New Jersey providing for jurisdiction over offenses committed on the Delaware river, is used in the sense of "over." *Commonwealth v. Hoyt*, 22 Pa. Co. Ct. R. 414, 416.

In the case of *Milburn v. City of Cedar Rapids*, 12 Iowa, 246, in construing a statute authorizing railroad corporations to raise or lower any turnpike, plank road, or other way for the purpose of having their railroad pass over or under the same, it was held that in the sense of the statute the words "over and upon" are synonymous, and in-

clude the idea of crossing highways on the surface thereof, and also running upon them lengthwise. *Gear v. C. O. & D. R. Co.*, 43 Iowa, 83, 84; *City of Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 455, 472.

**As within a reasonable time after.**

"On," as used in Gen. St. c. 25, § 6, providing that it shall be the duty of commissioners, on receiving the report of viewers for the opening of a road, to cause the same to be read before their meeting, etc., should not be construed to mean "immediately on," but to mean "on or within a reasonable time thereafter," so that the commissioners are not compelled to take final action at their first meeting, but may postpone such action until some subsequent meeting. *Masters v. McHolland*, 12 Kan. 17, 25.

**Crossing.**

Within the meaning of Const. art. 3, § 18, and Laws 1890, c. 565, §§ 90, 91, prohibiting the construction or operation of street railroads upon streets or highways without the consent of the local authorities, a street railroad crossing a street or highway is constructed upon such street or highway as well as when it follows the course thereof. A road across a railway is built upon it. In *re Syracuse & S. B. Ry. Co.*, 68 N. Y. Supp. 881, 882, 33 Misc. Rep. 510.

The statutory authority given by Laws 1899, c. 712, authorizing the taxation of special franchises of railroads situated in, upon, under, or above any highway, includes the franchise of a railroad in a highway crossing, though the word "across" was in the original draft of the act, and omitted on its final passage, as the word "upon" had been formally construed to include a highway crossing when used in connection with it. Judge Cullen, in *Osborne v. Jersey City & A. Ry. Co.* (N. Y.) 27 Hun, 589, in considering the question whether an order of the Supreme Court was necessary to authorize the construction of a railroad across a highway, and in construing the act of 1864, which provided that nothing therein contained should be construed to authorize the construction upon and along any highway without an order of the Supreme Court authorizing the same, said: "We think that wherever a railroad is constructed on the surface of the highway it is along and upon so much of the highway as is occupied by it." In the case of *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728, the Court of Appeals was called upon to construe an act which prohibited the building of a railroad in, upon, or along any or either of the streets or avenues of the city of New York, except under the authority and subject to such regulations as the Legislature might thereafter provide. It is urged that this act only prohibited the building of a railroad through a portion of the length of the street,

but did not apply to the crossing of the street. The court refused to consent to such a construction of the statute, and Judge Peckham says: "If the road were built through the length of the street, its location might be easily described by the use of any one of the three words contained in the statute—'in,' 'upon,' or 'along' such street. But to describe a road which simply crossed a street as being built along such street would be using language neither appropriate nor exact. To say of such a road that it would be in or upon that street at the point where the road crossed it would be both appropriate and exact. There is a difference in the meaning of these three words as used in the statute, and some effect should be given to such difference. If their meaning be construed to simply prohibit a railroad along the length of the street, no effect whatever is given to this difference. The words used are certainly apt to describe a railroad which crosses the street. Such railroad is plainly for that distance both in and upon the street which it crosses. If not in or upon it at that point, where is it? No description of its whereabouts at that particular point is better than to say that it is in or upon the street where it crosses. It is sufficient, and it is true. It is not necessary that the railroad should pass along the surface of the street in order to be in or upon it." *New York, L. & W. Ry. Co. v. Roll*, 66 N. Y. Supp. 748, 751, 32 Misc. Rep. 321.

### ON OR ABOUT.

The phrase "on or about" a certain day is not a sufficiently definite description as to time and place of the occurrence of an accident to constitute a compliance with Laws 1889, c. 440, providing that no action shall be maintained against a village unless the claim shall have been presented and notice of the time and place at which the injuries were received filed with the village clerk. *Lee v. Village of Greenwich*, 63 N. Y. Supp. 160, 161, 48 App. Div. 391.

"On or about," as used in a finding that a building on which a mechanic's lien was claimed was completed on or about a certain date, is a relative term, and, the filing of the notice of a mechanic's lien being required to be made within a certain number of days after the completion of the building, it is uncertain and indefinite. "On or about" is sufficiently definite in certain connections, but in cases of this kind, where the right of a person depends upon his doing a particular thing within a definite number of days after a certain event, it is necessary for him to allege and prove that the acts were performed within the time required by law. *Cohn v. Wright*, 26 Pac. 643, 89 Cal. 86.

The use of the words "on or about" in a statement filed by the claimant of a mechanic's lien with the clerk of a district

court in order to preserve his lien, that the contract under which he claims was made on or about a certain day, does not preclude the claimant, in a contest with a mortgagee of the property on which the lien is claimed, from introducing evidence showing the exact date of the contract. *Mitchell v. Penfield*, 8 Kan. 186, 188.

A statement for mechanic's lien that certain materials were furnished "on or about" the 1st day of July, though somewhat indefinite and uncertain as to time, will not be held to extend as far back as May 24th. *Santa Monica Lumber & Mill Co. v. Hege* (Cal.) 48 Pac. 69, 71.

A contract for the sale of oil provided that the same was to be sent by a vessel sailing "on or about" the 15th of March. Held, that such term, referring to the time of sailing, did not constitute a warranty, and the buyer was therefore not discharged from his obligation to pay for and receive the oil because the vessel did not sail until March 26th. *Hawes v. Lawrence*, 4 N. Y. 345, 346.

The expression "on or about" a certain date is held to be just as consistent with a day or two after the date as before. *Paine v. State Land Office Com'r*, 66 Mich. 245, 248, 33 N. W. 491.

The words "on or about," in a lease of a mill privilege, consisting of land, water power, etc., and giving the lessee the privilege of laying logs, boards, and other lumber on or about said privilege, does not operate as a permission for the lessee to occupy lands of the lessor lying outside the mill privilege. *Thompson v. Banks*, 43 N. H. 540, 541.

### In civil pleadings.

A complaint in an action on a fire policy, alleging that plaintiff gave notice to defendant of the loss within 60 days after the fire, as required by the policy, is not rendered sufficient, as a compliance with the policy, by the fact that in alleging the date of the fire and date of the giving of notice it states that such events occurred "on or about" certain dates. *National Wall Paper Co. v. Associated Manufacturers' Mut. Fire Ins. Corp.*, 70 N. Y. Supp. 124, 126, 60 App. Div. 222.

Where a statute required a claim for lands to be presented within six months, a bill alleging that the papers were filed "on or about" the day when the time of presentation was over should be construed as rendering the pleading defective, the words being just as consistent with a day or two after as before. *Paine v. State Land Office Com'r*, 33 N. W. 491, 493, 66 Mich. 245.

### In indictments or informations.

Where it is necessary to define the time of the commission of an offense in an indictment, the use of the term "on or about" a certain day rendered the indictment void for

uncertainty. *United States v. Winslow* (U. S.) 28 Fed. Cas. 737, 738; *United States v. Crittenden* (U. S.) 25 Fed. Cas. 694.

Cr. Prac. Act, § 166, declares that the precise time of the commission of an offense need not be stated in the indictment, but it is sufficient if shown to be before the finding of the indictment, and within the period of limitations, except where time is an indispensable ingredient of the offense. Held, that the use of the words "on or about" a certain day within the period of limitations, defining the time of the commission of a rape, did not render the indictment bad for uncertainty. *State v. Thompson*, 27 Pac. 349, 350, 10 Mont. 549.

Where an information in a prosecution for murder alleged that on or about a certain time the murder was committed, the words "or about" should be treated as without meaning and as surplusage, and hence "on or about" August 11, 1882, should be construed to mean August 11, 1882, and was sufficiently definite. *State v. Harp*, 3 Pac. 432, 433, 31 Kan. 496.

The term "on or about," used in a complaint for the illegal sale of intoxicating liquors in the allegation of the time of the sale, renders the complaint void for uncertainty. Nor can such words be treated as surplusage and stricken out, for, if that were allowed, the complaint would allege an exact day, which the allegation appears was not the intention. *State v. Baker*, 34 Me. 52, 53.

The term "on or about," as used in a warrant alleging that the offense was committed on or about January 2, 1891, did not render the allegation as to time indefinite, so as to require the proceedings to be quashed, where the information based on the warrant alleged that the crime was committed on January 2, 1891. *People v. Flock*, 59 N. W. 237, 100 Mich. 512.

The use of the phrase "on or about" in an indictment charging defendant with committing the offense of arson on or about a specified date does not render the information fatally defective for uncertainty, since Comp. Laws, § 7245, provides that the precise time when an offense is committed need not be specified in the indictment, except when time is a material ingredient. *State v. McDonald* (S. D.) 91 N. W. 447.

When, with reference to a particular day, the words "on or about" are used in an indictment or information, the last two words shall be regarded as mere surplusage. *Horn's Rev. St. Ind.* 1901, § 1738.

#### ON OR ABOUT THE PREMISES.

See "On the Premises."

"On or about his premises," as used in Code, § 4204, providing a penalty for the

sale of liquor by any person on or about his premises without first procuring a license therefor, etc., includes a sale from a jug which defendant had in a field where he was working with others, more than a mile from his house, and in the plantation of another person over which he had no control. *Powell v. State*, 63 Ala. 177.

"On or about," in Code 1886, § 4036, prohibiting the sale of liquor to be drunk on or about the premises of the seller, characterizes a place four or five steps from defendant's store, although in a public highway. *Whaley v. State*, 6 South. 380, 381, 87 Ala. 83.

#### ON OR BEFORE.

"On or before," as used in a contract entitling a party to a conveyance of a tract of real estate on the payment of a certain sum on or before a certain date, is to be construed as authorizing a payment on any date before the specified day. *Wall v. Simpson*, 29 Ky. (6 J. J. Marsh.) 155, 156, 22 Am. Dec. 72.

"On or before," as used in a notice by a comptroller requiring a bank to pay to the treasurer of the state, on or before the 1st day of January then next, one-half of 1 per cent. of its capital stock, such sum to continue payable each year until the safety fund should be reimbursed, means that the payment may be made any indefinite time, no matter how long, before January 1st, and necessarily implies that the ground or cause of payment, the consideration or indebtedness, was, prior to the time, complete. *People v. Walker* (N. Y.) 21 Barb. 630, 643.

"On or before," as used in a policy declaring that it shall determine if the premium is not paid on or before the day fixed, means at any time in advance of the instant of the expiration of the policy. *Sheerer v. Manhattan Life Ins. Co.* (U. S.) 20 Fed. 886, 888.

The term "on or before" in a teacher's contract, requiring payment on or before the end of the term, may, as a matter of strict interpretation, only require payment at the end of the term; but where the compensation is rated in the contract by the month, and it appears that it was understood between the teacher and the majority of the board that it should be paid monthly, and that such is the common and convenient usage, we are not prepared to say that the refusal of payment by the school director might not be regarded, if willful or proceeding from some motive beyond a desire to do his duty, as an abuse deserving censure. *Geddes v. Town Board*, 9 N. W. 431, 432, 46 Mich. 316.

A notice by a landlord to his tenant to move "on or before" the date when the lease

expres means that the landlord will insist on his legal right to have the tenant move out before the last day of the term, and is not a continuing offer to accept a surrender of the existing lease whenever the tenant elects to make it. *Koehler v. Scheider*, 10 N. Y. Supp. 101, 102, 16 Daly, 235.

#### **As at or before.**

Within a certain period "on or before" a day named, and "at or before" a certain day, are equivalent terms, and the rules of construction apply to each alike. *Leader v. Plante*, 50 Atl. 54, 95 Me. 339, 85 Am. St. Rep. 415.

#### **As between.**

"On or before," as used in the return of surveyors of a public road, reciting that the road should be opened on or before the 1st day of September next, in their natural, legal, and correct construction mean that the surveyors shall open the road between the day of the return and the 1st day of September. In re Public Road in Middlesex and Monmouth Counties, 4 N. J. Law (1 Southard, 290, 292.

#### **As rendering note nonnegotiable.**

"On or before the day named," as used in a note, did not render the same nonnegotiable by reason of the fact that the date of payment was uncertain, since the day of payment was certain to arrive; for, while it was true the maker might pay sooner if he chose, such option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more, such provision having no effect on the negotiability of a note. *Chicago Railway Equipment Co. v. Merchants' Bank*, 10 Sup. Ct. 999, 1003, 136 U. S. 268, 34 L. Ed. 349.

#### **As giving option as to payment of note.**

Promissory notes due on or before certain dates are due and payable at any time not later than such dates, when the maker may elect to treat them as due. *Burlington Ins. Co. v. McLeod*, 8 Pac. 124, 126, 34 Kan. 189; *Mattison v. Marks*, 31 Mich. 421, 422, 18 Am. Rep. 197.

A note payable on or before a certain day is payable on that day so far as the maker is concerned, and means that he may pay it before if he wishes to, but may put it off until the day named. The use of the words "on or before" does not render the note ambiguous as to its legal effect, or render parol testimony admissible to show that it was to be paid before the day named. *James v. Benjamin*, 72 Ga. 185.

#### **ON ACCOUNT OF.**

"On account of," as used in Act May 12, 1891 (P. L. 54), making moneys due for labor and services accruing within six months

preceding the sale or transfer of the employer's property, on account of insolvency or death of such employer, preferred liens on such property, means by reason of; because of the one or the other. *Brown v. German-American Title & Trust Co.*, 34 Atl. 335, 343, 174 Pa. 443.

An order directing the lessees to pay a certain sum on account of the drawer's share in certain rent, which was to become due at a subsequent date, was equivalent to a direction that the sum should be paid out of the drawer's share of the rent, and constituted a designation of the particular fund out of which the payment was to be made. *Rice v. Porter's Adm'rs*, 16 N. J. Law (1 Har.) 440, 448.

"On account of," used in a receipt, "Received of Capt. E. Smith 50 barrels of provisions on account of K.," did not mean that the provisions had been sold, nor that they were received by the receiptor, on an account due from K., but rather that K. owned the property; and hence parol evidence was admissible to show that the receiptor received the provisions to sell as a commission merchant, and that he sold the same in the usual course of business. *McKinstry v. Pearsall* (N. Y.) 3 Johns. 319.

A policy of insurance on a vessel "on account of ——" is equivalent to a policy "for whom it may concern," and hence, in an action on such a policy, proof aliunde may be given to show the real parties in interest. *Burrows v. Turner* (N. Y.) 24 Wend. 276, 278, 35 Am. Dec. 622.

#### **ON ACCOUNT OF COLOR.**

Act Cong. 1863, giving certain privileges to the Alexandria & W. R. Co., provided that "no person shall be excluded from the cars on account of color." Held, that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars, and that the company's providing cars assigned exclusively to colored people, although such cars were as good as those assigned exclusively to white persons, and in fact the very cars which were at a certain time assigned exclusively to white persons, was not a compliance with the provision. *Washington, A. & G. R. Co. v. Brown*, 84 U. S. (17 Wall.) 445, 452, 21 L. Ed. 675.

#### **ON ACCOUNT OF FREIGHT.**

Where a policy insured the owner of a ship "on account of freight" of the cargo loaded on her, such interest was thereby sufficiently described, and operated to insure the owner against liability to repay to the charterer money advanced by him in part payment of the freight which the ship was to earn for transportation of the goods loaded

on her, notwithstanding the word "freight," used in its technical sense, would not include such money freight, as such does not become due until completion of the voyage and delivery of the goods. *Hall v. Janson*, 4 Bl. & Bl. 500, 508.

Where the owners of a brig procured plaintiffs to load the same with a home cargo at a port to which the captain had been forced, and the charterers furnished the captain with money to cover disbursements under an arrangement that such advances were furnished on account of freight which the vessel was to earn, the charterer's interest in the funds so furnished was properly described in a policy issued to them as "advance on account of freight." *Wilson v. Martin*, 11 Exch. 684, 695.

#### ON ACCOUNT OF WHOM IT MAY CONCERN.

See "Whom It May Concern."

#### ON AN EQUAL FOOTING.

See "Equal Footing."

#### ON ARRIVAL.

The words "on arrival," in an instruction to a consignee to sell goods on arrival, do not mean that the property consigned must be sold within one minute or five minutes after its arrival, but just as soon thereafter as it can be sold without a manifest sacrifice; and the length of time depends upon the circumstances of the case, it being for the jury to say what is a reasonable time. *Burnard v. Voss*, 8 Ohio Dec. 221.

An instruction to a factor to sell goods on arrival is to be construed as requiring an immediate sale on the arrival of the goods if possible, even though for less than the market price. *Evans v. Root*, 7 N. Y. 186, 188, 57 Am. Dec. 512.

Where an agreement was for the delivery of goods on arrival, to be delivered with all convenient speed, "but not to exceed a given day," arrival in time for delivery on the day given was a condition precedent. *Alewyn v. Pryor, Ry. & M.* 406.

#### ON BAIL.

When a defendant is said to be "on bail" or to have "given bail," it is intended to apply as well to recognizances as to bail bonds. Code Cr. Proc. Tex. 1895, art. 307.

#### ON BEHALF OF.

The words "on behalf of," in an affidavit for garnishment, stating that "A. B., on behalf of C. B., being duly sworn on oath,

says," etc., is not a part of the affidavit which is verified by the oath of the party making it. *Miller v. Chicago, M. & St. P. Ry. Co.*, 17 N. W. 130, 131, 58 Wis. 310.

A contract by certain parties "on behalf of" others prima facie imports that they made the contract only as agents, and cannot be said to be ambiguous. *Lewis v. Nicholson*, 18 Adol. & E. 503, 512.

"On behalf of," as used in a contract stipulating that it was agreed "between J., of the first part, and C., of the other part, on behalf of the G. Ry. Co.," and signed by J. and by C., did not constitute a contract on the part of the principals alone, but the contracting party was bound notwithstanding the use of the words "on behalf of." *Cooke v. Wilson*, 1 C. B. (N. S.) 153, 162.

#### ON BOARD.

See "Take on Board."

A contract for the transportation of flour from Niles to Buffalo, by which a carrier agreed to deliver the flour from Niles "on board" at Detroit for a certain amount, cannot be construed to mean that the carrier would have the property so removed from the cars into their depot at Detroit in the capacity of forwarding merchants or warehousemen, and in process of their usual custom see that the property was put on board some suitable water craft for its transportation East, but it must be construed to mean that the carrier acted as a common carrier until the flour was delivered on board some ship, and that it did not cease to act in that capacity as soon as the property was deposited in their depot, there being a special contract to deliver the property on board. The liability of the carrier for loss of the flour by fire while stored in its warehouse at Detroit was that of a common carrier, and not a warehouseman. *Moore v. Michigan Cent. R. Co.*, 3 Mich. 23, 24.

Insurance was effected on freight of a vessel at and from Cadiz to a port in Sicily, and at and from thence to her port of destination in the United States. Held, that the phrase "freight on board" meant that the insurance was one entire risk intended to cover all the freight on both voyages, and was equivalent to freight to be laden on board, so that the insurance attached when the voyage commenced, though part of the cargo had not been loaded at that port. *Robinson v. Manufacturers' Ins. Co.*, 42 Mass. (1 Metc.) 143, 146.

#### ON THE BOOKS.

A corporation's by-law providing that the shares of stock shall be transferable only on the books of the company, etc., means that the assignment "shall be literally made

and perfected on the books." Northop v. Curtis, 5 Conn. 246, 253.

### ON BOTH SIDES OF THE ROAD.

The phrase "on both sides of the road," found in a statute providing that every railroad must maintain fences on both sides of the road, means the margin or border of the entire ground used as a roadway, and does not mean any place between the track and margin of the right of way. *People v. Ohio & M. R. Co.*, 21 Ill. App. 23, 27.

### ON CALL.

"On call," as used in an instrument payable on call, is equivalent to the expression "on demand" or "when demanded." *Territory v. Hopkins*, 59 Pac. 976, 982, 9 Okl. 133; *Mobile Sav. Bank v. McDonnell*, 4 South. 346, 347, 83 Ala. 595; *Meador v. Dollar Savings Bank*, 56 Ga. 605, 608.

"On call," as used in a bond which by its terms is payable on call, signifies that it is payable immediately. *Bowman v. McChesney (Va.)* 22 Gratt. 609, 612. So, also, as used in a certificate payable on call. *Meador v. Dollar Sav. Bank*, 56 Ga. 605, 608.

### ON A DAY CERTAIN.

See "Day Certain."

### ON DEMAND.

Where it appears from a contract that it was the intention of the parties thereto that the money was to be paid upon demand, the statute of limitations does not begin to run until an actual demand of payment is made. *Horton v. Seymore*, 85 N. W. 551, 82 Minn. 535; *Portner v. Wilfahrt*, 88 N. W. 418, 419, 85 Minn. 73.

"Payment of a sum of money to be made on demand, as a condition upon which a mortgage upon real estate shall be discharged, means payment by the mortgagor upon a demand made upon him, and not payment by a stranger to the deed with or without a demand." *Popple v. Day*, 123 Mass. 520, 522.

A contract to furnish coal "on demand" to a certain mine, but that the daily demand shall not exceed one-half the daily output of the mine, indicates that the coal shall be delivered when required by the plaintiff, and that no more than half of the daily product of the mine can be required by plaintiff. The demand required by the contract need not be made daily as the coal is mined, but may be made for the future. *Watson Coal & Min. Co. v. James*, 33 N. W. 622, 625, 72 Iowa, 184.

A bank deposit payable on demand is a debt payable in two years, within *Laws 1890*,

c. 564, § 58, providing that no stockholder of a corporation shall be personally liable for any debt of the corporation payable within two years from the time it is contracted, nor unless an action for its collection shall be brought within two years after the debt becomes due. *Barnes v. Arnold*, 61 N. Y. Supp. 85, 90, 45 App. Div. 314.

### In notes or bonds.

A bond which by its terms is payable on demand is payable immediately. *Bowman v. McChesney (Va.)* 22 Gratt. 609, 612.

The words "on demand," in a promissory note payable on demand, do not mean forthwith, but have several significations, and mean an actual call or demand for payment, and are not merely governed by the law controlling an ordinary negotiable instrument. *Crofoot v. Thatcher*, 57 Pac. 171, 174, 19 Utah, 212, 75 Am. St. Rep. 725.

The word "on demand" in a note should not make the demand a condition precedent to a right of action, but import that a debt is due and demandable immediately, or at least that the commencement of a suit therefor is a sufficient demand. *Appeal of Andress*, 99 Pa. 421, 424.

When a note or bill is payable on demand, the statute of limitations runs from the date of the instrument, and not from the time of demand, because the right of action accrues immediately upon giving the note, and it makes no difference whether the note is payable with interest or with interest after six months. *Young v. Weston*, 39 Me. 492, 494.

The words "on demand" have a precise legal meaning. They do not limit the obligation to pay presently, but are used to show that the debt is due. A note payable on demand after three months' notice is due, and the statute of limitations begins to run against it forthwith, the provision as to notice being merely a limitation of the payee's right to sue. *Knapp v. Greene*, 29 N. Y. Supp. 350, 351, 79 Hun, 264.

### ON DEMAND AFTER DATE.

The expression "on demand after date" in a note is deemed equivalent to the words "on demand," with the exception that the note is not immediately due, but some time must elapse before demand can be made, and therefore before the note becomes due. *Foley v. Emerald & Phoenix Brewing Co.*, 39 Atl. 650, 651, 61 N. J. Law, 428.

A note made payable on demand after date is payable immediately. Such a note is due at once without an actual demand, and the statute of limitation begins to run against it immediately. *O'Neill v. Magner*, 22 Pac. 876, 877, 81 Cal. 631, 15 Am. St. Rep. 88.

**ON DEPOSIT.**

"Money on deposit," says the Court of Appeals of New York, is, *ex vi termini*, money placed where the owner can command it at any time." *Long v. Straus*, 6 N. E. 123, 125, 7 N. E. 763, 768, 107 Ind. 94, 57 Am. Rep. 87 (citing *Curtis v. Leavitt*, 15 N. Y. 9).

Where a depositary acknowledges in writing to have received a certain number of dollars "on deposit to be paid on demand," such phrase imports not a contract of bailment, but a loan of money payable presently or on demand. *Wright v. Paine*, 62 Ala. 340, 344, 34 Am. Rep. 24.

**ON THE DOOR.**

The phrase "on the door," in a statute requiring notice of a tax sale to be posted on the courthouse door, does not necessarily mean on the swinging panel which fills the opening or entrance to the building, but a conspicuous posting upon the building at the side of the opening, or upon a separate board or panel or bulletin kept there for that purpose, is sufficient, to all reasonable intents and purposes. *Hoskins v. Iowa Land Co.*, 96 N. W. 977, 978, 121 Iowa, 299.

**ON EACH ENTRY.**

13 Stat. 214, providing that on the entry of any goods the decision of the collector as to the rate and amount of duties to be paid on such goods shall be final and conclusive unless the importer shall, within 10 days after the ascertainment and liquidation of the duties by the proper officers of the customs, give notice in writing to the collector "on each entry," means that in all cases, whether of entry in bond or for consumption, the owner shall give notice in writing on each entry to the collector, etc., not meaning on the paper or record called the entry, but in respect of each entry. *Ullman v. Murphy* (U. S.) 24 Fed. Cas. 508, 508.

**ON EXPENSE.**

Where the selectmen of a town notified the selectmen of another town that a certain person was on the expense of the former town, the expression "on expense" was a sufficient notification that the person referred to was a pauper. *Town of Hamden v. Town of Bethany*, 43 Conn. 212, 216.

A notice of support furnished paupers, sent by the selectmen of a town, stating that certain persons were "on expense in this town" should be construed to fairly import that the persons named were paupers, that they were then residing in such town, were chargeable to the town, and that the town was incurring expense in their support. *Town of Bethlehem v. Town of Watertown*, 51 Conn. 490, 492.

6 Wds. & P.—7

**ON THE EXPRESS CONDITION.**

See "Express Condition."

**ON FAILURE OF ISSUE.**

See "Failure of Issue."

**ON FILE.**

Every paper once legally filed in the general land office prior to the adoption of Act Nov. 29, 1871, and not withdrawn under a law authorizing it, and by one having authority to withdraw it was in contemplation of that law, on file in that office. *Snider v. Methvin*, 60 Tex. 487, 493.

The words "on file," used in a deed in reference to a plat, will be taken to mean deposited, as distinguished from a technical filing of the plat. *Slosson v. Hall*, 17 Minn. 95 (Gil. 71, 74).

**ON THE FOLLOWING CONDITION.**

The words "provided nevertheless" and "upon the following conditions," occurring in a deed, are appropriate words to create a condition, but they do not of necessity create such an estate. They will give way when the intention of the grantor, as manifested by the whole deed, is otherwise, and they have frequently been explained and applied as expressing simply a covenant or limitation in trust. Consequently, where it was recited after the habendum clause of a deed, "provided nevertheless, and upon the following conditions," that if the grantor survives the grantee he shall have the right within a specified time to buy back the estate at a price to be fixed by arbitration, such clause creates a covenant in spite of the words with which it was introduced. *Woodruff v. Woodruff*, 16 Atl. 4, 6, 44 N. J. Eq. (17 Stew.) 849, 1 L. R. A. 380.

**ON FOOT.**

See "Pork on Foot."

**ON FREIGHT.**

A firm in the habit of receiving grain in store to be shipped to the New York market received plaintiff's grain, which was deposited with that of other customers in a common bin. A memorandum was given to plaintiff acknowledging the receipt of the grain on freight. Held, that the words "on freight" should be held to import a bailment, and not a sale. *Dawson v. Kittle* (N. Y.) 4 Hill, 107, 108.

A receipt reciting that corn was delivered to a certain person "on freight," and not to be sold, means left to be disposed of according to the usage of the place and of the



parties themselves. *Outwater v. Nelson* (N. Y.) 20 Barb. 29, 31.

### ON HAND.

See "Cash on Hand"; "Goods on Hand"; "Stock on Hand."

A will providing that all of the testator's money on hand or in bank at the time of his decease should go to his daughter includes money in the hands of an agent, though the agent had a claim on such sum for his commission, and the legacy included the entire sum, and is not to be reduced by the commission due the agent. *In re Copia's Estate* (Pa.) 5 Phila. 214, 215.

A lease of a sawmill provided that, on a termination thereof by the lessor on the sale of the property, the lessee should have two months' notice to "saw out" a water term, and then, if any logs remained over, he should either have the privilege to continue in possession at option of the lessor at the same rate rent until logs on hand were sawed, or should be allowed the extra cost of teaming said logs to another mill, etc. Held, that the words "logs on hand" meant those bought and provided in the regular course of business, and not simply those in the mill-yard, and that he was not precluded from recovering the extra expense of sawing at another mill those that remained over after two months' notice, which necessarily remained over as those bought in the regular course of business, but that he was not entitled to recover the extra expense for the sawing out of logs the result of neglect of use of the mill for other than ordinary purposes. *Crouch v. Parker*, 56 N. Y. 597, 598.

### ON HER OWN ACCOUNT.

A declaration that a married woman intends to carry on business "in her own name" is not synonymous with a declaration that she intends to carry on business "on her own account," and hence the sole traders' act, requiring the filing of a declaration that she intends to carry on business in her own name and on her own account is not satisfied by a declaration stating that a married woman intends to carry on business in her own name. *Manton v. Tyler*, 1 Pac. 743, 744, 4 Mont. 364.

### ON ITS FACE.

Rev. St. art. 2181, declaring that, when an alias or pluries execution is issued, it shall show "upon its face" the number of previous executions, means that such facts shall be shown in the execution itself, and the statute is not complied with by a mention of previous executions in a bill of costs attached to an execution. *Driscoll v. Morris*, 21 S. W. 629, 631, 2 Tex. Civ. App. 603.

### ON A JOURNEY.

See, also, "Journey."

Gantt's Dig. § 1517, made it a misdemeanor to wear any pistol concealed as a weapon unless on a journey. Held, that the words "on a journey" contemplated a traveler bona fide going from one place to another, and that a traveler was on a journey, within the meaning of the law, while stopping at a town on his way, if he was in fact and in good faith prosecuting his journey, and only stopped for a temporary purpose, and did not stop to stay or mingle generally with the citizens of the place either for business or pleasure. *Carr v. State*, 34 Ark. 448, 38 Am. Rep. 15.

### ON LAKES OR RIVERS.

Where a bill of lading given by a railroad company to a shipper of freight provided that the railroad should not be responsible, in the absence of negligence, for loss or damage on lakes or rivers, the phrase "on lakes or rivers" meant that the carrier was not to be responsible for loss or damage occurring in the navigation of the lakes or rivers; and hence where the goods shipped were lost while stored on a wharfboat which floated on the waters of a river awaiting the arrival of a packet on which the goods were to have been shipped, the wharfboat serving as a storehouse in the meanwhile, the navigation of the river had not commenced, and the carrier was liable. *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302, 308.

### ON THE LINE.

"On the line thereof," as used in 13 Stat. 356, granting to a railroad company every alternate section of public lands designated by odd numbers to the amount of 10 sections per mile on each side of the road "on the line thereof," do not mean contiguous to the roadbed or to the land taken for the roadbed, but that the land shall be taken along a parallel to the general direction of the road on each side of it, and within lines perpendicular to its terminus at each end. *United States v. Burlington & M. R. R. Co.* (U. S.) 24 Fed. Cas. 1305, 1306.

The preposition "on" has an almost inexhaustible variety of meanings. One is "conforming to or agreeing with, as on the line." Hence, in a description of a boundary, to start from the N. E. corner of the N. E. quarter of the S. E. quarter of section 8, and to run thence west on the section line to the N. W. corner of the N. W. quarter of the S. W. quarter, the words "on the section line" will be held to express relative as well as absolute position, and to mean that the line shall run parallel with the section line, since the line would have to be on the quar-

ter-section line. *Burnham v. Police Jury of Claiborne Parish*, 32 South, 87, 88, 107 La. 513.

The act of 1869, authorizing residents who live upon the line of the Illinois & Michigan Canal to cut and remove ice from said canal, will be construed to include any one living so near the canal as to desire to cut and remove ice therefrom. *Card v. McCaleb*, 69 Ill. 814, 817.

#### ON THE MERITS.

See "Merits."

#### ON MODERATE TERMS.

See "Moderate."

#### ON A MOUNTAIN OR RIDGE.

The words "to," "on," "along," "with," or "by" a mountain or ridge mean summit point, or summit line, unless otherwise expressed. *Pol. Code Cal.* 1903, § 3905; *Rev. St. Ariz.* 1901, par. 929; *Pol. Code Mont.* 1895, § 4105.

#### ON THE PART OF.

*Gen. St. c.* 31, § 5, providing that illegitimate children shall be capable of inheriting and transmitting an inheritance on the part of or to the mother, cannot be construed as meaning transmissibility of an estate not only to, but through, the mother, and on to her collateral kindred. *Croan v. Phelps' Adm'x*, 14 Ky. Law Rep. 915, 916, 918, 21 S. W. 874, 94 Ky. 213, 23 L. R. A. 753.

The phrase "on the part of the mother," in a statute relative to descent of property, has a technical signification, referring not only to the mother, but to all ancestors of the mother. *Kelly's Heirs v. McGuire*, 15 Ark. 555, 586.

Under *Rev. St.* 1899, § 2916, providing that bastards shall be capable of inheriting and transmitting inheritance on the part of the mother, a bastard may, like a legitimate child, inherit from the brother of his mother dying after her, the words "on the part of the mother" meaning the mother's side of the genealogical tree. *Moore v. Moore*, 69 S. W. 278-281, 169 Mo. 432, 58 L. R. A. 451.

*Rev. Code* 1845, p. 442, which declares that bastards shall be capable of "inheriting and transmitting inheritance on the part of their mother in like manner as if they had been lawfully begotten of such mother" is construed to mean that the bastards will have capacity to take real property by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants, in like manner as if they were legitimate. This provision is

not to be so construed as to render a bastard capable of transmitting an estate by descent to his mother or to his illegitimate brothers. *Bent's Adm'r v. St. Vrain*, 30 Mo. 268, 271 (citing *Stevenson v. Sullivan*, 18 U. S. [5 Wheat.] 260, 5 L. Ed. 70).

The phrase "on the part of the father," in a statute relative to descent of property, has a technical signification, referring not only to the father, but to all ancestors of the father, both paternal and maternal. *Kelly's Heirs v. McGuire*, 15 Ark. 555, 586.

#### ON A PASSAGE.

The phrases "at sea" or "on a voyage" or "on a passage" are equivalent in meaning, and, when either of them is used in a marine policy to describe the time during which the liability of the insurer continues, it operates to continue the risk until the arrival of the vessel at the port of destination. *Wales v. China Mut. Ins. Co.*, 90 Mass. (8 Allen) 380, 383.

A marine policy which provided that if, at the expiration of the policy, the vessel should be on a passage, the risk should continue, means after she has left her port of lading, prepared to proceed to her port of destination, with intent to do so; and hence she is on her passage, although she comes to anchor on account of head winds, there being an intention of proceeding as soon as the weather is permissive. *Bowen v. Hope Ins. Co.*, 37 Mass. (20 Pick.) 275, 279, 32 Am. Dec. 213.

A marine policy insuring a vessel for a year, and providing that if the vessel was on a passage at the end of the term the risk could continue until arrival at port of destination, does not insure the vessel after the expiration of the year, while lying in a safe harbor, in which she had put voluntarily to obtain necessary clearance and water and crew for her further voyage. *Washington Ins. Co. v. White*, 103 Mass. 238, 242, 4 Am. Rep. 548.

#### ON THE PREMISES.

See "On or About the Premises."

A policy describing the insured property as being situated on or confined to premises occupied by the insured, locating such premises, and an application for insurance, asking for it on certain parts of the property while on the premises only, did not cover a loss of the property while on different premises, 20 miles distant, though being used for the ordinary purposes which must have been contemplated when the policy was issued. *Lakings v. Phoenix Ins. Co.*, 94 Iowa, 476, 62 N. W. 783, 784, 28 L. R. A. 70.

Where a fire policy on a church provided that, if naphtha be kept or used on the prem-

ises by the insured, the policy should be void, the use of a naphtha torch by a painter to remove the old paint from the building, which was of wood, was a use "on the premises," within the meaning of such words as used in the policy, notwithstanding the fact that no naphtha was at any time inside the building. *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 33 N. E. 572, 573, 158 Mass. 475.

Where a statute provided that, whenever the name of the owner of the lot is stated as unknown in the assessment, then the said contractor, or his agent or assigns, shall publicly demand payment on the premises assessed, a demand near to or in the hearing of the premises does not satisfy the requirement of the statute providing for a public demand on the premises, the term "on the premises" meaning a person on the premises. *Alameda Macadamizing Co. v. Williams*, 12 Pac. 530, 534, 70 Cal. 534.

A will in which testator left all the furniture, household effects, etc., "in, upon, or about" the premises included articles which had been upon the property, and had been temporarily sent away for repairs, but did not include articles which had been intended for, but which were never in, the house. *Brooke v. Warwick*, 12 Jur. 912, 913, 12 Law T. 41.

#### ON PURPOSE.

"On purpose," as used in an instruction that the jury should find the defendant guilty of assault with intent to rob if he feloniously, on purpose, and of his malice aforethought, shot another with a loaded pistol, with intent to steal the moneys, goods, and chattels of such person, means intentionally, and not accidentally. *State v. Tate*, 56 S. W. 1099, 1100, 156 Mo. 119; *State v. Musick*, 14 S. W. 212, 213, 101 Mo. 260.

#### ON REASONABLE REQUEST.

An agreement "to pay on reasonable request" was equivalent to an agreement to pay within a reasonable time after request, and the debt could not mature until demand was made, and a reasonable time for compliance had elapsed. *Illinois Land & Loan Co. v. Beem*, 2 Ill. App. (2 Bradw.) 390, 393.

#### ON RECORD.

Under Rev. St. 1881, § 629, providing that a bill of exceptions, to be on record, must be presented to the judge for examination, and, if found correct, signed and filed by him, a bill in which the only signature of the judge that appeared was attached to the certificate of presentation, without any adjudication as to the correctness of the bill,

is not on record. *Harvey v. State*, 31 N. E. 835, 5 Ind. App. 422.

#### ON SALE OR RETURN.

A contract on sale or return is defined by Judge Story as an agreement by which goods are delivered by a wholesale dealer to a retail dealer to be paid for at a certain rate if sold by the latter, and, if not sold, to be returned. And a contract between a manufacturer and retail dealer providing that the dealer should act as special agent in the sale of certain patterns which the manufacturer should furnish, to be paid for half in cash and half in interest-bearing credit; that old patterns might be returned for new ones, but not in payment for goods; and that, if the contract was terminated, the purchaser should have the right to return all patterns on hand, and receive 75 per cent. of the price paid—is not a contract of sale or return, but a contract of sale. *Butterick Pub. Co. v. Bailey*, 75 N. W. 189, 191, 105 Iowa, 326.

#### ON THE SAME STREET.

See "Same Street."

#### ON THE SAME VOYAGE.

See "Same Voyage."

#### ON SHARES.

A contract to continue business on shares means that the parties shall share equally. *Crittenden v. Johnston*, 40 N. Y. Supp. 87, 88, 7 App. Div. 253.

"Letting land on shares" is a phrase well understood among farmers. It means that both parties shall share equally in the products of the land, to compensate the one for his labor, and the other for the use of his land. In such cases, after the crops are harvested, and before a division is made, each party is the owner of an undivided moiety of the same, and is a tenant in common with the other, unless the contract contains some special provision taking the case out of the general rule. *Connell v. Richmond*, 11 Atl. 852, 853, 55 Conn. 401.

#### ON THE SIDE OF.

See "Side."

#### ON SHORE.

"On shore," as used in 24 Geo. III, Sess. 2, c. 47, § 15, giving the officers of excise authority while on shore to seize goods, meant "on land," in contradistinction to "on board a ship"; and an officer seizing goods at an inland place at any distance from the sea was within the protection of the act. *The King v. Brady*, 1 Bos. & P. 187, 188.

**ON THE SHORE LINE.**

The words "along," "with," "by," or "on" the shore line, mean on a line parallel with, and three miles from, the shore. Pol. Code Cal. 1903, § 3907.

**ON STOCKS.**

"In common understanding, an advance or loan of money on stocks, bonds, bullion, bills of exchange, or promissory notes is an advance or loan where these species of property are applied as collaterals, or are hypothecated to secure the return of the advance, or the payment of the sum lent." It is used in this sense in Rev. St. § 3407, providing that every person, firm, or company having a place of business where money is advanced or loaned on stocks, bonds, bullion, etc., shall be regarded as a bank or as a banker. *Selden v. Equitable Trust Co.*, 94 U. S. 419, 421, 24 L. Ed. 249.

**ON STORE.**

The words "on store," in a receipt for grain delivered at a warehouse, ordinarily mean that the grain is sold to a miller or warehouseman, and that the market price is to be demanded at such time as suits the person leaving the grain, or the actual intention of the parties may be shown by parol. *Light v. Hellman* (Pa.) 1 Peara. 537, 538.

**ON THE TRACK.**

The words "on the track," in Code, § 1699, requiring a locomotive engineer, on perceiving any obstruction on the track of the road, to use all means known to skillful engineers in order to stop the train, mean an obstruction on the track of the road, against which the locomotive or train may strike while running its proper course and direction; and an animal, though near the road, and on the company's right of way, is not an obstruction on the track of the road, within the meaning of the statute. *East Tennessee, V. & G. R. Co. v. Bayliss*, 77 Ala. 429, 434, 54 Am. Rep. 69.

An engine in a roundhouse for repairs is not upon a railroad track, within St. 1887, § 270, making the employer liable for injury to an employé from negligence of an employé in charge or control of an engine or train upon a railroad track; the words "upon a railroad track" contemplating the dangers from a locomotive engine or train as a moving body. *Perry v. Old Colony R. Co.*, 41 N. E. 289, 164 Mass. 296.

**ON THE TRIAL.**

The expression "on the trial" of any person," as used in Act Feb. 7 1850, enacting that "hereafter, on the trial of any person

indicted for trading with a slave, it shall not be necessary for the state to aver or prove," etc., means the prosecution of any person. *Hirschfelder v. State*, 19 Ala. 534, 539.

On the trial of a case, after the evidence had been closed on both sides, and after the arguments of the counsel had been delivered to it and the jury, the court permitted the plaintiffs to amend their declaration. The statute provided that when, in the opinion of the court, any informality exists in the declaration which shall affect the merits of a cause, the plaintiff shall be permitted to amend on or before the trial of the cause. In construing defendant's objection that the amendment was allowed too late, the court said: "The amendment complained of here must be construed as having been allowed, within the time prescribed for the act, though perhaps done near to the close of the last hour. It was after the trial had been commenced, but being before the court had charged the jury in regard to the law of the case, and before any verdict was made or ready to be delivered by the jury, it was certainly done during the trial of the cause, and must therefore have been done on the trial of it, which brings it, as to the trial, within the express terms of the act." *Yohe v. Robertson* (Pa.) 2 Whart. 155, 158. See, also, *Franklin Fire Ins. Co. v. Findlay* (Pa.) 6 Whart. 483, 497, 37 Am. Dec. 430.

A stipulation allowing the evidence in a certain case to be read on the trial of another case applies to any trial of the case, whether the first or second, so long as neither party is relieved from the obligation by an application to the court. *Herbst v. Vacuum Oil Co.*, 22 N. Y. Supp. 807, 68 Hun. 222.

**ON THEIR OWN RESPONSIBILITY.**

A testator directed all of his estate to be sold, and the proceeds divided into six shares, to be paid to the legatees "on their own responsibility," and they to use it during their natural life, and at their decease the said principal so paid to them, to be divided among their lawful heirs, share and share alike. Held, that the words "on their own responsibility" meant that the persons entitled should receive the fund without giving security therefor, but that such construction would not be given the words without qualification, so that, where one of the sisters threatened to dispose of her share in order to defeat her son's interest therein, she could be enjoined from so doing, and required to give security for the protection of the remaindermen. *Sherman v. Sherman*, 36 N. J. Eq. (9 Stew.) 125, 126.

**ON TRIAL.**

The term "on trial," in St. 1863, c. 33, providing that, whenever any criminal case

shall be on trial at the end of any term, such term shall be continued until such case is finished, is to be taken in its literal meaning, and requires that the case must be actually on trial before the court and jury at the end of the term. *Commonwealth v. MacLellan*, 121 Mass. 31, 32.

### ON A VOYAGE.

The phrases "at sea" or "on a voyage" or "on a passage" are equivalent in meaning; and, when either of them is used in a marine policy to describe the time during which the liability of the insurer continues, it operates to continue the risk until the arrival of the vessel at the port of destination. *Wales v. China Mut. Ins. Co.*, 90 Mass. (8 Allen) 380, 383.

### ONCE.

#### See "At Once."

Act Cong. July 7, 1838 (5 Stat. 288), relating to steamboats, and providing that an examination of their boilers must be made at least "once in every six months," should be construed to mean that more than six months must not elapse after one examination before another is made. There must not at any time of the year be a period of six months within which an examination has not been made. It is not sufficient if an examination is made once in each six months of the year. *Virginia & M. Steam. Nav. Co. v. United States (U. S.)* 28 Fed. Cas. 1229, 1230.

### ONCE A WEEK.

1 Rev. St. N. Y. c. 767, § 24, requiring notice of dissolution of a limited partnership, previous to the time specified in the certificate of its formation, to be published once in each week for four weeks, requires one publication, and then a repetition three times after the first publication, at an interval of seven days between each of the four times. *In re King (U. S.)* 14 Fed. Cas. 502.

Code, § 135, providing that publication of a summons shall not be made less than once a week for six weeks, does not limit the publication to any particular day of the week; and, where the first publication was made on Monday, it is not fatal to the publication if the next publication is not made until Tuesday or any other day of the succeeding week. *Steinle v. Bell (N. Y.)* 12 Abb. Prac. (N. S.) 171, 176; *Ronkendorff v. Taylor*, 29 U. S. (4 Pet.) 349, 361, 7 L. Ed. 882.

#### As requiring full number of weeks.

"Once a week" means once in a week; once at any time within the week. A pub-

lication of notice once a week for a certain number of weeks may not cover a number of weeks equal to the number of times of publication. Thus, if the first day of the week should be the 1st day of the month, and if the notice should be published on the 7th, 14th, 21st, and 28th, it would be once a week for four weeks successively, although it would not cover a period of four weeks. *Ratliff v. Magee*, 65 S. W. 713, 714, 165 Mo. 461.

Where St. 1864-65, p. 422, c. 145, § 35, provided that, to impose an additional school tax, an election should be called by posting notices for 20 days, and, if there is a newspaper in the county, by advertisement therein once a week for three weeks, the words "once a week for three weeks" do not require the call to be published 21 days before the day of election, but three insertions upon three successive weeks, and at any time in any of such weeks before the election, are sufficient. *State v. Yellow Jacket Silver Min. Co.*, 5 Nev. 415, 431.

Act June 16, 1836, § 33, providing that notice of a sheriff's sale by advertisement shall be inserted "once a week during three successive weeks" previous to the sale, requires the first notice to be at least 21 days before the day of the sale; and hence a notice published any time in each week for 3 weeks before the sale, in which the first was less than 21 days before the date of the sale, did not constitute a compliance with the statute. *Erie Saving Fund & Building Ass'n v. Thompson (Pa.)* 13 Phila. 511; *Francis v. Norris (Pa.)* 2 Miles, 150, 151.

Where a statute provided that public notice of the time and place of the sale of real property for taxes due to the city of Washington shall be given by advertisement inserted in some newspaper published in said city "once in each week for at least 12 successive weeks," it must be advertised for 12 full weeks, or 84 days. *Early v. Homans*, 57 U. S. (16 How.) 610, 613, 14 L. Ed. 1079.

St. 1864-65, p. 422, c. 145, § 35, providing that, in order to impose an additional school tax, an election should be called by advertisement in a newspaper once a week for three weeks, meant once during each week, consisting of seven days, commencing with Sunday and ending with Saturday, on any day of such week, and not that it should be published 21 days before the election. *State v. Yellow Jacket Silver Min. Co.*, 5 Nev. 415, 430.

### ONCE IN JEOPARDY.

#### See "Jeopardy."

The plea of once in jeopardy stands on narrower, more technical, and less substan-

tial ground than a plea of former acquittal and conviction. It only alleges that there might have been a conviction or an acquittal if the judge trying the cause had not made a mistake in law which prevented a verdict. It is of no consequence how many mistakes he makes, if the trial results in a conviction. Mistakes can be corrected on a writ of error, and the defendant tried over again; but, if the mistake results in closing the trial without a verdict, this is remediless. *Commonwealth v. Fitzpatrick*, 15 Atl. 466, 468, 121 Pa. 109, 1 L. R. A. 451, 6 Am. St. Rep. 757.

#### ONCE IN A WHILE.

Where a will directed that a trust should be created for placing flowers on certain graves once in a while, such devise was held to be void for uncertainty. *Angus v. Noble*, 46 Atl. 278, 279, 73 Conn. 58.

#### ONE.

See "Any One."

A bequest of one carriage will be construed to be a specific legacy on proof that the testator only owned one carriage. *Everitt v. Lane*, 87 N. C. 548, 551.

The phrase "one set of blacksmith tools," in a bequest of one set of blacksmith tools, operates to create a specific legacy, if the testator only owns one set of such tools. *Everitt v. Lane*, 87 N. C. 548, 551.

#### ONE BUILDING.

"One building," as used in a reinsurance compact limiting the amount of insurance on any one building or risk, in the ordinary sense of that term, should be construed to include a building five stories in height, containing three stores, the outer wall of which building was common to each of the stores, the several floors being on the same level; and, while two partition walls divided the building into three rooms or compartments on each floor, there were large doors in each of these walls between the several compartments in each of the five stories, used for the purpose of the passage of persons and the removal of goods from one store to another or others on each floor, the whole structure being under one management and devoted to the same uses, the storage of non-fibrous merchandise. *German-American Ins. Co. v. Commercial Fire Ins. Co.*, 11 South. 117, 118, 95 Ala. 469, 16 L. R. A. 291.

#### ONE CLASS OR KIND OF BUSINESS.

"One class or kind of business," as used in Pub. St. c. 119, § 201, providing that

foreign insurance companies doing business within the state shall be confined to one class or kind of business, is equivalent to one class or kind of insurance, as used in St. 1887, c. 214, § 80; and the issuance of policies insuring against accidents to the person of the assured, and of employer's liability policies, is not the transaction of more than one class or kind of business, or one class or kind of insurance. *Employer's Liability Assur. Corp. v. Merrill*, 29 N. E. 529, 531, 155 Mass. 404.

#### ONE DAY.

St. 1877, c. 250, § 1, relating to the arrest of debtors, and providing that notice be issued by a magistrate to the debtor to appear and submit himself to an examination touching his estate, and providing further that such notice may be served by leaving the same at his last and usual place of abode not less than three days before the time fixed for the examination, and "one day additional for every 24 miles' travel," means at the rate of one day additional for every 24 miles traveled; and hence, where the distance traveled is only a fraction of a mile, the time allowed need not be more than the corresponding fraction of an hour. *Stewart v. Griswold*, 134 Mass. 391, 392.

Notice of taxation given before 9 o'clock p. m. of any day for the day following at 12 is "one day's notice," within the rule of T. T. 1 Will. 4, § 12, requiring that, before taxation of costs, "one day's notice" shall be given to the opposite party. *Edmunds v. Cates*, 4 Mees. & W. 66.

Code Cr. Proc. art. 554, directs that no defendant in a capital case shall be brought to trial until he has had one day's service of a copy of the names of persons summoned under a special venire facias. Held, that "one day's service" meant that both the day of the service and the day of the trial must be excluded; that at least one entire day must intervene between the day on which the service was had and the day on which the trial begins. *Speer v. State*, 2 Tex. App. 246, 253.

#### ONE DAY AFTER.

The declaration set out a note payable "one day after date," and the note produced read, "Payable one day after," the word date being omitted. In considering the objection that this was not the note declared on, the court said: "This variance is altogether too immaterial to be regarded. The court will supply the word 'date,' and intend that the note was payable one day after its date." *White v. Word*, 22 Ala. 442, 445.

**ONE DRINK.**

Where a defendant was charged with selling intoxicating liquor at retail, without a license, in less quantities than a quart, and the evidence of the prosecuting witness was that defendant sold to him one drink of whisky, the jury were entitled to find that "one drink of whisky" meant a quantity less than a quart, without evidence of that fact; and therefore an instruction that the jury must find, before they could convict, that one drink was a less quantity than a quart, and that, if there was no evidence of that fact, they could not convict defendant, was properly refused. *Feigel v. State*, 85 Ind. 580; *Hamilton v. State*, 103 Ind. 96, 100, 2 N. E. 299, 302, 53 Am. Rep. 491.

**ONE FOOT HIGH.**

A contract to deliver a number of trees not less than one foot high is ambiguous, as to whether the trees should be measured in length only to the top of the ripe wood, rejecting the green, immature tops, or whether the measurement should include such green, immature tops, and hence evidence of a custom is admissible to explain such ambiguity. *Barton v. McKelway*, 22 N. J. Law (2 Zab.) 165, 174.

**ONE-FOURTH.**

The conveyance of one-fourth of a tract of land, without designating by metes and bounds or otherwise locating the part conveyed, vests in the grantee, and those claiming under him, the title to one-undivided fourth of the whole tract, as tenant in common with the grantor. *McCaul v. Kilpatrick*, 46 Mo. 434, 437.

**ONE FULL YEAR.**

Poor Act, § 1, Rev. 834, providing that a pauper must dwell in a township for one full year in order to obtain a legal settlement there, means a dwelling for a full year continuously and without any interruption. *Eatontown v. Inhabitants of Shrewsbury*, 6 Atl. 319, 320, 49 N. J. Law (20 Vroom) 188.

**ONE GENERAL CONTRACT.**

As used in Gen. Laws 1889, c. 200, § 7, providing that when a person shall furnish labor or material for buildings united together, and situated on the same or contiguous lots, or separate buildings on contiguous lots, pursuant to the purposes of one general contract with the owner or joint owners, it shall not be necessary to file a separate lien on each building, the phrase "one general contract" cannot be construed to mean an entire contract to wholly erect

and complete the building, to furnish all the material, and to do all the work on it. The word "general" is used with reference to two or more separate buildings, so that, to support a claim of lien on all of them, the contract must be entire, so as to include them all, in order to connect them and make them one for the purpose of the lien. *Menzel v. Tubbs*, 53 N. W. 653, 654, 51 Minn. 364, 17 L. R. A. 815.

The term "one general contract," in a mechanic's lien law, providing that only one mechanic's lien shall be necessary where the separate buildings on which the lien is claimed shall be erected upon one general contract, includes a contract to roof 29 houses, more or less, at \$170 each, and the fixing of the rate of compensation does not convert it into various distinct and separate contracts. *Bulger v. Robertson*, 50 Mo. App. 449, 503.

**ONE-HORSE CART.**

The term "one-horse cart," as used in Act April 1, 1800, relating to tolls, does not include a light, one-horse wagon, with a firm box, swelled sides, painted in imitation of panel work, a crooked bolster, a chair seat with wooden springs, in which were two passengers, a trunk, a box, a bag of oats, and a bottle. *Pardee v. Blanchard* (N. Y.) 19 Johns. 442, 444.

**ONE-HORSE WAGON.**

A half interest in a two-horse wagon is not "one one-horse wagon," within the meaning of the statute exempting from execution one one-horse wagon. *Kirksey v. Rowe*, 40 S. E. 990, 114 Ga. 893, 88 Am. St. Rep. 65.

**ONE LEAGUE SQUARE.**

The fact that a tract of land is described as one league square refers only to contents, and not to shape. "A tract of land of one square league" does not, as a term of description, suggest any boundary whatever. *Muse v. Arlington Hotel Co.* (U. S.) 68 Fed. 637, 643.

**ONE LOT.**

The phrase "one lot," as employed in the statute exempting a homestead consisting of a quantity of land not exceeding one lot, cannot be construed as applying to an undivided half of two lots. *Ward v. Huhn*, 16 Minn. 159, 162 (Gil. 142, 144).

Where an act providing that a debtor's homestead should be exempt from execution stated the exemption as including one town or city lot, the word "one" should not be construed as limiting the exemption absolutely to one lot, according to the plat and survey of the town or city, but as meaning

a lot or piece of ground in the town or city on which the head of the family has its dwelling place, with the appurtenances, no matter whether it contains more or less than one of such lots. *Wassell v. Tunnah*, 25 Ark. 101, 103.

A memorandum of sale headed, "Invoice of Articles Purchased by A. of B," with the date, and containing the item, "One icehouse and lot, \$140," is void, under the statute of frauds, as to the icehouse and lot, by reason of uncertainty in the description of the property. *Pipkin v. James*, 20 Tenn. (1 Humph.) 325, 326, 34 Am. Dec. 652.

#### ONE PINT.

An allegation in an indictment for selling liquor without a license that defendant sold one pint means that he sold that particular quantity, and no more. *State v. Bach*, 36 Minn. 234, 30 N. W. 764.

#### ONE PLACE.

Const. art. 5, § 7, providing that a district judge shall hold the regular terms of court at one place in each county in the district twice a year, does not mean one town or one house, but means the place prescribed by law—the county seat. *Lytle v. Halff*, 12 S. W. 610, 613, 75 Tex. 128.

#### ONE SITTING.

In the case of *Bones v. Booth*, 2 W. Bl. 1227, involving the construction of a statute making the winning of £10 at any one time or sitting a nullity, Justice Blackstone said that "one sitting" means a course of play where the company never parts, though the person may not be gaming the whole time; and it was held that playing from Monday evening to Tuesday night without interruption, except for an hour or two at dinner—the persons gaming never having parted company during such time—constituted one sitting. *Trumbo v. Finley*, 18 S. C. 305, 311.

#### ONE TAKING.

"One taking," within the meaning of the rule that an indictment for larceny, of a single count, must charge but one taking, has no reference to a taking at any one time, and describes such a taking, even though a number of articles were taken at such time. *State v. Newton*, 42 Vt. 537, 539.

"One taking," within the meaning of the rule that but one taking can be alleged in a single count of an indictment for larceny, includes the act of taking several articles of property, though owned by different persons, if they are taken at the same time. *State v. Smith*, 10 Ohio Dec. 682.

#### ONE-THIRD THE CAPITAL SUM.

Where a will provided that, when testator's son should attain the age of 21 years, his executors should pay him one-third of the capital sum "or balance then remaining," it was held that testator evidently meant that one-third of his whole residuary estate should pass. *Forsyth v. Forsyth*, 46 N. J. Eq. (1 Dick.) 400, 406, 19 Atl. 119, 121.

#### ONE-THIRD NEW FOR OLD.

The deduction of "one-third new for old," made in favor of the insurers when an injured vessel is repaired at the insurer's instance, is a deduction allowed upon the supposition that the vessel after being repaired is in better condition than she was at the commencement of the voyage, in consequence of new materials having been substituted for old. *Byrnes v. National Ins. Co.* (N. Y.) 1 Cow. 265, 274.

#### ONE THOUSAND EIGHT HUNDRED AND NINE SEVEN.

"One thousand eight hundred and nine seven," as used in an indictment charging the commission of an offense on that date, means "one thousand eight hundred and ninety-seven," and the indictment is sufficient. *Wood v. State* (Tex.) 51 S. W. 235.

#### ONE WHOLE YEAR.

Where a house was hired at 20 guineas a year, to be paid weekly, and either landlord or tenant to be at liberty to determine the tenancy at three months' notice from any quarter day, this was a renting of a tenement for "one whole year," within the meaning of St. 6 Geo. iv, c. 57, relating to a gaining of settlements by paupers by such renting. *The King v. Inhabitants of Herstonceux*, 7 Barn. & C. 551.

"One whole year at the least," in a statute, has exactly the same effect as the phrase "one whole year," and in either case a portion of a day is, for the purpose of computation, to be reckoned a whole day. *Reg. v. Inhabitants of St. Mary, Warwick*, 1 El. & Bl. 816, 828.

#### ONE YEAR.

"One or more years," within Act March 21, 1772, authorizing a proceeding by a landlord where a tenant under a term of one or more years holds over, includes a lease for nine months, or any time certain less than a year. The mischief which the law intended to remedy was that where tenants unjustly held possession after the expiration of their leases. The injury was fully as great if possession was withheld after a lease for nine months as after the expira-



tion of one for a year. In 2 Bl. Comm. 410, it is said that if the lease be but for half a year or a quarter, or any less time, the lessee is respected as a tenant for years, and is styled so in some legal proceedings, and that every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. *Shaffer v. Sutton*, 5 Bin. 228, 229.

"One year from date," as used in a contract executed on the 24th of June, requiring one of the parties thereto to deliver a deed after one year from date, means the 24th day of June of the next succeeding year. *Vorwerk v. Nolte* (Cal.) 24 Pac. 840, 841.

"One year's rent," as used in Code 1873, c. 134, § 11, giving a landlord a lien for one year's rent on goods removed from the leased premises, denotes the amount of rent to be distrained for, and does not refer to the specific rent of any particular year or period of time. *Wades v. Figgatt*, 75 Va. 575, 582.

"One year," as contained in an indorsement on an insurance policy stating that, for an extra premium, permission was thereby granted to the life assured to proceed to and reside at Belize for one year, means exclusive of the time occupied in the voyage out, and did not limit the period to any particular year. *Notman v. Anchor Assur. Co.*, 4 C. B. (N. S.) \*476, 481.

#### ONE YEAR AND AN INDEFINITE PERIOD THEREAFTER.

Where premises are leased for "one year and an indefinite period thereafter," at an annual rent, and the lessee enters and occupies them, he is the owner of an estate as tenant from year to year. *Pugsley v. Alkin*, 11 N. Y. (1 Kern.) 494, 496.

#### ONE YEAR'S PROVISIONS.

The words "one year's provisions," in a bequest of one year's provisions, cannot be construed to create a specific legacy. *Everitt v. Lane*, 37 N. C. 548, 552.

#### ONE VOYAGE ONLY.

A vessel sailed under a license valid for "one voyage only, including the going and returning," and was authorized thereby to depart from Dantzig and proceed to the destination of London, with liberty either to come back direct and in ballast into the port of departure, or, having sold her cargo, to enter into one of the ports of Nantz or of Bourdeaux. Another clause provided that "she may load in the ports of Nantz or Bourdeaux, and to the destination of that from which she departed, silks, etc., but shall not

navigate to any other destination than those presently indicated." Held, that the words "for one voyage only, including the going and returning," showed that the voyage was to commence and conclude at Dantzig, and the vessel having proceeded from Dantzig to London, and thence to Bourdeaux, she was not protected by the license on a further voyage from Bourdeaux to London. *Everth v. Tunno*, 1 Barn. & Ald. 142, 145.

#### ONEROUS TITLE.

Under the Spanish and Mexican law, property acquired by the husband and wife during the marriage, and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community, whilst property acquired by either of them by lucrative title solely constituted the separate property of the party making the acquisition. By "onerous title" was meant that which was created by a valuable consideration, as the payment of money, the rendition of services, and the like, or by the performance of conditions, or payment of charges to which the property was subject. *Scott v. Ward*, 13 Cal. 458, 471; *Kircher v. Murray* (U. S.) 54 Fed. 617, 624.

An onerous title is the cause in virtue of which we acquire a thing by payment of its value in money, in another thing, or in services, or by means of certain charges and conditions to which we subject ourselves, as purchase, exchange, renting, and dowry. *Noe v. Card*, 14 Cal. 576, 597 (citing *Escriche Diccionario*, tit. "Oneroso"; *Yates v. Houston*, 3 Tex. 433, 453).

The title is said to be onerous when it is acquired for a certain price or under certain charges. It is the contrary to a lucrative title. Civ. Code La. 1900, art. 8556, subd. 22.

#### ONLY.

See "Going Only."

"Only," as contained in the United States Constitution, providing that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," was used to exclude from the criminal jurisprudence of the federal government the odious doctrines of constructive treasons, and limits the definition to plain, overt acts. *Shortridge v. Macon* (U. S.) 22 Fed. Cas. 20, 21.

"Only," as used in Cr. Prac. Act, § 440, which declares what shall be grounds for new trial, and uses the words "in the following cases only," is employed literally, and excludes all other grounds than those

enumerated. *People v. Fair*, 43 Cal. 137, 146.

"Liable only for the amount opposite his name," as used in a subscription contract providing that a subscriber shall be "liable only for the amount opposite his name," is so construed as to make the contract a several obligation. *McFarland v. Lyon*, 23 S. W. 554, 555, 4 Tex. Civ. App. 586.

The use of the word "only" in bank shares, which provide that they shall be transferred only at the banking house, and on the books of the bank, "carries an implication as strong as negative words can make it that there is no other mode of transfer, and therefore they cannot be effectually transferred, as against a creditor of the vendor who attaches them without notice of any transfer, by the delivery of the certificates thereof, with an assignment and blank power of attorney from the vendor to the vendee, even if notice of such transfer be given to the bank before the attachment." *Fisher v. Essex Bank*, 71 Mass. (5 Gray) 873, 881.

On a card advertising cigars, the statement that "we use only the very best grades of Havana tobacco, and manufacture only genuine Havana cigars," the word "only" means wholly; and the statement precludes the idea of the use of any tobacco except Havana tobacco in the cigars. *Hilson Co. v. Foster* (U. S.) 80 Fed. 896, 900.

Code 1851, § 162, providing that, in an action or defense founded on an instrument for the payment of money only, it shall be sufficient to give a copy of the instrument, and to state that there is due thereon a specified sum, means not merely exclusive of any other promise or stipulation, but free from any condition or contingency. *Alder v. Schmidt*, 10 N. Y. Leg. Obs. 363.

"Only," as used in Pub. St. c. 166, § 5, providing that executions shall not run against the bodies, goods, or estates of executors or administrators, but only against the goods and estate of the deceased in their hands, does not exclude goods in the hands of a trustee, but is used *alio intuitu* to exclude goods belonging to the administrator. *Harmon v. Osgood*, 24 N. E. 401, 151 Mass. 501.

"Only," as used in an instruction in a railroad crossing accident case, in which the negligence of defendant's flagman in inviting the plaintiff to cross the tracks in front of a train is in issue, that the fact that the company employed the flagman is only evidence of the additional care exercised by the defendant, in effect renders the conduct of the flagman immaterial. *Ayres v. Pittsburg, C. & St. L. Ry. Co.*, 50 Atl. 958, 959, 201 Pa. 124.

The word "only," in a statute providing that, in a prosecution for a certain crime, the jury may acquit the defendant of that crime, and convict of a certain allied crime only, has the same meaning as the word "merely." *Commonwealth v. Lewis*, 21 Atl. 501, 502, 140 Pa. 561.

The use of the word "only," as used in the charter of Superior of 1889, subc. 13, § 103, providing that the common council shall have power to issue bonds for certain purposes only (naming them), is clearly restrictive, and excludes, as clearly as language can, the idea that the council can issue bonds for purposes other than those expressed. *Uncas Nat. Bank v. City of Superior*, 91 N. W. 1004, 1006, 115 Wis. 340.

An indorsement on a bill of exchange to "pay to J. S. only" has been held to be a restrictive indorsement, which operates to put an end to the negotiability of the paper. *Lee v. Chillicothe Branch of State Bank* (U. S.) 15 Fed. Cas. 151, 153.

The word "only," in a claim made by an inventor that the main characteristics of his invention consist in the plate for secondary batteries, having cells, etc., and the active material, etc., "packed in said cells only," means exclusively, and that the active material was to be placed or packed in the cells of the plate to the entire exclusion of every other receptacle or part of the plate. *Accumulator Co. v. Consolidated Electric Storage Co.* (U. S.) 53 Fed. 793, 794.

#### In limitation in deed or lease.

In construing a deed to a railroad company, conveying one tract of land only for depot and other railroad purposes, and then granting another parcel, and stating in a subsequent clause that "both of said pieces or parcels are granted only and solely for said road purposes," it was said that the words "only and solely" are words of restriction or exclusion. As used in this deed, their effect clearly is to prohibit the grantee from using the lands for other than the specified purposes. *Horner v. Chicago, M. & St. P. Ry. Co.*, 38 Wis. 165, 175.

The word "only," as used in a lease providing that if the building was damaged by fire, etc., the lessee should pay rent only for such portion of the premises as he can reasonably occupy during the time required to make the necessary repairs, but, if it should be so damaged as to require it to be rebuilt, then the lease should end, does not warrant an inference that the rent should be suspended while the premises are untenable from injury by fire, without necessarily compelling rebuilding. *New York Real Estate & Bldg. Imp. Co. v. Motley*, 38 N. E. 103, 104, 143 N. Y. 156.

"Only," as used in a lease to the lessor's mother of a dwelling house, only for herself to occupy for a residence, does not mean that the lessee alone shall occupy the premises, but refers to the purpose for which the house was to be occupied, though not exclusively so. *Schroeder v. King*, 38 Conn. 78.

#### In limitation in devises.

The words "only proper use," as used in a deed of gift by which a father conveys a slave to a daughter, to the "only proper use" and behoof of such daughter, mean her own separate use. *Caldwell v. Pickens' Adm'r*, 39 Ala. 514, 520.

A bequest to a wife, stipulating that the property shall be held by her only, has the effect of excluding her husband from any rights in the property. *Ozley v. Ikelheimer*, 26 Ala. 332, 336.

"Only for the benefit of," as used in a will wherein testatrix bequeathed certain slaves to be held in trust only for the benefit of a certain daughter, was synonymous with "for her sole use," and secured the property to the separate use of the daughter. *Nixon v. Rose (Va.)* 12 Grat. 425, 428.

The word "only" in a will giving testator's property to his wife for life, and after her death to be divided equally between his heirs, only his daughters B. and M., was construed to have been used in the sense of "except," thus excluding the daughters from any interest under the will. *Lott v. Thompson*, 15 S. E. 278, 279, 36 S. C. 38.

Under a bequest to executors of money to be invested and the income only paid over semiannually to a certain person, he is entitled to the income only during his life, and not the principal legacy. *Wynn v. Bartlett*, 45 N. E. 752, 167 Mass. 292.

#### In limitation of insurance risk.

The word "only" in a clause in a fire policy declaring that it is issued on the express condition that the property shall not be operated as a distillery during the term of the insurance, it being intended by the policy to cover carpenter's risk only, manifestly means that the carpenter's risk is the only hazard assumed by the company. *Alkan v. New Hampshire Ins. Co.*, 10 N. W. 91, 94, 53 Wis. 136.

"Only," as used in a policy of insurance on a steamboat against loss by fire only, does not limit the liability of the assurer to losses by fire caused by any particular agency, or to exclude such liability where the fire was caused by a particular agency, but simply shows that no risk whatever was assumed except loss by fire. *Germania Ins. Co. v. Sherlock*, 25 Ohio St. 33, 46.

#### In limitation of jurisdiction.

The word "only," as used in Code Civ. Proc. § 1780, providing that an action may be maintained against a foreign corporation by a nonresident "in one of the following cases only," is inserted as a word of restriction, and implies a general jurisdiction, purposely narrowed and restrained. *Chambers v. Feron & Ballou Co.*, 56 N. Y. Supp. 338 (citing *Hopper v. Hopper*, 125 N. Y. 400, 28 N. E. 457).

"Only," as used in the Constitution providing that the Supreme Court shall have appellate jurisdiction only, coupled with the other words employed, plainly indicates a purpose to render the court's primary and principal powers appellate. *People v. Richmond*, 26 Pac. 929, 933, 16 Colo. 274.

#### ONROERENDE AND VAST STAAT.

The phrase "onroerende and vast staat" is by a statute of the colony of New York passed October, 1810, translated in English "immovable and fast estate," and therefore, in Dutch wills, deeds, and antenuptial contracts, the phrase should be construed to mean land or real estate. *Spraker v. Van Alstyne (N. Y.)* 18 Wend. 200, 208.

#### ONUS PROBANDI.

See "Burden of Proof."

#### ONYX.

"Onyx marble" is defined in the Imperial Dictionary to be a "very beautiful, translucent limestone, of stalagmitic formation, discovered by the French in the province of Oran. \* \* \*" It is used for the manufacture of ornamental articles. Merchandise invoiced as onyx columns, vases, etc., and known by dealers in marble as onyx marble, is assessable as manufactures of marble for a duty of 50 per cent. ad valorem, under Rev. St. U. S. § 2499, providing that a nonenumerated article bearing a similitude to an enumerated article shall be dutiable at the same rate as the enumerated article. *Mandel v. Seeberger (U. S.)* 39 Fed. 760, 761.

#### OONTZ.

Oontz or craps, as it is otherwise known, is a game ordinarily played with two dice. They are shaken up in the hand, and then rolled or thrown from it. The player wins if he throws the numbers seven or eleven, otherwise he loses. It can be played with any four-cornered thing or cube with numbers on it that can be thrown or rolled, and upon any surface, as the floor, the ground, a box, a hat, etc. *Commonwealth v. Kammerer (Ky.)* 13 S. W. 108.

**OPEN.**

See "Held Open."

The words "outward, open, actual, visible, substantial, and exclusive," in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is, opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain; absolute; real, at present time, as a matter of fact; not merely nominal; opposed to form; actually existing; true; not including, admitting or pertaining to any others; undivided; sole; opposed to inclusive. *Bass v. Pease*, 79 Ill. App. 308, 318. See, also, *Helleher v. City of Keokuk*, 15 N. W. 280, 281, 60 Iowa, 473; *State v. Millard*, 18 Vt. 574, 577, 578, 46 Am. Dec. 170.

The requirement of Rev. Laws 1813, c. 86, § 178, providing that lands acquired by a city for streets and public places shall be held in trust, and shall be held "open" for public places forever, is not violated by the erection of a soldiers' monument in a park 100 feet in height, and based on a platform 120 feet long, which is situated on the crest of a hill, with a broad driveway on one side, and the open river on the other. "The placing of monuments and statues in parks is a generally recognized and legitimate use of such parks, whether such monuments are purely ornamental, or include the idea of a memorial." *Parsons v. Van Wyck*, 67 N. Y. Supp. 1054, 1058, 56 App. Div. 329.

**Judgment.**

Opening a judgment is not setting it aside, annulling, or reversing it. It is but a mode of allowing the defendant a hearing on the merits, and the court may impose such terms as it may deem proper. A party has no right to a hearing after judgment, except for causes which touch the honesty and justice of the case. If a judgment is deemed erroneous, an application should be made to strike it off, and not to open it, and the ruling on such point will distinctly draw in question the power of the court to enter such judgment. *Huston Tp. Co-op. Mut. Fire Ins. Co. v. Beale*, 1 Atl. 926, 928, 110 Pa. 321.

**Saloon.**

A city ordinance making it criminal for any person to keep "open any saloon, bar-room or tipping house" between certain hours, will be construed to include a restaurant which sells liquor in connection with its other business, though there is a curtain between the bar where the liquor is sold and the eating room. "The object of the ordinance is manifestly not merely to stop drink-

ing at that hour, but also to compel those who are inclined to collect and tarry at such places to then depart." *Baldwin v. City of Chicago*, 68 Ill. 418, 426.

Where a saloonkeeper connects his living rooms with his saloon, and occasionally serves liquor in them, they become a part of the saloon, and to open them on Sundays to others than members of his family is an opening of the saloon. *People v. Cox*, 38 N. W. 235, 237, 70 Mich. 247.

**Street.**

A public highway might be opened without anything being done by the road overseers for that purpose. The people themselves along the line of the road might open it, or the public travel might at once take possession of a road and use it. Whenever a public road is traveled it is in fact opened, although nothing may have ever been done by the road overseers for the purpose of opening it. No formal opening is ever required. It is true it may be formally opened by the several overseers along the line of the road, but it may also be informally opened by themselves or by others, or it may be opened in fact by the public travel taking possession of it and using it. *Wilson v. Janes*, 29 Kan. 233, 248.

An authority to a municipal corporation to open or extend streets has been held not to authorize the extension of a street across the right of way of an existing railroad, as such right of way is already devoted to a public use by express legislative grant, and the extension of the street across it is an unauthorized appropriation of it to another public use. *Illinois Cent. R. Co. v. City of Chicago*, 30 N. E. 1044, 1045, 141 Ill. 586, 17 L. R. A. 530.

"Be open for travel," as used in a petition in relation to a highway, is insufficient as a request "that a highway be established," so as to invest the supervisors with any jurisdiction in the matter. *Curtis v. Pocahontas Co.*, 72 Iowa, 151, 33 N. W. 616.

The words "open and make the same," in St. c. 500, § 7, making it the duty of county commissioners to fix the time within which the several towns through which any highway may be laid out shall open and make the same, mean "to make the road passable, safe, and convenient for travelers and others passing with their teams, wagons, or other carriages." *Lowell v. Inhabitants of Moscow*, 12 Me. (3 Fairf.) 300, 301.

**Same—Construction and improvement.**

The term "opening," in a clause of the city charter authorizing the opening of a street, etc., "refers to throwing open to the public what before was appropriated to individual use, and the removing of such obstructions as exist on the surface of the

earth, rather than any artificial improvement of the surface. By the term 'opening' we do not understand the improvement of a street or highway by grading, culverting, etc. The term is generally (we think always) clearly distinguishable from such kind of improvement." *Reed v. City of Toledo*, 18 Ohio, 161, 165.

A statutory power to open and extend a street includes the construction of the street, or the extension thereof, as well as the mere act of laying it out. *Matthiessen & Wiechers Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. (11 C. E. Green) 247, 254.

"Opening a street" refers to throwing open to the public what before was appropriated to individual use, and the removing of such obstructions as exist on the surface of the earth, rather than any artificial improvement of the surface; and hence Act March 6, 1889, § 1, authorizing the opening, extending, or widening of any street, does not authorize the grading or graveling of a street. *Wilcoxon v. City of San Luis Obispo*, 35 Pac. 988, 989, 101 Cal. 508.

The act of Congress giving to the city of Washington power to open and keep in repair streets, avenues, lanes, etc., agreeably to the plan of the city, includes the power to alter the grade or change the level of the land on which the streets, by the plan of the city, are laid out. *Smith v. Washington City*, 61 U. S. (20 How.) 135, 147, 15 L. Ed. 858.

As used in a statute authorizing the overseers of highways to open them, the word "open" means to clear away the obstruction in the road, or the physical act of inclosing the highway for the public use, and not the mere form of giving it to the public in its finished condition. *Gaines v. Hudson County Ave. Com'rs*, 37 N. J. Law (8 Vroom) 12, 14.

It cannot be said with propriety that a road has been opened, as a whole, when nothing has been done to that entire portion which constitutes three-fourths of it, and the remainder was a road, opened and used before as such. *State v. Inhabitants of Cornville*, 43 Me. 427, 428.

A road is opened, within the statute providing that it shall be considered discontinued unless it is opened within six years from its establishment, where the trees on it have been felled and cut up for more than six years, although it was impassable except for those on foot. *Baker v. Runnels*, 12 Me. (3 Fairf.) 235, 237.

"Opened," as used in 1 Rev. St. 520, providing that every public highway laid out that shall not be opened and worked within six years from the time of its being so laid out shall cease to be a road for any purpose

whatever, means that it must be opened as a highway over its entire route. *Beckwith v. Whalen*, 70 N. Y. 430, 435.

#### **Same—Dedication.**

Where the landowners have dedicated to the public the land of a street regularly located on the confirmed city plan, the street is "open," so as to charge adjoining owners with the cost of constructing a sewer thereon. *City of Philadelphia v. Thomas' Heirs*, 25 Atl. 873, 874, 152 Pa. 494.

Streets cannot be said to be "laid out and opened," within the meaning of a city charter giving the city power of taxation for municipal purposes to a distance of 240 feet back from the line of such streets as the corporate authorities had "laid out and opened," until there has been a formal acceptance of them by the authorities of the town according to law, though they may have been, since an alleged dedication, used as streets by the owners of property, and may have been generally considered streets of the town. *Valentine v. City of Hagerstown*, 38 Atl. 931, 932, 86 Md. 486 (cited in *Sindall v. City of Baltimore*, 49 Atl. 645, 647, 93 Md. 526).

#### **Same—Lay out.**

"Open," as used in an application to selectmen to open a street, is equivalent in meaning to the words "lay out" as used in the statute authorizing such petition. *Winoski Lumber & Water Power Co. v. Town of Colchester*, 57 Vt. 538, 541.

The words "opening and laying out," as used in the road laws in reference to the laying out or opening of roads, "are constantly used as equivalent expressions." In *Re Twenty-Eighth St.*, 102 Pa. 140, 146.

The term "open and dedicated," employed with respect to a street or highway, means laid out or set apart by the owner, and imply that nothing further is necessary to make it a highway in fact. *Hemphill v. City of Boston*, 62 Mass. (8 Cush.) 195, 197, 54 Am. Dec. 749.

#### **OPEN ACCOUNT.**

"An open account is one in which some item of the contract is not settled by the parties, whether the account consists of one item or many, or where there have been running or current dealings between the parties, and the account is kept open with expectation of further dealings." *Purvis v. Kroner*, 23 Pac. 260, 261, 18 Or. 414; *Battle v. Reid*, 68 Ala. 149, 152; *Sheppard v. Wilkins*, 1 Ala. 62, 64; *McCamant v. Batsell*, 59 Tex. 363, 368. An account consisting of the price of a carriage purchased and paid for by plain tiff for defendant at his request, together with the cost of the transportation from New

York to New Orleans, is not an open account, within the meaning of the statute barring actions on open accounts in three years. *Caruthers v. Mardis' Adm'rs*, 8 Ala. 599, 601.

An open account is one in which the amount due has not been ascertained or fixed either by the act and agreement of the parties or by operation of law, *Nisbit v. Lawson*, 1 Ga. (1 Kelly) 275, 287; *Anderson v. State*, 2 Ga. (2 Kelly) 370, 374; *Hargroves v. Cooke*, 15 Ga. 321, 332; and is usually raised by one party only, and is an *ex parte* affair, and is open until agreed to by the other; but when the debtor has acknowledged the justice of the account, and it is no longer the act of one party, but the agreement of both, the account becomes liquidated. *Hargroves v. Cooke*, 15 Ga. 321, 332.

Whether the account consists of a single item or many items, if the terms of the contract have not been adjusted by agreement of the parties, the demand is an open account. *Gayle's Adm'r v. Johnston*, 72 Ala. 254, 47 Am. St. Rep. 405.

In strict legal phraseology, an open account is a debt not reduced to writing, which is subject to future adjustment, and may be reduced or modified by proof, such as accounts running between merchants, a merchant's account for the sale of goods, and all other of like character. *Smith v. Ellington*, 14 Ga. 379, 382.

An account is open and current when it is running, not closed, settled, or stated, so that there are reciprocal demands between the parties—something upon which either party could sustain an action. *Taylor v. Parker*, 17 Minn. 469, 473 (Gil. 447, 451).

An open account is one in respect to which nothing has occurred to bind either party by its statements, or an account which is yet fully open to be disputed. *Abb. Law Dict.* The word "open" indicates that there is something undetermined by the contract of the parties or by the application of settled rules of law, and an account cannot be said to be open when no term of the contract remains to be settled by agreement of the parties. *McCamant v. Batsell*, 59 Tex. 363, 368.

When an account is stated and rendered, and no objection is made to it, it is no longer an open account, but becomes liquidated. *Anderson v. State*, 2 Ga. (2 Kelly) 370, 374.

"The term 'open account' is used in opposition to a stated account wherein the account is closed by an assent to its correctness by a party charged." *Whittlesey v. Spofford*, 47 Tex. 13, 17.

An account which is signed and rendered by the debtor with the statement, in detail, of the debtor and creditor items, is not

an open account, within the meaning of the statute of limitations. *Dixon v. Lyons*, 13 La. Ann. 160.

"There is no element of an open or unliquidated account in the indebtedness of one tenant in common to his co-tenant for rents collected. It is more in the nature of an action for money had and received by one person to the use of another, or that of an implied trust, rather than an express trust." *Hairston v. Sumner*, 17 South. 709, 106 Ala. 381.

Within the meaning of the statute fixing limitations to a right of action on an open account, an account of an agent with his principal is not an open account, and an action thereon is not limited by such statute. *Dolhonde v. Laurans' Widow*, 21 La. Ann. 406.

"Open," as used in an instruction in an action against a city for injuries from a defective sidewalk, stating that, if the defect was open and notorious, the city was chargeable with notice thereof, means not concealed; not hidden; exposed to view; apparent—a secondary signification in which the word is very frequently used—and the jury would not understand the court to refer to a defect consisting of an open hole in the sidewalk. *Kelleher v. City of Keokuk*, 15 N. W. 280, 281, 60 Iowa, 473.

A demand for money collected by plaintiff on a judgment in favor of himself and defendant's intestate jointly is not an open account. *Bradford v. Barclay*, 39 Ala. 33.

## OPEN AND GROSS LEWDNESS.

The phrase "open and gross lewdness," in a statute making open and gross lewdness criminal, is not equivalent to the phrase "gross lewdness in an open place." The word "open" has no reference to place at all, nor to the number of people. It is used simply to define a quality of the act of lewdness. It is open lewdness as opposed to secret lewdness. It defines the same act, regardless of whether it is committed in the presence of one or of many. *State v. Juneau*, 59 N. W. 580, 581, 88 Wis. 180, 24 L. R. A. 857, 43 Am. St. Rep. 877; *Commonwealth v. Wardell*, 128 Mass. 52, 53, 35 Am. Rep. 357.

"Open," as used in Rev. St. c. 99, § 8, providing a punishment for open and gross lewdness, etc., means undisguised, not concealed, and opposite to private, concealed, and unseen. *State v. Millard*, 18 Vt. 574, 577, 578, 46 Am. Dec. 170.

St. 1784, c. 40, § 6, providing that open and gross lewdness and lascivious behavior shall be punished, etc., does not include the commission of such behavior in secret, notwithstanding the parties are observed by a

third person without their knowledge. *Commonwealth v. Catlin*, 1 Mass. 7, 8.

### OPEN AND NOTORIOUS INSOLVENCY.

The doctrine that the maker of a note must be in "open and notorious insolvency," before recourse can be had to the assignor, means not merely the want of sufficient property to pay all of one's debts, but the absence of all property, within reach of the law, applicable to the payment of any debt. *Hardesty v. Kinworthy* (Ind.) 8 Blackf. 304, 305; *Somerby v. Brown*, 73 Ind. 253, 256. Property in possession of an assignee in bankruptcy is not only within reach of the law, but in the actual custody of the law. *Somerby v. Brown*, 73 Ind. 253, 256.

### OPEN AND PEACEABLE ENTRY.

A statute providing for the foreclosure of a mortgage by "open and peaceable entry" on the mortgaged premises, and possession thereof peaceably for three years, means an entry not opposed by the mortgagor or persons claiming the premises, and made in the presence of two witnesses, whose certificates are sworn to and recorded within 30 days in the registry of deeds as required by Gen. St. c. 140, § 182. *Thompson v. Kenyon*, 100 Mass. 108, 111.

### OPEN BULK.

"Open bulk," as used in Acts N. C. 1891, c. 331, providing that persons selling seeds in packages unmarked by the date when such seeds were grown, except farmers selling seeds in open bulk to other farmers or gardeners, shall be guilty of a misdemeanor, means in the mass; exposed to view; not tied or sealed up. Used in the connection they are in this act, they do not relate to the quantity that may be sold; nor does the statute restrict it to an ounce or less, or require a bushel or more to be sold. *In re Sanders* (U. S.) 52 Fed. 802, 804, 18 L. R. A. 549.

### OPEN CORPORATION.

An open corporation is where all the citizens or corporators have a vote in the election of the officers of the corporation—usually applied to municipal corporations. *McKin v. Odom* (Md.) 3 Bland, 407, 415.

### OPEN COURT.

The term "open court," within the meaning of a chancery rule declaring that the chancery court shall be deemed always open for certain purposes, signifies the time when the court can exercise its functions. *Ex parte Branch*, 63 Ala. 383, 387.

The phrase "in open court," as used in the statute requiring an application for certiorari to be made to the inferior court of common pleas of the county, in open court, is used to emphasize the distinction between the court in public session, and one or more judges of the court exercising the judicial functions in chambers. Where the record avers that "the application was made to the court of common pleas held at F., in and for the county of H., of the term of September, 1891, three judges being present," it sufficiently indicates that it was done in open court. *Conover v. Bird*, 28 Atl. 428, 429, 58 N. J. Law (27 Vroom) 228.

Code, § 2222, declaring that no divorce shall be granted on the testimony of the plaintiff, but that all such suits shall be heard in open court, means a court which is in session, organized for the transaction of official business. *Hobart v. Hobart*, 45 Iowa, 501, 503.

### OPEN ESTATE.

"Open," as used in reference to the rule that, so long as an estate is open, the accounts of the executor and administrator in the orphans' court are subject to revision and correction as to any matter discovered to be in error, means not finally closed and settled. *Martin v. Jones*, 89 Atl. 102, 103, 87 Md. 43.

### OPEN FOR BUSINESS.

See "Actually Open for Business."

Within the meaning of the term in an insurance policy providing that the books and inventory of a business should be kept in an iron safe when the store was not open for business, the expression "not open for business" meant such ordinary occasions as Sundays and holidays, and after the store had closed at night; and where it appears that the store had been burned during business hours, and it does not appear that the premises were ever actually closed, such store will not be held not to have been open for business, within the meaning of the policy, the requirement of the policy being rather that the books should be placed in a place of safety, than that they should be inserted in the safe in all cases of fire. *Phoenix Ins. Co. v. Schwartz*, 41 S. E. 240, 241, 115 Ga. 113, 57 L. R. A. 752, 90 Am. St. Rep. 98.

In a statute imposing a penalty upon any one permitting his place to be open for the purpose of traffic on Sunday, it is clearly and manifestly the intention of the statute to close the places and houses therein mentioned against barter, sale, and traffic on Sunday; and it is meant that no selling should occur in these places or houses on Sunday, and that traffic shall be cut off

entirely on that day. *Whitcomb v. State*, 17 S. W. 258, 259, 30 Tex. App. 272.

#### OPEN HOUSE.

An open house is defined by Rev. St. 1895, art. 3380, as one in which no screen or other device is used or placed either inside or outside of such house or place of business for the purpose of obstructing the view through the open door or entrance into such house or place of business. Where intoxicating liquors are sold in quantities less than a quart, a partial obstruction of the view in a saloon precludes it from being an open house. *Componovo v. State* (Tex.) 39 S. W. 14. Under this statute and definition, it is held that the statute is not violated by a partition of the room in which the liquors are sold for the purpose of renting a part of it, not to obstruct the view, and which does not in fact obstruct the view of the bar from the front door. *State v. Andrews*, 82 Tex. 73, 75, 18 S. W. 554. See, also, *State v. Drake*, 86 Tex. 329, 335, 24 S. W. 790; *State v. Austin Club*, 89 Tex. 20, 25, 33 S. W. 113, 30 L. R. A. 500.

#### OPEN MANNER.

Act Jan. 19, 1852, providing that it shall be unlawful for any one to carry a deadly weapon about his person, not "in an open manner and fully exposed to view," does not mean that, if any part of the barrel of a pistol was stuck down in the pocket, it would constitute a violation of the statute, but must be construed as meaning that the weapon must be carried in such a manner that others who might come in contact with the person might see that he was an armed and dangerous person, who was to be avoided in consequence, and only requires that the weapon should be exposed sufficiently to view to enable any person to see and know that it was a weapon. *Stockdale v. State*, 32 Ga. 225, 227.

#### OPEN POLICY.

An open policy of insurance is one in which "the amount of liabilities is left open to be determined according to the actual loss, either by agreement of the parties, or upon proof and compliance with its terms or with the rules of evidence." *Riggs v. Home Mut. Fire Protection Ass'n*, 39 S. E. 614, 618, 61 S. C. 448.

An open policy is one in which the sum to be paid as indemnity in case of losses is not fixed in the contract, but is left open, to be proved by the claimant, or to be determined by the parties. This determination is called an "adjustment of the loss." *Fire Ins. Ass'n v. Miller* (Tex.) 2 Willson, Civ. Cas. Ct. App. § 332.

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An open or running policy of insurance is defined by 2 Bouv. Law Dict. p. 430, as a policy on which the value is to be proved by the assured. However, by an "open policy" is sometimes meant in the United States one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time. *Corporation of London Assurance v. Paterson*, 32 S. E. 650, 655, 106 Ga. 538.

A valued policy is where the value of the subject insured is agreed upon by the parties. If it is not estimated at any particular amount or rate, it is an open policy. *Cox v. Charleston, F. & M. Ins. Co.* (S. C.) 3 Rich. Law, 331, 332, 45 Am. Dec. 771.

Where a policy for marine insurance was in the form of a valued policy, and, after a statement of the subject insured, there appeared the phrase, "Valued at \$——, as indorsed," but the blank was not filled in, and there was no indorsement as to value, it was held that the failure to fill the blank or to make any indorsement as to value constituted the policy an open policy, and not a valued policy. *Snowden v. Gulon*, 5 N. E. 322, 326, 101 N. Y. 458.

The term "open fire policy" includes any policy, unless it appears to have been the intention of the parties thereto, upon a fair and reasonable construction upon its form, to value the loss, and thereby fix by contract the amount of the recovery. A policy for a certain sum on a dwelling house, containing a stipulation that the company will pay the assured the loss or damage, not exceeding the sum assured, is an open, and not a valued, policy. *Farmers' Ins. Co. v. Butler*, 38 Ohio St. 128, 134.

An open policy is a personal contract, and, when made on the insured's own account, the terms are that the assured causes himself to be insured and takes insurance for a given sum for a specified voyage, for a term of time, upon the ship and goods on board her, against the perils of the sea and other risks. Such a policy is always held to be an open policy, and to entitle the insured, in case of loss, whether partial or total, to an indemnity and recompense to the amount of his actual loss by the perils from which the contract professes to protect him. *Laurent v. Chatham Fire Ins. Co.*, 1 N. Y. Super. Ct. (1 Hall) 41, 48.

A fire policy issued to indemnify a contractor against loss he may sustain by reason of the building which he has contracted to build in case of its destruction, to a sum not exceeding a designated sum, is an open policy. It does not mean that as soon as the house is destroyed by fire the insured shall be entitled to recover the sum designated, but means that he is to recover that



amount if that is the damage done to him by the fire. The insurance company guarantees him against any loss, to the extent of the sum designated, which he may sustain by reason of the property being destroyed by fire; and therefore, upon a total loss of the building insured, the insurer is only liable for the actual loss sustained, not exceeding the sum designated. *Ulmer v. Phoenix Fire Ins. Co.*, 39 S. E. 712, 713, 61 S. O. 459.

An open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss. *Civ. Code Cal.* 1903, § 2595; *Rev. Code, N. D.* 1899, § 4496; *Civ. Code S. D.* 1903, § 1846.

An open policy is where the amount of the interest of the assured is not fixed by the policy, but is left to be adjusted in case of loss. *Civ. Code Ga.* 1895, § 2129.

In an open policy of insurance, for which an aggregate amount is expressed, there are as many contracts for insurance as there are indorsements on the policy of separate shipments of goods. If the open policy contained all the conditions which govern the shipments of goods specially insured under the policy, and the company reserves the right to reject or accept each special insurance in each shipment, the contract must be regarded as made at the domicile of the company issuing the open policy. *State v. Williams*, 15 South. 290, 291, 46 La. Ann. 922.

#### OPEN RISK.

An open and visible risk is such as would in an instant appeal to the senses of an intelligent person. It is one so patent that a person familiar with the business would instantly recognize it. *Johnston v. Oregon, S. L. & U. N. Ry. Co.*, 31 Pac. 283, 286, 23 Or. 94.

#### OPEN SEASON.

"Open season," as used in the game and fish act, means the season wherein the killing of game is permitted. *Rev. St. Okl.* 1903, § 3076.

#### OPEN STORE.

The term "open store," as used in Code, § 5542, imposing a penalty on any merchant or shopkeeper who "keeps open store" on Sunday, implies something more than opening the door of a shop or store or keeping the door open. It involves the keeping open of the store as such—the opening up of the business carried on in the house, and the exposition to sale of the wares stored there for sale. The words in and of themselves mean the opening up and keeping open the

storehouse of goods, wares, and merchandise for the purposes of traffic. *Jebeles v. State*, 81 South. 377, 181 Ala. 41.

"Open store," as used in Code 1876, § 4443, prohibiting any merchant or shopkeeper from keeping open store on Sunday, is construed not to mean the mere act of keeping the door of the store open, but the keeping of a door open, and by means thereof the selling of merchandise or other articles kept there for sale. "If the parties intended a sale, whether payment was presently made or expected to be made afterward, the statute was violated." *Snider v. State*, 59 Ala. 64, 67.

#### OPEN TO OCCUPATION AND PURCHASE.

*Rev. St. U. S.* § 2319, declaring that mineral deposits are free and open to exploration and purchase, and the land in which they are found is open to occupation and purchase to a certain extent or amount—the land to that extent constituting a mining claim under the law when the same is properly located—means that the absolute title may be acquired in the land. This language will not bear the interpretation that the government intended thereby to sell to the purchaser of a mining claim a mining easement therein, or simply the right to occupy and possess the mining claim for the necessary use of the mineral vein. The right to occupy and to purchase means the right to acquire the full title. *Silver Bow Min. & Mill. Co. v. Clark*, 5 Pac. 570, 574, 5 Mont. 378.

#### OPEN VENIRE.

Open venire, in Dakota, is where the marshal of the United States for the territory selects and summons jurors as at common law. *United States v. Beebe*, 11 N. W. 505, 507, 2 Dak. 292.

#### OPENING.

*Rev. St. art. 4427*, declaring that all railway corporations which fence their right of way may be required to make openings through their fences and over their roadbeds at prescribed distances, does not require open crossings, although literally an opening in a fence may be said to mean an unobstructed way through it. But in common parlance the word does not always have such significance, beings sometimes used to indicate a way through that is capable of being used as a mode of ingress and egress to and from the inclosure. As the word is used in the statute, it does not require the construction of an open crossing. *Missouri, K. & T. Ry. Co. v. Chenault*, 60 S. W. 55, 58, 24 Tex. Civ. App. 481. See.

also, *Burgess v. Missouri, K. & T. R. Co.* (Tex.) 41 S. W. 708, 704.

### OPENING THE BIDDINGS.

The phrase of "opening the biddings," which in the English books occurs so frequently in relation to mortgage foreclosure sales, means no more than a further suspension of the sale, and a continuance of the property in the market. If there should be made to appear either before or after the sale has been ratified any injurious mistake, misrepresentation, or fraud, the biddings may be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent into the market and resold. *Andrews v. Scotton* (Md.) 2 Bland, 629, 644.

### OPENLY OUTRAGE PUBLIC DECENCY.

The phrase "openly outrages public decency," in Pen. Code, § 675, making any person committing any act which seriously disturbs or injures the public peace, or who openly outrages public decency, guilty of a misdemeanor, includes the teachings of the doctrine of anarchy. To give this construction to the law in no way abridges the liberty of conscience in matters of religion, nor the freedom of speech on all questions of government or of social life, nor does it in any way trespass upon the proper freedom of the press. The point and pith of the offense of anarchists is that they teach the doctrine that the pistol, the dagger, and dynamite may be used to destroy the rulers. The teaching of such horrid methods of reaching an end is the offense. In this class of cases the courts and the public have too long overlooked the fact that crimes and offenses are committed by written or spoken words. We have been punishing offenders in other lines for words spoken or written, without waiting for an overt act of injury to the persons or property. The press is restrained by the law of libel from the too free use of words. *People v. Most*, 73 N. Y. Supp. 220, 222, 86 Misc. Rep. 139.

### OPENNESS.

Openness and notoriety and exclusiveness of possession, as the terms are used in the law of adverse possession, are shown by such acts in respect to the land in its condition at the time as comport with ownership—such acts as would ordinarily be performed by the true owner in appropriating the land or its avails to its own use, and in preventing others from the use of it as far as reasonably practicable; and nearly akin to these are the acts evidencing the element of hostility toward all the world. *Goodson v. Brothers*, 20 South. 443, 445, 111 Ala. 589.

## OPERA.

An opera is a composition of a dramatic kind, but set to music and sung, accompanied with musical instruments, and enriched with appropriate costumes, scenery, etc. *Rowland v. Kleber* (Pa.) 1 Pittsb. Rep. 68, 71.

An opera is defined to be a musical drama, consisting of airs, choruses, recitations, etc., enriched with magnificent scenery, machinery, and other decorations, and representing some passionate action. It is therefore a theatrical exhibition, within license laws. *Bell v. Mahn*, 15 Atl. 523, 121 Pa. 225, 1 L. R. A. 364, 6 Am. St. Rep. 786.

"What is the exact legal meaning of 'an opera' has been and is the subject of dispute, one court holding that an act to tax theaters does not include opera companies—*Rowland v. Kleber* (Pa.) 1 Pittsb. Rep. 68—and another, in *Society for Reformation of Juvenile Delinquents v. Diers* (N. Y.) 60 Barb. 152, deciding otherwise." *Commonwealth v. Fox* (Pa.) 10 Phila. 204.

### OPERA COMPANY.

An opera company are persons who sing compositions set to music, such as the operas of Mozart, Handel, Rossini, Verdi, etc. An opera company need not be licensed under an act fixing licenses for theaters. *Rowland v. Kleber* (Pa.) 1 Pittsb. Rep. 68, 71.

### OPERA HOUSE.

As public house, see "Public House."

A house in which operas are represented is termed an opera house. *Rowland v. Kleber* (Pa.) 1 Pittsb. Rep. 68, 71.

The opera house and the theater alike comprehend the stage, proscenium, boxes, orchestra, parquet, and the galleries. *Bell v. Mahn*, 121 Pa. 225, 229, 15 Atl. 523, 524, 1 L. R. A. 364, 6 Am. St. Rep. 786.

## OPERATE

See "Cease to be Operated."

The word "operate" means to put into or to continue in operation or activity; to work, as to operate a machine—and is distinct from maintaining or keeping in repair. *McChesney v. Village of Hyde Park*, 37 N. E. 858, 862, 151 Ill. 634.

The expression "used and operated," as used in a petition in an action against a railroad for personal injuries, stating that the defendant used and operated a turntable in connection with its railroad, etc., is equivalent to a charge that the defendant controlled such turntable. *Nagel v. Missouri Pac. Ry. Co.*, 75 Mo. 653, 660, 42 Am. Rep. 418.

The operation in the expression "upon which the will may operate" means full operation according to the whole intention of the testator, and not a partial or limited operation which would execute this intention in part, and leave it in part unexecuted. *Lamar v. McLaren*, 84 S. E. 116, 119, 107 Ga. 591.

#### **Operating drawbridge.**

A contract between a bridge company and another party relative to the erecting of a drawbridge, and providing that the operating and managing of the draw should be left to the bridge company, means the opening and closing of the draw. *Portage Lake Bridge Co. v. Wright*, 44 N. W. 498, 500, 78 Mich. 426.

#### **Operating in grain fields.**

A policy of fire insurance was issued on a harvesting machine while operating in the grain fields, and in transit from place to place in connection with harvesting, and the machine was moved the day after the policy was issued from the place where it had been stored since the previous season to a blacksmith shop to be repaired in order to fill contracts for cutting and threshing grain; and while near such shop, and about the day the harvesting season commenced, the machine was burned. Held, that it was not operating in the grain fields at the time it was destroyed, within the meaning of the policy. *Mawhinney v. Southern Ins. Co.*, 32 Pac. 945, 946, 98 Cal. 184, 20 L. R. A. 87.

#### **Operating railroad.**

It is not erroneous in an instruction to use the verb "operate" in an active sense, in reference to operating a mill, as meaning running the mill or carrying on its business. It may be "that the etymology of the word makes it a neuter verb, but modern usage has accepted it as an active verb. In this it is in consonance with the noun 'operative,' as meaning a manufacturer or artisan who performs the manual labor necessary to cause a mill or factory to operate. The word 'operate' is frequently used by the Legislature in the statutes of this state in its active sense, when applicable to the business of railroads, as meaning running or managing a railroad. The law uses words in their accepted sense, rather than according to their strict etymology, or to the niceties of philology." *Rhodes v. Matthews*, 67 Ind. 131-139.

"Operate its railroad," as used in an instruction in an action against a railroad located in a public street, stating that the company had a right to operate its railroad over the street in question, means that the defendant had a right to run its cars over the street. *Cumming v. Brooklyn City R. Co.*, 10 N. E. 855, 857, 104 N. Y. 669.

"Operating," as used in a statute relating to recovery for injuries to stock inflicted by a railroad company whether by reason of negligence or not, while operating their road, unless such road is inclosed with a legal fence, means that, whenever a railroad company run their engines and cars upon their line of road, they are operating it. If they use it for purposes of general traffic, then it may be said to be in full operation; and if, when part of the road is built, trains are being run over that portion of the road, conveying material for the extension of the line, it may be consistently said that that portion of the line built is being operated for construction purposes. In either event, the company would be operating their road, and would be required to build a fence within a reasonable time. *Chicago, K. & W. Ry. Co. v. Totten*, 42 Pac. 269, 272, 1 Kan. App. 558; *McKnight v. Iowa & M. R. Const. Co.*, 43 Iowa, 406, 408.

Laws 1885, c. 155, providing that the occurrence of any fire caused in "operating a railroad" shall be prima facie evidence of the negligence of the company, is not confined to fire escaping from locomotives, but applies to all cases where the damage was caused by fire arising from any step in the operation of the road. It includes caring for a right of way. *Missouri Pac. R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. 793, 794; *Missouri Pac. Ry. Co. v. Cady*, 24 Pac. 1088, 44 Kan. 633.

"Operating a railroad" as used in Pub. St. c. 112, § 212, providing the amount that may be recovered for the loss of the life of a passenger, or one not a passenger or in the employment of a railroad corporation, by reason of the negligence or carelessness of a corporation operating a railroad or a street railway, describes the kind of corporation intended to be subjected to the liability therein imposed, and not the work immediately in the process of performance by it. Even if they could be held to limit the liability to occasions when the railroads are being actually operated, they would not limit it to accidents occasioned by locomotives moving trains, etc., or only upon its tracks. The handling of its freight, the loading and unloading of its cars, and the transfer of freight from a vessel to its cars, are railroad operations. *Daley v. Boston & A. Ry. Co.*, 16 N. E. 690, 695, 147 Mass. 101.

Trustees in charge of a railroad whose main track is all outside the state, but whose trains are brought into the state over the tracks of another company, are "operating a railroad in this state," within the meaning of *Starr & C. Ann. St. c. 120, par. 40*, requiring those owning, operating, or constructing a railroad in this state to return schedules of its taxable property. *Quincy, O. & K. C. Ry. Co. v. People*, 41 N. E. 162, 163, 156 Ill. 437.

The court, in discussing the meaning of the word "operate," in *Sayles' Ann. Civ. St.*

art. 4500f, providing that every railroad corporation shall be liable for all damages sustained by any employé while engaged in operating its cars by reason of the negligence of any other employé, etc., held that "operate," as used in the statute, signifies to perform a work or labor; to put into or continue in operation or activity; to work, as to operate a machine. It is further held that, if sectionmen upon the car were working handles in such a manner as to apply the power to the hand car for the purpose of moving it, they were engaged in the work of operating it, within the meaning of the statute. *Perez v. San Antonio & A. P. Ry. Co.*, 67 S. W. 137, 138, 28 Tex. Civ. App. 255.

The term "operating any railroad," in Code 1873, § 1289, providing that, in an action for damages from a fire set out or caused by the operating of any railroad, it shall only be necessary for the plaintiff to prove injury to, or destruction of, his property, does not include the burning of grass on a railroad right of way by its sectionmen; and therefore, in case a fire is so set, the damaged person, in an action against the railroad, has the burden of showing that the fire was so set. *Connors v. Chicago & N. W. Ry. Co.*, 82 N. W. 953, 954, 111 Iowa, 384.

The word "operation," as used in a contract referring to all works, materials, and plant in use in or about the construction or operation of a railroad, does not necessarily imply that the works, plant, or materials referred to were rolling stock. Works and plant which must be furnished in the building of a road are as necessary in the operation of the road as rolling stock. *Central Trust Co. v. Condon* (U. S.) 67 Fed. 84, 92.

The "use and operation of a railway," as used in Code, § 1307, declaring that railroad companies shall be liable for injuries to employes caused by, or directly connected with, the use and operation of the railway, is not limited to the actual running of trains on the railway, but includes the running of a single engine without cars attached, and also the propelling of a hand car, which, by reason of a collision with a flat car used by a section hand, caused plaintiff's injury. *Larson v. Illinois Cent. R. Co.*, 58 N. W. 1076, 1077, 91 Iowa, 81.

The term "operating such railroad," as used in Rev. St. 1899, § 2873, relating to injuries to employes while "operating such railroad," includes all work that is directly necessary for running trains over a track, and includes section hands who are engaged in repairing and putting in shape the roadbed and bridges. *Callahan v. St. Loui's Merchants' Bridge Terminal R. Co.*, 71 S. W. 208, 215, 170 Mo. 473, 60 L. R. A. 249, 94 Am. St. Rep. 746.

The term "land not used in operating the road," in a statute exempting from taxa-

tion all the land of a railroad company except land not used in operating the road, does not include a lot on which a section house and other improvements are situated. *Vicksburg & M. R. Co. v. Bradley*, 6 South. 321, 66 Miss. 518.

#### Operating street railway.

"Operation," as used in St. 1872, c. 11, § 1, being the charter of a street railway corporation, which provides that "said city [New Bedford] or town [Fairhaven] is hereby authorized and empowered to contract with said railway corporation concerning the construction, maintenance, and operation of said railway, upon such terms as it may agree with said railway corporation," etc., cannot be construed so as to extend the power to make a contract excluding the use of such railway by another railway company, which use is either previously or subsequently authorized by the Legislature. *New Bedford & F. St. R. Co. v. Achushnet St. R. Co.*, 9 N. E. 536, 538, 143 Mass. 200.

#### Operating on timber land.

The term "operate," as used in a bond allowing a party the right to rescind a certain bargain for the purchase of land by giving notice thereof at a certain time, unless a majority of the owners of the tract should sooner determine to operate on the said land, etc., includes the selling of stumpage; that is, selling off the timber growing or to be cut by the purchaser, as well as the cutting of the timber by the owner at his own expense. *Eaton v. Smith*, 37 Mass. (20 Pick.) 150, 151.

#### Operating tollroad.

A charter incorporating a company for the purpose of operating a tollroad between designated points does not authorize the company to establish a stage line upon their road, nor to contract to carry United States mail. *Wiswall v. Greenville & R. Plankroad Co.*, 56 N. C. 183, 186.

#### Operating trains or cars.

The word "operate," in a contract by a railroad company employing a contractor to build its road, and agreeing to furnish the motive power and operate the construction train, was construed not to have been used in the restricted sense that the necessary force was to be furnished to move the train over the road at such times as directed by the contractor, and not to preclude the trainmen or the railroad from determining how fast or how slow the train should be run, but to have been used in its natural sense, as giving the contractor the right to control the movements and speed of such train. *Miller v. Minnesota & N. W. R. Co.*, 39 N. W. 188, 190, 76 Iowa, 655, 14 Am. St. Rep. 258.

Under Laws 1893, c. 220, making railroad companies liable for injuries to any employé occurring through the negligence of another employé while he is engaged in "operating, running, riding upon, or switching" cars, such a company is liable to a freight handler who was negligently run into by an engine while he was pushing a car to the freight house by direction of his superior. *Egan v. Chicago, M. & St. P. Ry. Co.*, 69 N. W. 997, 998, 95 Wis. 69.

The term "operation," as used in Rev. St. art. 4560f, providing that a corporation operating a railroad shall be liable for damages sustained to its employés while operating its cars and locomotives, evidently comprehends something more than the mere running of its cars, locomotives and trains. We find the following among other definitions in the Standard Dictionary: "To effect any result; exert agency; act; to bring about a specified result; to produce the proper or intended effect; operation; the act or process of operating; a mode of action; a single, specific act or transaction; a course or series of acts to effect a certain purpose." The Supreme Court of Iowa, in *Deppe v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 52, in discussing a similar statute, said that, while it was true that an employé was not injured while operating a train, neither the act nor the constitutional limitation "requires us to put this very narrow construction upon it. The plaintiff was employed in the discharge of a duty which exposed him to the perils and hazards of the business of railroads, and, though the injuries did not arise from such hazards, they cannot be separated from the employment." In *Chicago, M. & St. P. Ry. Co. v. Artery*, 137 U. S. 507, 11 Sup. Ct. 129, 34 L. Ed. 747, the statutes of Iowa are held to apply to those only who are in some manner engaged in labor connected with the use and operation of the railway, and cases are cited to show the construction given by the Iowa courts to the terms "use" and "operation," and the general view which should obtain in the construction of such statutes; and, where one was engaged in moving a push car, he was at work within the zone of the damages to be provided against. *Texas & P. R. Co. v. Webb*, 72 S. W. 1044, 1046, 31 Tex. Civ. App. 498.

#### OPERATING EXPENSES.

Compensation for the use of equipment which is hired, and not owned, by a railroad company, is most certainly part of the expense of producing the business which is transacted, and is therefore a part of the operating expenses of such road. *Commonwealth v. Philadelphia & E. R. R.*, 30 Atl. 145, 146, 164 Pa. 252.

The operating expenses of a railroad company should be construed to include a

claim for damage done to property by the railroad company in negligently running a train at a highway crossing. *Smith v. Eastern R. Co.*, 124 Mass. 154, 155.

The terms "rentals" and "operating expenses," in an agreement by the lessee of a railroad to pay certain dividends to the stockholders of the leased road and operating expenses, was construed not to include money borrowed by the lessor from the lessee to complete the leased road, and secured by bonds of the lessor. *Eastern R. Co. v. Rogers*, 124 Mass. 527, 532.

#### OPERATING SUPPLIES.

Within the doctrine laid down in *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 839, which declares that, for the purpose of keeping works of a public character in operation, those who have given the company operating the same credit for supplies necessary to keep the works in operation are to have a lien extending back not to exceed six months, under extraordinary circumstances, does not include gas meters furnished for a gas company, though such company would come within the meaning of works of a public character as used in the above decision. *Reyburn v. Consumers' Gas, Fuel & Light Co.* (U. S.) 29 Fed. 561, 563.

#### OPERATION.

See "Criminal Operation"; "In Operation."

Keep in operation, see "Keep."

Other operation, see "Other."

"Operation" means exertion of power; method of working; process of operating; mode of action. *City of Little Rock v. Pariah*, 38 Ark. 166, 174 (citing Webst.).

In an action against a surgeon for malpractice, in failing to remove certain sponges placed in the body for the absorption of blood and pus, it was contended that an operation begins when the opening is made in the body, and continues while the sponges or pads are being placed in the body, but when the affected portion of the body, whether it be an unnatural growth or a part of the human system, has been removed, and all precautions taken to prevent hemorrhage, and the moment arrives for the sponges to be removed, the operation is at an end, and no longer is the surgeon in a position where the knowledge or information which makes him a man of skill is required to be exercised. It was held that the operation begins when the opening is made into the body, and ends when this opening has been closed in the proper way, after all appliances necessary to the successful operation have been removed from the body; that from the time the surgeon opens with his knife the body of the patient until

he closes the wound thus made, in a proper way, the law imposes on him the duty of exercising not only due care, but due skill as well; and that the removal of the sponges required some degree of skill, and at least required a surgeon to perform this service. *Akridge v. Noble*, 41 S. E. 78, 81, 114 Ga. 949.

Under a lease of land for oil and gas purposes, which provided that the lessee covenants to commence operations for a test well within one year from the date hereof, where such lessee procured timber with which to construct a derrick, and ordered the machinery, and located a well within the year, he had complied with this condition of the lease. Webster defines the word "operation" as an effect brought about in accordance with a definite plan, and in giving the interpretation ordinarily ascribed to the words "to commence operations"—that is, applying to the words their common acceptance—the expression means the performance of some act which has a tendency to produce an intended result. *Fleming Oil & Gas Co. v. South Penn Oil Co.*, 17 S. E. 203, 205, 37 W. Va. 653.

"Operation," as used in Act April 9, 1872, giving a priority of liens for labor and services performed in the operation of works, mines, manufactories, or other business, etc., means such as in the course of a regular employment contributes directly or indirectly to the particular, permanent, and continuous use of such business, whether skilled or unskilled in the particular art or craft, but does not include labor or services contributed to the construction and equipment of such businesses; it being only temporary and preliminary to their operation. *Appeal of Llewellyn*, 103 Pa. 458.

#### OPERATION OF LAW.

See "Surrender by Operation of Law."

"Operation," as used in Const. art. 1, § 6, providing that all acts of a general nature shall have a uniform operation, means the practical working and effect of a law. *Geebrick v. State*, 5 Iowa, 491, 496.

In construing the acceptance by the United States of the grant of the District of Columbia, which provided that the operation of the laws of the state within such District should not be affected by the acceptance until the time fixed for the removal of the government thereto, and until Congress should otherwise by law provide, the court said: "A law is always in operation as long as it is the rule of conduct of the subject upon which it is intended to operate; that is, as long as the subject is bound to obey it, or conform his condition to its provisions. The operation of a law can be nothing more than the obligation of a

law. The law ceases to operate when it is no longer obligatory, and as long as it is obligatory it is in full operation. The laws would not cease to operate upon citizens of a state, although it should happen that there was neither a court, a judge, nor an officer of justice to punish a breach of such laws. There is a great difference between the operation of the laws, and the execution of the laws. A law may be in operation, and yet, from a defect of courts or officers of justice, it may not be possible to carry it into execution. The operation of a law is a part of its very existence. It ceases to be a law when it is no longer operative." *United States v. Hammond* (U. S.) 28 Fed. Cas. 96, 98.

In consideration of the performance of certain agreements on the part of plaintiff, defendant, a street car company, agreed to construct and operate for 10 years a certain extension of its road, and, in default thereof, forfeit the extension to plaintiff. Plaintiff performed the agreement on his part, but, before the 10 years had expired, the receiver appointed at the suit of defendant's mortgagee to take charge of all of defendant's property refused to operate the extension. Held, that the appointment of the receiver was not such a prevention "by operation of law," within the meaning of Civ. Code, § 1511, as would excuse performance on the part of defendant, and plaintiff was entitled to specific performance. *Klauber v. San Diego Street Car Co.*, 30 Pac. 555, 95 Cal. 353.

#### OPERATIVE.

The noun "operative" is used to designate a manufacturer or artisan who performs the manual labor necessary to cause a mill or factory to operate. *Rhodes v. Matthews*, 67 Ind. 131-139.

"Operative" is synonymous with "workman." A closer definition would be "a workman who performs manual labor in and about machinery." *Cooking v. Ward* (Tenn.) 48 S. W. 287, 289.

An operative is one who obtains his living by coarse manual labor, as distinct from professional services. *Ericsson v. Brown* (N. Y.) 38 Barb. 390, 392.

"Operative," as used in Rev. St. § 355, giving a preference in favor of operatives in the service of an insolvent debtor, includes all classes of labor, except that which might be properly distinguished as professional or scientific labor. *Akron Iron Co. v. Whitely Co.*, 11 Ohio Dec. 203.

All laborers are not operatives. Generally speaking, an operative is a person employed as a workman in a mill or factory; a skilled workman; an artisan; especially one

who operates a machine in a factory—and is so used in Rev. St. Ohio 1890, § 6355, giving preference to those who shall perform labor as operatives in the service of an insolvent. In re City Trust Co. (U. S.) 121 Fed. 706, 708, 58 C. C. A. 126.

#### **Farm laborer.**

In construing the provision of the statute relating to assignments for the benefit of creditors that "every person who shall have performed any labor as an operative in the services of the assignor shall be paid by the assignee or trustee of the proceeds of the property assigned in preference to any other claims against the assignor," the court said: "The usual definition given to the word 'operative' is: A workman; one employed to perform work for another; an artisan, etc. 'Workman' means a person who performs work for another, be it skilled or unskilled, manual or mental labor. It seems that, as used in the statute, it was not meant to exclude any kind of laborers, but as a broad term, including every person who performs labor in the operation of his employer's business. The man who follows the plow is just as much an operative to the farmer in the tillage of his land as the man who wields the hammer in a large manufacturing establishment, and in either case they are just as necessary to the operation of their employers' business as if their labor was what is known as 'skilled labor.' They are operatives just as much as if they were skilled laborers." The court held that a person who performs labor on a farm by the month or by the day, under the control and direction of the farmer in the operation and management of the farm, was an operative. In re Assignment of Lowry, 7 Ohio Dec. 282, 284.

#### **Laborer distinguished.**

The words "operative" and "laborer" are ordinarily applied to a class of men who obtain their living by coarse manual labor, as distinct from professional men. "Operative," though very nearly of the same signification, is somewhat more comprehensive than "laborer." *Ericsson v. Brown* (N. Y.) 38 Barb. 390, 392.

#### **Officer of railroad.**

"Operatives," as used in an instruction providing that if a railroad accident was due to the neglect of other operatives of the road, whose duty it was to have inspected a certain brake, defendant would not be liable, etc., does not include the officers and agents of the road, but means employes of a like class who are fellow servants of brakemen. *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio St. 318, 324.

#### **Subcontractor.**

Rev. Civ. St. art. 317a, giving a lien to "mechanics, laborers, and operatives" per-

forming labor or working with tools or teams in the construction of a railroad, does not include one who has undertaken and performed a subcontract for the construction of several miles, at a specified sum per mile. *Kraukauer v. Locke*, 25 S. W. 700, 701, 6 Tex. Civ. App. 446; *Parks v. Locke* (Tex.) 25 S. W. 702, 703.

#### **Superintendent or foreman.**

The superintendent of a mine is not a laborer, servant, clerk, or operative of a company, within the meaning of a provision of its charter making the stockholders individually liable for the wages of such persons in case the company becomes insolvent. *Cocking v. Ward* (Tenn.) 48 S. W. 287, 289.

The term "operative," in a statute providing that all mechanics, laborers, and operatives who may have performed labor in the construction or repair of any railroad, locomotive, car, or other equipment, or may have performed labor in the operating of a railroad, or to whom wages may be due or owing, shall hereafter have a lien prior to all others upon such railroad or its equipment for such wages as are unpaid, does not include the foreman or superintendent of laborers of a subcontractor engaged in the construction of appellant's road, who furnishes certain tools and teams to carry on the work of construction, and sometimes uses the tools himself, and at other times directs their use by the laborers. *Texas & St. L. R. Co. v. Allen & Humphries* (Tex.) 1 White & W. Civ. Cas. Ct. App. §§ 568, 569.

#### **Traveling agent or salesman.**

One who is employed by the publisher of a legal directory as traveling agent in obtaining subscriptions and in selling the directory to attorneys and others, and collecting accounts, is not an operative, within the meaning of Rev. St. § 6355, giving operatives a preference out of the trust funds in case of assignment for the benefit of creditors by his employer. In re Sloan, 54 N. E. 516, 517, 60 Ohio St. 472.

"Operatives," as used in General Incorporation Act 1875, § 11, providing that the stockholders in mining, quarrying, and manufacturing companies shall be jointly and severally liable individually for all moneys due and owing to the laborers, servants, clerks, and operatives of the company, in case the corporation becomes insolvent, cannot be construed to include a traveling salesman on a salary of \$100 per month. *Hand v. Cole*, 12 S. W. 922, 88 Tenn. 400, 7 L. R. A. 96, 97.

#### **Workman in his own shop.**

"Operatives," as used in St. 1838, c. 163 § 24, giving a preference to operatives in the service of any insolvent for their services, includes a creditor of an insolvent debtor

who received materials from the shop of the insolvent, and took them to his own shop, and there manufactured such materials into boots at certain agreed prices, and delivered the manufactured articles to the debtor. *Thayer v. Mann*, 56 Mass. (2 Cush.) 371, 373.

A blacksmith who follows an independent calling, shoeing horses, sharpening plows, etc., for others, is not an operative. In re *Assignment of Lowry*, 7 Ohio Dec. 282, 284.

### OPERATIVE WORDS.

The operative words of a release, according to Littleton (section 455), are "remise, release, and quitclaim," to which Lord Coke has added "renounce and acquit," intimating at the same time that some others may have the same effect, as where the lessor grants to the lessee for life, that he shall be discharged of the rent. *Agnew v. Door* (Pa.) 5 Whart. 131, 136, 34 Am. Dec. 539 (citing 1 Co. Inst. 754).

### OPERATOR.

The term "owner, lessee, or operators of passenger terminals, and the person or company operating the same," in Laws 1899, c. 4700, § 6, relating to the power of railroad commissioners to compel admission into certain passenger terminals of railroad companies desired or required by the commissioners to enter, and to fixing reasonable rates, etc., for the use and privileges conferred, cannot be limited to corporations only, but also includes associations and individuals. *State v. Jacksonville Terminal Co.*, 27 South 221, 237, 41 Fla. 363.

The term "laborer," in Act April 11, 1849, § 10, incorporating a steamship, and providing that the stockholders shall be individually liable for all debts due and owing to their laborers and operators, does not include the consulting engineer. "If we should attempt to define the plaintiff in reference to the services he rendered, we should scarcely describe him as a laborer or an operator. The services of plaintiff were very like those rendered by the lawyer. Each may involve some manual labor, but that is the incident rather than the principle of the services. The plaintiff, in my opinion, correctly described his services as professional, as distinguished from those of a laborer or operator. *Ericsson v. Brown* (N. Y.) 38 Barb. 390-392.

The terms "owner," "owners," "lessee," "agent," or "operator," as used in the act relating to mines and mining, shall include the immediate proprietor, lessee, or occupier of any coal mine, or any person having on behalf of any owner or owners or lessee as aforesaid the care and management of any coal mine, or any part thereof. *Gen. St. Kan.* 1901, § 4141.

The term "operator," as used in the chapter relating to mines and mining, means any firm, corporation, or individual operating any coal mine or part thereof. *P. & L. Dig. Laws Pa.* 1894, vol. 2, col. 3150, § 349; *P. & L. Dig. Laws Pa.* 1897, vol. 4, col. 1249, § 33.

The term "owners and operators," as used in the act relating to mines and mining, means any person or body corporate who is the immediate proprietor or lessee or occupier of any coal mine or colliery, or any part thereof. The term "owner" does not include a person or body corporate who merely receives a royalty, rent, or fine from a coal mine or colliery, or part thereof, or is merely the proprietor of the mine, subject to any lease, grant, or license for the working or operating thereof, or is merely the owner of the soil, and not interested in the minerals of the mine, or any part thereof. But any contractor for the working of a mine or colliery, or any part or district thereof, shall be subject to this act, as an operator or owner, in like manner as if he were the owner. *P. & L. Dig. Laws Pa.* 1894, vol. 2, col. 3110, § 193.

### OPINION.

See "Disqualifying Opinion"; "Fixed Opinion."

Unqualified opinion, see "Unqualified."

"Opinion," as used in Rev. Laws, §§ 2975, 2976, providing that if commissioners appointed for the apportionment of expenses in repairing a highway and bridge among the towns to be benefited, before an examination is made, shall be of the opinion that a town would be excessively burdened by defraying all the expenses, they should give notices, etc., is not a conclusive opinion or judgment, but is simply a preliminary opinion to which they have arrived on an *ex parte* examination, and upon which they are to notify the towns they deem especially benefited of a time and place for the hearing in the premises. *Town of Weybridge v. Town of Addison*, 57 Vt. 569, 574.

The opinion which a witness is not allowed to give instead of a statement of fact is defined to be an inference of fact from observed facts. *Lipscomb v. State*, 23 South 210, 220, 75 Miss. 559.

### As disqualifying a juror.

Opinion is a conviction which is based, and must be based, on testimony (citing *State v. Krug*, 12 Wash. 288, 41 Pac. 126), and such is its use in regard to the competency of jurors. *State v. Royse*, 64 Pac. 742, 744, 24 Wash. 440.

An opinion which will disqualify a juror in a criminal case implies a settled judgment or conviction of the mind. *Stout v. People*



(N. Y.) 4 Parker, Cr. R. 71, 110; Greenfield v. People (N. Y.) 6 Abb. N. C. 1, 7.

An opinion which will disqualify a juror must be an abiding bias of mind, based upon the substantial facts in the case, in the existence of which he believes. *State v. Meyer*, 3 Atl. 195, 198, 58 Vt. 457.

"Opinion," within the rule that an opinion formed and expressed by a venireman as to the prisoner's guilt is a ground of challenge, means an unqualified expression of opinion on the point of guilt, and not a general expression merely. *State v. Windsor* (Del.) 5 Har. 512-514.

An opinion, such as to disqualify a juror, does not exist where there is a mere suspicion in the mind of the juror that the defendant is guilty; it is only an unqualified opinion that disqualifies. *State v. Millain*, 3 Nev. 409, 439.

This court has often had occasion to define the character of the opinion that disqualifies the juror. Whatever the answers of the juror on his voir dire to the questions of the accused, if it appear on the juror's whole examination, especially by his answers to the presiding judge, that he has no fixed opinion, and can render a verdict according to the law and the testimony produced, he is a good juror. *State v. LeDuff*, 15 South. 397, 46 La. Ann. 546.

The fixedness or strength of the existing opinion is the essential test of a juror's competency, and the court should look specially to such state of mind in passing on the question of competency. "If such impressions become fixed and ripen into decided opinions, they will influence a man's conduct, and will create necessarily a prejudice for or against the party towards whom they are directed, and should disqualify him as a juror. But if, in obedience to the laws of his organization, his mind receives impressions from the reports he hears, which have not become opinions, fixed and decided, he would not be disqualified." *Olive v. State*, 15 South. 925, 926, 34 Fla. 203 (citing *O'Connor v. State*, 9 Fla. 215).

It is a good ground for a challenge for principal cause that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge on which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill will. But all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive; others, that it must be decided and substantial; others, fixed; and still others, deliberate and settled. All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside. The theory of the law

is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education every case of public interest is, as a matter of necessity, brought to the attention of the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or opinion in respect thereto. On the trial of the issue of fact raised by a challenge for such cause the court will practically be called on to determine whether the nature and strength of the opinion formed are such as in law necessary to raise the presumption of partiality. Therefore, where a petit juror in a criminal case testified on his voir dire that he believed that he had formed an opinion, though not upon evidence produced in court as to the guilt or innocence of the prisoner, but that he had not expressed it and did not think that it would influence his verdict, the court properly overruled the prisoner's challenge for cause. *Reynolds v. United States*, 98 U. S. 145, 155, 25 L. Ed. 244.

#### **Belief synonymous.**

See "Belief."

#### **Impression.**

The word "opinion" means a mere impression, as used in Code, § 468, providing that it shall be good cause for challenge to any person called as a juror in the trial of an indictment that he has formed or expressed an opinion as to the guilt or innocence of the accused. *Palmer v. People*, 4 Neb. 68, 75; *Carroll v. State*, 5 Neb. 31, 33.

An impression is not an "opinion," and therefore a mere impression as to the guilt of defendant is not a ground of challenge under a statute making a formed opinion a ground of challenge. *State v. Medicott*, 9 Kan. 257, 259. The court in the latter case remarking that a mental condition so indefinite and unsettled as is usually indicated by the term impression scarcely deserves the name of an opinion. *State v. Allen*, 46 Conn. 531, 547.

An opinion as to the guilt of a defendant is different from a mere impression. The former disqualifies for jury service, while the latter does not. *Traviss v. Commonwealth*, 106 Pa. 597, 605.

On the examination of a juror in answer to the question, "Now, on the presumption that the facts were true as you read them in the paper, you formed an opinion did you not," he answered, "Well, I think not; I formed an impression." Commenting on this, the court said: "The word 'impression,' if it can properly be applied to a mental operation, does not reach the strength of an opin-

lon. An opinion is a conviction which is based, and must be based, upon testimony. An impression is a mere fancy or lodgment in the mind, which is not based upon testimony, and the existence of which cannot be traced to proof, and in this case the juror himself distinguished between an opinion and an impression by insisting that he had not formed an opinion, and did not entertain any at the time, but that it was a mere impression." *State v. Krug*, 41 Pac. 126, 130, 131, 12 Wash. 288; *State v. Royse*, 64 Pac. 742, 744, 24 Wash. 440.

As the average juror is not usually versed in the niceties of language, and frequently uses the word "opinion" to mean an "impression," the mere statement of a juror that he has formed an opinion is not sufficient as a ground of challenge, where it appears from the examination that it is a mere impression formed from reading newspapers. *State v. Taylor*, 35 S. W. 92, 99, 134 Mo. 109.

#### OPINION (Of Court).

See "Judicial Opinion"; "Written Opinion."

The "opinion" of a court is the reasons given for its judgment. *Adams v. Yazoo & M. V. R. Co.*, 24 South. 317, 318, 77 Miss. 194, 60 L. R. A. 33.

An opinion is the view of judges in relation to a given subject. In *re Winslow's Estate*, 34 N. Y. Supp. 637, 638, 12 Misc. Rep. 254.

The term "opinion," as used in a statute providing that the losing party in the Appellate Court might apply to the Supreme Court for the transfer of a cause from the former court to the latter, on the ground that the opinion of said division of the Appellate Court contravenes a ruling precedent of the Supreme Court, or that a new question of law is directly involved and was decided erroneously, should be construed in a technical or legal sense, and is not employed therein in the sense of or in place of the terms "decision" or "judgment." The term "opinion," in a legal sense, so far as it applies to judges and courts, has a well-defined meaning. In law, Webster's International Dictionary defines the word to mean the expression of views of the judges, etc. Bouvier's Law Dictionary defines the word "opinion" in practice to be a statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case. Black's Law Dictionary defines the term to mean the statement by a judge or court of the decision reached in regard to a cause tried or argued before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based. In the sense and meaning as above defined and well understood in legal parlance, the term

"opinion" is used in the statute in question. *Craig v. Bennett*, 62 N. E. 273, 274, 158 Ind. 9.

#### Decision and judgment distinguished.

There is a manifest difference between a mere opinion and a decision; the former is a statement given by the court for its conclusions, while the latter is the judgment or conclusion of the court. *Coffey v. Gamble*, 91 N. W. 813, 814, 117 Iowa, 545.

The terms "opinion" and "decision" are sometimes used interchangeably in statutes. The provision in section 1846 is that the prosecuting attorney may except to any opinion of the court and reserve a point of law for the decision of the Supreme Court; and in section 1845 it is provided that a defendant may take an exception to any decision of the court, so that an exception to the opinion of the court overruling a motion for a new trial is sufficient as an exception to the decision as required by statute. *Pierce v. State*, 10 N. E. 302, 303, 109 Ind. 535.

An opinion of a judge, in which he states that a bill in equity cannot be sustained, and must be dismissed, with costs, is not a final decree or decretal order from which an appeal can be taken. It is merely an incomplete act, announcing the intention of the judge, which he may or may not subsequently change. *Phillips v. Pearson*, 27 Md. 242, 253.

The terms "opinions" and "decisions" are often confounded, yet there is a wide difference between them, and, in ignorance of this, what has been a mere correction of an opinion has been sometimes regarded as a mutilation of the record. A decision of the court is its judgment; an opinion is the reasons given for that judgment. The former is entered of record immediately on its rendition, and only subject to change through regular application through the court on a petition for a rehearing or a modification. The latter is the property of the judges, subject to their revision, correction, and modification in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records. *Houston v. Williams*, 13 Cal. 24, 27, 73 Am. Dec. 565; *Craig v. Bennett*, 62 N. E. 273, 274, 158 Ind. 9.

"The opinion of the judge," says the court in *State v. Ramsburg*, 43 Md. 325, 333, "is the expression of the reasons by which he reaches his conclusions. These may be sustained or contradictory, clear or confused. The judgment or decree is the fiat or sentence of the law determining the matter in controversy in concise technical terms, which must be interpreted in their own proper sense. It would, we think, be of dangerous tendency to make the force and effect of the most solemn official acts depend upon

the various interpretations which ingenuity might suggest to the most carefully considered language introducing them." In the case of *Durant v. Essex Co.*, 74 U. S. (7 Wall.) 107, 19 L. Ed. 154, it was said the reason for the signing of a decree "is no part of the judgment itself." The decree, and not the opinion, is the instrument through which the court acts. Where an opinion, after stating that the judge has examined the case on the merits, and that he would dismiss the bill without regard to technicalities, continues: "But it seems to me to be clear that this proceeding could not be sustained at any rate, as, at best, it would be simply a conversion of plaintiff's property, for which she had an ample remedy at law"—such language cannot qualify the decree dismissing the bill, without showing the cause of the dismissal, so as to make it a dismissal for want of jurisdiction. *Martin v. Evans*, 36 Atl. 258, 260, 85 Md. 8, 36 L. R. A. 218, 60 Am. St. Rep. 292.

## OPHTHALMOSCOPE.

An ophthalmoscope is a practical instrument used by oculists for examining the interior of the eye and other parts of the body. The principle on which it works is as follows: The light is reflected from a burner in front of the examiner, who holds this object to his eye, into the eye of the patient, without penetrating the observer's eye, as there is only a very small hole through which it can enter, and in that way protects the observer's eye from the direct rays of the light. It is peculiarly adapted for physician's and oculist's work. It is an instrument intended for practical use in the profession of an oculist. It is an instrument; a tool, not used for the discovery or contemplation of natural objects for the purpose of attaining or communicating general instruction, but as an instrument for carrying on a profession or an art. It is a philosophical apparatus, within the meaning of the tariff laws. *Robertson v. Oelschlaeger*, 11 Sup. Ct. 148, 149, 137 U. S. 436, 34 L. Ed. 744.

## OPIUM.

Opium, as used in a life policy providing that the same should be void in case the insured should come to his "death by opium," meant, not the accidental or involuntary, but the rational and voluntary, use of opium. *St. Louis Mut. Life Ins. Co. v. Grave*, 69 Ky. (6 Bush) 268, 271.

## OPIUM DEN OR JOINT.

An "opium joint" is a house or place kept for the purpose of smoking opium therein, and this is what is meant by an ordinance

to prevent and suppress opium smoking and houses or places kept therefor. *Ex parte An Lit* (U. S.) 28 Fed. 512, 513.

Any building where opium is sold for the purpose of being smoked on or about the premises where the same is smoked shall be considered an "opium den." *Ann. Codes & St. Or.* 1901, § 1993.

## OPPORTUNITY TO BE HEARD.

"Opportunity" means a fit or convenient time; a time or place favorable for executing a purpose; a suitable occasion. *In re Hause*, 19 N. W. 973, 974, 32 Minn. 155; *In re Brown*, 39 Pac. 469, 471, 2 Okl. 590.

"Opportunity," as used in St. 1893, § 325, providing that no attorney shall be suspended until a copy of the charges have been delivered to him and an opportunity shall have been given to him to be heard in his defense, is opposed to the idea that a fixed and arbitrary time must be given in each case which might arise, but means a time sufficient to prepare his defense, so that an attorney need not necessarily have 20 days in which to answer an action under all circumstances, and 8 days will be sufficient under the circumstances. *In re Brown*, 39 Pac. 469, 471, 2 Okl. 590.

"Opportunity to be heard," as used in Gen. St. 1878, c. 49, § 14, providing that where a party has not appeared in probate court he can only appeal when he had not due notice or "opportunity to be heard," means such opportunity as the party is entitled to by law. The fact that the party had no actual notice of the hearing, the published notice not having come to his personal knowledge until after the order was granted, does not amount to a want of opportunity to be heard. If a fit and proper time and place has been fixed, and notice thereof given, which the law declares sufficient—in short, if all the opportunity is given which the law provides for—it cannot be said in any legal sense that a party had no opportunity to be heard. It seems to us that the want of opportunity to be heard, like the want of due notice, refers only to some act or omission in the proceedings which has deprived the party of his full legal rights in the premises. *In re Hause*, 19 N. W. 973, 974, 32 Minn. 155; *In re Brown's Will*, 21 N. W. 474, 32 Minn. 443.

## OPPOSE.

"Oppose," as used in Code, § 4476, providing for the punishment of any person who shall knowingly and willfully obstruct, resist, or oppose any officer or person duly authorized in serving or attempting to serve or execute any lawful process, means "force." The words "obstruct," "resist," or "oppose"

mean the same thing, and the word "oppose" would cover the meaning of the words "resist or obstruct." It does not mean to oppose or impede the process with which the officer is armed, or to defeat its execution, but that the officer himself shall be obstructed. *Davis v. State*, 76 Ga. 721, 722.

"Opposing," as used in a statute making a person knowingly obstructing and opposing a sheriff in selling personal property on execution liable to fine and imprisonment, includes the ordering away of bidders, giving notice to bidders that the title is not good and that the sheriff has no right to sell, and various things of that sort, or resisting an officer in the execution of the writ. *State v. Morrison*, 27 Pac. 133, 137, 46 Kan. 679.

#### OPPOSING INTEREST.

Rev. St. § 5034, provides that at the meeting of creditors of a bankrupt for election of an assignee, if no choice be made, the judge, or, if there be no "opposing interest," the register, shall appoint one or more assignees. By "opposing interest" is meant not merely an interest contending by a vote for the election of particular persons, but an interest opposed to the exercise of the power of appointment by the register. In *re Jackson* (U. S.) 13 Fed. Cas. 191, 193.

#### OPPOSITE.

"Opposite," as used in a deed describing one of the lines as ending at a point on one side of the street opposite a point on the other side, means that a straight line between the two points must cross the street at a right angle. *Bradley v. Wilson*, 58 Me. 357, 360.

"Opposite the town," as used in Act 1870, incorporating a ferryboat company, and prohibiting all others from rowing or towing any boat, etc., for hire or reward over a certain river to or from any point "opposite the town" named, means that portion of the river and its banks which the town would come in contact with if it were moved straight across the river. *Sunbury Steam & Tow Boat Co. v. Grant (Pa.)* 15 Atl. 706, 707.

#### OPPOSITE PARTY.

In the provision of the statute that, in actions against executors, administrators, or guardians, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, the "opposite party" meant is that party against whom the evidence is sought to be used, and an intervenor whose interests are the same as that of the plaintiff is not an "opposite party"

who may require the plaintiff to testify. *Es lava v. Mazange's Adm'r* (U. S.) 8 Fed. Cas. 780, 781. Under a like statute (Rice's Code. § 3813d) it was held that it is not necessary that a witness shall be the "opposite party" on the record in a case in order to be incompetent as a witness against a personal representative, but he will be incompetent if his interests are antagonistic to those of the personal representative against whom he is called. *Hill v. McLean*, 78 Tenn. (10 Lea) 107, 114; *Trabue v. Turner*, 57 Tenn. (10 Helsk.) 447, 454. And under a like provision (Code, § 2765) it was held that "opposite party" means the party to the transaction whose rights would be affected by the testimony offered. The fact that parties as to the general issues of insolvency are adversary parties does not necessarily constitute them "opposite parties," in the meaning of the statute, as to special issues which may be made and tried. *Dolan v. Dolan*, 7 South. 425, 426, 89 Ala. 256.

Pub. Acts, pp. 156, 157, provide that "when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be permitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person, provided, that whenever the words 'opposite party' occur in this section, it shall be deemed to include the assignors or assignees of the claim, or any part thereof in controversy." In construing this statute, the court said: "It is evident that this statute is intended to reach the real party in interest, and not a mere nominal party who is not interested in the result of the allowance or disallowance of the claim against the estate of a deceased person except as it becomes his duty as executor or administrator to prosecute or defend a suit in which the estate is interested. The Legislature intended not only that the party owning the claims should not be permitted to testify to the matters equally within the knowledge of the deceased person, but also to prevent any evasion of the statute by an assignment so as to permit the assignor to testify." *Penny v. Croul*, 49 N. W. 311, 312, 87 Mich. 15, 13 L. R. A. 83.

The words "opposite party," in a statute providing that an assignor of a chose in action shall not be examined in favor of his assignee unless the opposite party be living, must be intended to embrace the debtor, otherwise they would to a great extent defeat its evident object. *White v. Heavner*, 7 W. Va. 324, 327.

In a suit by an administrator of one estate against the administrator of another, the administrator of either estate is not an

"opposite party" within the meaning of a statute relating to transactions with decedent, unless such person was the legatee under the will or had any interest in the estate, except the fact that she was the widow of the deceased. *Duryea v. Granger's Estate*, 33 N. W. 730, 733, 66 Mich. 593.

Under How. Ann. St. § 7545, excluding evidence of the "opposite party" as to facts equally within the knowledge of a decedent in a suit prosecuted or defended by his "heirs, assigns, devisees or personal representatives," a daughter who seeks to enforce against the widow and other heirs a parol contract made by her deceased father is incompetent to testify as to the terms of the contract. *Lloyd v. Hollenback*, 98 Mich. 203, 205, 57 N. W. 110, 111.

### OPPOSITE POLITICS.

"Opposite politics," as used in Act 1870, requiring the publication of the Session Laws in two newspapers which are of "opposite politics," and fairly represent the two political parties into which the people of the county are divided, is not the exact equivalent of "fairly represent the two political parties." That papers are of opposite politics is not implied of necessity in the requirements that they fairly represent the two principal parties. *People v. Sullivan County Suprs*, 56 N. Y. 249, 254.

### OPPOSITION.

See "Third Opposition."

"Opposition to the discharge," as used in Bankr. Act 1867 (14 Stat. 521), providing that no appeal shall be made to the court until there is an "opposition to the discharge" of the bankrupts, applies only to an opposition to a discharge made after the bankrupt applies, under section 29 of the act, for his discharge. *In re Hill* (U. S.) 12 Fed. Cas. 144, 145.

### OPPRESSION.

The word "oppression" has not acquired a strictly technical meaning, and may be taken in its ordinary sense, which is an act of cruelty, severity, unlawful exaction, domination, or excessive use of authority. When a revenue officer, under color of law, willfully and unlawfully takes the property of another, or subjects him to greater hardships than are necessary for the proper enforcement of the law, he is guilty of oppression. It is not essential that an unlawful act should be a serious injury to a person to make it oppressive. The exercise of unlawful power, or other means, in depriving an individual of his liberty or property against his will, is generally an act of oppression. *United States v. Deaver* (U. S.) 14 Fed. 595, 597.

### OPTICAL INSTRUMENT.

Certain slightly made magic lanterns, not sufficiently substantial to be used by a mature person, but rather by children, as toys, are not dutiable as "optical instruments," under paragraph 321, Schedule N, § 1, c. 849, Tariff Act Aug. 27, 1894, 28 Stat. 514. *Borgfeldt v. United States* (U. S.) 124 Fed. 457, 458.

### OPTION.

See "Buyer's Option"; "Local Option Law"; "Time Option."

Contract of sale distinguished, see "Contract of Sale."

Purchase of option as a bet, see "Bet."

"Option" means a privilege. *Illges v. Dexter*, 77 Ga. 86, 88.

The word "option," as used in a contract by which a seller agreed to deliver at a certain place, between the 15th of May and the 15th of June, at "buyer's option," meant a privilege to the buyer of demanding fulfillment of the contract on any day within the specified limits. *Dodge v. Klene*, 44 N. W. 191, 193, 28 Neb. 216.

The word "option" is a synonym for "choice" or "preference," and, as used in a contract giving a real estate broker an option solely to sell, is evidence of an intention to confer a right which he was to possess or enjoy above all other persons, and hence secured him against the interference of the owner of the premises, as well as other persons. *Levy v. Rothe*, 89 N. Y. Supp. 1057, 1058, 17 Misc. Rep. 402.

An option is not an actual or existing contract, but merely a right reserved in a subsisting agreement. In a certain sense an option is a mere solicitation, a promise without mutuality, not yet ripened into a perfect agreement. It is a proposition by one party to a contract, which must be accepted in precise terms by the other in order that it may be binding upon both parties. *Rivers v. Oak Lawn Sugar Co.*, 27 South. 118, 122, 52 La. Ann. 762 (citing *Schleider v. Dielman*, 10 South. 934, 44 La. Ann. 462).

An option is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end. *McMillan v. Philadelphia Co.*, 28 Atl. 220, 159 Pa. 142.

An option is, in a sense, a continuing offer of a contract; and if the offeree decides

to exercise his right to demand the conveyance, or other act contemplated, he must signify that fact to the offerer. *Sizer v. Clark*, 93 N. W. 539, 541, 116 Wis. 534.

An option is not a sale. It is not even an agreement for a sale. At best, it is but a right of election in the party receiving the same to exercise a privilege, and only when that privilege has become exercised by acceptance does it become a contract to sell. *Hopwood v. McCausland*, 94 N. W. 469, 470, 120 Iowa, 218.

An option is simply a contract by which the owner of property agrees with another person that he shall have a right to buy the property at a fixed price within a certain time. *Hanly v. Watterson*, 89 W. Va. 214, 220, 19 S. E. 536, 538 (citing *Litz v. Goosling*, 19 S. W. 527, 93 Ky. 185, 21 L. R. A. 127).

An option is nothing more than a continuing offer to sell; but until it is accepted it does not become a contract of sale, for it lacks the element of an agreement between the minds of the parties. It is only when there has been an acceptance of a proposal to sell that the vendee becomes in any sense the equitable owner of the subject-matter of the option. *Milwaukee Mechanics' Ins. Co. v. B. S. Shea & Son*, 123 Fed. 9, 11, 60 C. O. A. 103.

An agreement in writing to give a person the "option" to purchase lands within a given time at a named price is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time. He does not sell his land; he does not then agree to sell it; but he does sell something; that is, the right or privilege to buy at the election or option of the other party. The second party gets in present, not lands, nor an agreement that he shall have lands, but he does get something of value; that is, the right to call for and receive lands if he elects. The owner parts with his right to sell his lands, except to the second party, for a limited period. The second party receives this right, or, rather, from his point of view, he receives the right to elect to buy. *Ide v. Leiser*, 24 Pac. 695, 10 Mont. 5, 24 Am. St. Rep. 17.

A contract by which the owner of property agrees with another person that he shall have a right to buy the property at a fixed price within a certain time is an "option," and, if based upon a valid consideration, such contract is binding and may be enforced. *Johnston v. Trippe* (U. S.) 33 Fed. 530; *Watts v. Kellar*, 56 Fed. 1, 5 C. O. A. 394; *Williams v. Graves*, 26 S. W. 334, 338, 7 Tex. Civ. App. 356.

The use of the word "option," in a contract relating to corporate stock, negatives

the claim that the agreement to purchase was omitted from such contract. This was expression, not omission. The use of the word "option" necessarily and affirmatively excludes another absolute agreement to purchase. By its use the parties assert a fact entirely inconsistent with the existence of an agreement to purchase. They did not omit to express a contract of purchase where they expressed an option. *Wescott v. Mitchell*, 50 Atl. 21, 24, 95 Me. 377.

"An option in the purchase of stock is a privilege to be exercised within a stated time. Time is of the essence of contracts of this nature." A certificate that a person, having paid the sum of \$200, was entitled to 20 shares of the capital stock of a bank on payment of the balance due thereon and surrender of the certificate properly indorsed, was a purchase of the stock, and not an option in the purchase, and made the party a stockholder. *Ross v. Bank of Gold Hill*, 19 Pac. 243, 244, 20 Nev. 191.

The option in a will giving a certain sum in notes or in Confederate state bonds at the "option of testator's executors" is not such an option as will enable the executors to defeat the gift. *Harper v. Bibb*, 47 Ala. 547.

Code Civ. Proc. § 297, providing that motions for new trial in certain cases may be made, at the option of the moving party, either on the minutes of the court, or a bill of exceptions, or a statement of the case, is not to be construed as confining the moving party to one only of these grounds, but he may include one or more than one at his option. *Gamer v. Glenn*, 20 Pac. 654, 8 Mont. 371.

There is a decided distinction between an "option" to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell and the other to buy certain property, the sale to be completed within an agreed time. In the latter case the mere lapse of time with a contract unperformed does not entitle either party to refuse to complete it, and therefore time is not of the essence of the contract; but where the contract is merely an option generally, without consideration, and especially as applied to mining property, of course time is of the essence. *Clark v. American Developing & Mining Co.*, 72 Pac. 978, 981, 28 Mont. 468 (citing *Snyder, Mines*, § 1378).

#### In futures.

Dealing in options as gaming, see "Gaming."

In construing a statute making it criminal for any person to have or give to himself or another the option to sell or buy at a future time any grain or other commodity,

stock of any railroad company or other company, the court quotes with approval Webster's definition of "option" as being a stipulated privilege to a party in a time contract of demanding its fulfillment on any day within the specified limit, and says that the word "option" as used in the statute, taken with a context, means a mere choice, right, or privilege of selling or buying, and it is a contract for such choice, right, or privilege of selling or buying at a future time any commodity which the statute was intended to prohibit, as contradistinguished from an actual sale or purchase with the intention of delivering and accepting the commodities specified. *Tenney v. Foote*, 95 Ill. 99; *Id.*, 4 Ill. App. (4 Bradw.) 594, 599; *Schneider v. Turner*, 22 N. E. 497, 499, 130 Ill. 28, 6 L. R. A. 164; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 43 N. E. 774, 778, 160 Ill. 85, 31 L. R. A. 529.

The words "dealing in options, futures, or margins" are well understood to mean a mere speculative contract in which the parties speculate in the rise or fall of prices, and imply a contract in relation to the price of the contract, and not the article itself. A contract for the sale and purchase of grain to be delivered at a future time, if entered into without an intention of having any grain pass from one party to another, but with an understanding that at the appointed time the purchaser is merely to receive or pay the difference between the contract and the market price, is a transaction which the law will not sustain. *Plank v. Jackson*, 26 N. E. 568, 569, 128 Ind. 424.

A contract of sale in which the seller is bound to deliver at a future time, within certain limits, is not an "option" to buy or sell at a future time, within the meaning of a statute declaring such option contracts illegal. *Jackson v. Foote* (U. S.) 12 Fed. 37, 41; *White v. Barber*, 8 Sup. Ct. 221, 230, 123 U. S. 392, 31 L. Ed. 243.

The term "option," as used in a statute, providing that a contract to have or give an option to sell or buy any grain or other commodity at a future time shall be void, refers to optional contracts, or the mode adopted of speculating in differences in market values on grain or other commodities. Such a contract is fictitious, and has none of the elements of good faith, and is defined as a "gambling contract." The word "option" as so used means a mere choice, right, or privilege of buying or selling. *Osgood v. Bauder*, 39 N. W. 887, 890, 75 Iowa, 550, 1 L. R. A. 655.

There are two elements in an option contract: First, the offer to sell, which does not become a contract until accepted; and, second, the completed contract to leave the offer open for a specified time. These elements are wholly independent, and cannot

be treated together without great liability to confusion and error. *Hanly v. Watterson*, 39 W. Va. 214, 220, 19 S. E. 536, 538.

### OPTION ACCOUNT.

The expression "option account," as used in a letter by a customer to a broker, who had been dealing in wheat on margins, in which the customer stated, "I now see that you have my actual wheat account mixed with my option account," meant an account of transactions in which it was not intended by either party that the actual commodity should be received or delivered, but which transactions consisted of mere wagers on the rise and fall of the price of wheat. *Dows v. Glaspel*, 60 N. W. 60, 64, 4 N. D. 251.

### OPTION DEAL.

An option deal is not a gaming or "gambling device," within the meaning of the Missouri statutes providing that all judgments by confession, conveyances, bonds, bills, notes, and securities, when the consideration is money or property won at any game or gambling device, shall be void. *Third Nat. Bank v. Harrison* (U. S.) 10 Fed. 243, 248.

### OPTIONAL CONTRACTS.

"Optional contracts," as used with reference to transactions on the board of trade, are contracts which are usually settled by adjusting market values as the party having the option may elect. It is simply "a mode adopted for speculating in differences in the market value of grain or other commodities." Such a contract is obviously fictitious, having none of the elements of good faith, as in a contract where both parties are bound. *Pearce v. Foote*, 113 Ill. 228, 234, 55 Am. Rep. 414; *Osgood v. Bauder*, 39 N. W. 887, 890, 75 Iowa, 550, 1 L. R. A. 655.

### OR.

#### Construed as and.

And construed as or, see "And."

"Or" and "and" are sometimes synonymous. *People v. Van Rensselaer* (N. Y.) 8 Barb. 189, 200; *Hope v. Clifden*, 6 Ves. 499, 508.

The popular use of "or" and "and" is so loose and so frequently inaccurate that, while they are not treated as interchangeable, and their strict meaning should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one may be read in place of the other in deference to the meaning of the context. *Witherspoon v. Jernigan* (Tex.) 78 S. W. 445-447.

The construing of "or" as "and," or the converse, both in wills and deeds, is freely admitted by courts whenever it is held to be unequivocally clear that the true general intent will thereby be given effect. *Singluff v. Johns*, 89 Atl. 872, 875, 87 Md. 273; *Harris v. Parker*, 41 Ala. 604, 616.

"Or" will be stricken out, and the word "and" inserted, where the intent of the parties require it, even if the whole thought and sense of the instrument is thereby changed. *Richmond v. Woodard*, 32 Vt. 833, 838.

"It is not uncommon to construe 'or' to mean 'and' when necessary to carry into effect the intention of the parties." *Litchfield v. Cudworth*, 32 Mass. (15 Pick.) 23, 27.

In a by-law of a corporation providing that the directors shall serve for the term of one year "or" until their successors shall be elected, "or" must be read as "and," as the intention evidently is that the directors should serve for one year, and thereafter until their successors should be elected. *Chemical Nat. Bank v. Colwell* (N. Y.) 14 Daly, 361.

The word "or," in a city charter, declaring that no suit shall be brought against the city for personal injuries caused by its negligence unless the claim shall have been presented to the common council, and until 30 days after such presentation shall have been made, "or" unless claim has been made within 60 days, was construed to mean "and," and therefore the statute requires such claim to be presented within 60 days from the injury, and prohibits action to be brought thereon till the expiration of 30 days from such presentation. *Jewell v. City of Ithaca*, 73 N. Y. Supp. 953, 954, 36 Misc. Rep. 499.

#### Same—In bonds and notes.

In a note by which the maker promised to pay "W. 'or' J. on demand," the word "or" must be understood to mean "and," and, such payees being joint owners of the note, an action thereon by one of them only could not be maintained. *Willoughby v. Willoughby*, 5 N. H. 244, 245; *Quinby v. Merritt*, 30 Tenn. (11 Humph.) 439, 440.

A bond was executed by B. and others to S., administrator, "or" L., administratrix, of M., deceased. The word "or," used in the instrument, must be taken to mean "and," so that because the writing describes the money owing as payable to either one or the other will not vitiate it. *Brittin v. Mitchell*, 4 Ark. (4 Pike) 92-94.

The word "or," in a bond for land, payable to S. or T., who were the joint owners of the land, means "and." *Parker v. Carson*, 64 N. C. 563, 564.

"Or," as used in appeal bond conditioned that if the appellant should prose-

cute his suit with effect in the Supreme Court, "or" perform the judgment, sentence, or decree of the Supreme Court, the bond shall be void, is equivalent to "and," as used in the statute prescribing that the bond should be conditioned that the appellant should prosecute his suit with effect in the Supreme Court and perform the judgment. The obligation or bond is alternative to do one or the other, therefore, though the statute uses the word "and" in conditioning the two alternative obligations, the meaning is more appropriately expressed by the word "or." *Robinson v. Brinson*, 20 Tex. 438, 439.

#### Same—In deeds and conveyances.

The word "or" is often used in deeds, conveyances, and elsewhere in the place of the word "and," and will be construed to mean "and" where that meaning is apparent from the context. *Town of Easthampton v. Vail*, 45 N. E. 1030, 1032, 151 N. Y. 463.

In deeds, agreements, wills, and other private papers the word "or," said to be one of the most equivocal in the language, should be construed in a copulative, and not in a disjunctive sense, when necessary to the spirit and intent of the document. In such papers "and" and "or" are readily convertible words, according to the sense required by the context. *Attorney General v. West Wisconsin Ry. Co.*, 36 Wis. 466, 486.

"Or," as used in a deed stipulating that the grantor "or" his heirs should have the privilege of a road to pass and repass from the highway, should be construed to mean "and." To effectuate the intentions of the parties it is not unusual to construe "or" as "and." *White v. Crawford*, 10 Mass. 183, 187.

As used in a lease providing that the lessee should continue the renewing "of such lease or leases," "or" is to be construed "and," as it comprehends new leases. *Furnival v. Crew*, 3 Atk. 83, 86.

As used in a deed wherein a grantor reserved to himself all minerals "or" magnesias of any kind, "or" meant "and," and hence there was reservation of all the minerals. *Gibson v. Tyson* (Pa.) 5 Watts, 34, 38.

In a surrender of copyhold premises, which provides that if the grantee shall die during the lifetime of the surrenderer "or" without issue of his body, "or" was construed to mean "and." "Where sense requires it, there are many cases to show that we may construe the word 'or' into 'and,' and 'and' into 'or,' in order to effectuate the intention of the parties. Here, therefore, in order to give effect to the intention of the surrenderer, we must say that when he used the word 'or' he meant 'and.' I would say with Lord Hardwicke that there is no magic in particular words, further than as they show the intention of the par-



ties." *Wright v. Kemp*, 3 Term R. 470, 478.

The word "or," in a deed to one and the heirs of her body, providing that if she "will have no heirs, 'or' dying intestate," the land shall revert to the grantor, construed to mean "and," the clear construction of the reservation being that it was to take effect only upon the grantee's "dying intestate and without issue." *Shoofstall v. Powell* (Pa.) 1 Grant, Cas. 19, 21.

#### Same—In civil statutes.

The word "or" is frequently used as having the same meaning as "and," particularly in permissive, affirmative sentences, so that the change of the word "or" to "and" in the Constitution in such a use will not change its meaning. *Vicksburg, S. & P. R. Co. v. Goodenough*, 32 South. 404, 411, 108 La. 442.

In the construction of statutes it is the duty of the court to ascertain the clear intention of the Legislature. In order to do this the courts are often compelled to construe "or" as meaning "and," and again "and" as meaning "or." *United States v. Fisk*, 70 U. S. (3 Wall.) 445, 447, 18 L. Ed. 243.

It is within common knowledge that the words "or" and "and" are frequently used interchangeably, not only by those unskilled in the use of language, but by those who are acquainted with the shades of difference in the two conjunctions, for oftentimes the idea of the user is as correctly expressed by the use of one as the other. So it is held that under an act concerning distributions and descents, and providing that the wife shall not be entitled to any interest, under the provisions of the section, in any land to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not "or" never has been a resident of this state, the word "or" should be read "and," with the effect that a wife who had ever been a resident of this state is entitled to the benefits of the act. *Kennedy v. Haskell*, 73 Pac. 913, 914, 67 Kan. 612.

As used in Act April 11, 1848, § 8, providing that a married woman living with her husband may incur debts for necessities for the maintenance of herself and family, but that no judgment shall be rendered against the wife unless it shall appear that the debt was contracted by the wife "or" incurred for articles necessary for the support of the husband and wife, "or" must be read "and." *Murray v. Keyes*, 35 Pa. (11 Casey) 384, 391.

As used in the inheritance tax law of 1895, § 2, providing that when a bequest of property is made to father, mother, husband, wife, brother, and sister, widow of a son, or a lineal descendant, during life or for a

term of years, "or" remainder to the collateral heir of the decedent, it shall not be subject to any tax, "or" means "and." It is well settled that the words "or" and "and" will not have their literal meaning when to give them their literal meaning renders the sense of a statutory enactment dubious. *Ayers v. Chicago Title & Trust Co.*, 58 N. E. 318, 323, 187 Ill. 42.

As used in Act April 21, 1899 (Laws 1899, p. 237), providing for the incorporation and governing of casualty insurance companies, section 2, subd. 6, providing that it may include such kinds of business as are specified under subdivisions 1 and 2 of section 1, hereof, "or" under subdivisions 3, 4, 5, 6, and 7 of section 1 hereof, "or" must be construed to mean "and." Sutherland, in his work on Statutory Construction (section 252) says: "The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context." *People v. Van Cleave*, 58 N. E. 422, 424, 187 Ill. 125.

As used in Act 1836, § 2627, prohibiting any publication out of the court respecting the conduct of judges, officers of the court, jurors, witnesses and parties on a question before such court, and providing that the party aggrieved may proceed against the author, printer, and publisher by indictment, "or" may bring an action at law for damages, "or" is not to be construed as used disjunctively, and hence the statute authorizes both a criminal prosecution and an action for damages. *Foster v. Commonwealth* (Pa.) 8 Watts & S. 77, 79.

As used in Gen. St. 1878, c. 34, § 33, providing that the owner of land across which a railroad has been constructed may recover his land and damages where no proceedings under the law have been instituted "or" are pending to ascertain and assess compensation, "or" should be construed in a conjunctive sense. *Kanne v. Minneapolis & St. L. Ry. Co.*, 23 N. W. 854, 856, 33 Minn. 419.

As used in Pol. Code, § 3780, providing that redemption from a tax sale may be made within 12 months from the date of the purchase, "or" at any time before the filing of certain affidavits and the application for a deed, "or" may be read "and." *California & N. R. Co. v. Mecartney*, 38 Pac. 448, 104 Cal. 616.

Where a statute chartering a railroad authorized it to build a road to run from a point in a town "or" on the track of any railroad running out of it, the word "or"

will be construed as "and." *Attorney General v. West Wisconsin Ry. Co.*, 36 Wis. 466, 187.

It is well settled that, when either the "or" or "and" has been mistakenly used for the other, the one intended will be substituted for the one mistakenly used, so as to carry out the legislative intention; hence in Code 1892, § 293, providing that the board of supervisors shall have power, in its discretion, to employ counsel by the year, or to employ counsel in all civil cases in which the county is interested, the word "or" will be read "and," in view of the course of legislation previous thereto. *Warren County v. Booth*, 32 South. 1000, 1001, 81 Miss. 267.

As used in Civ. Code, § 3828, providing that a mother, or, if no mother, a father, may recover for the homicide of a child, minor of sui juris, upon whom she or he is dependent "or who contributes to his or her support, unless said child leave a wife, husband, or child," "or" should be construed to mean "and"; hence, in order to entitle a parent to recover, it must appear that he or she is dependent on the child, and that the latter contributes to the parent's support. *Smith v. Hatcher*, 29 S. E. 162, 163, 102 Ga. 158 (citing *Clay v. Central Railroad & Banking Co.*, 84 Ga. 345, 10 S. E. 967).

As used in the act relating to forcible entry and detainer, authorizing a remedy for an unlawful "or" forcible entry, "or" must be read "and," as it would be unreasonable to give such a construction to the word "or" as would create a new kind of action, all former acts in relation to the matter having used the language "unlawful 'and' forcible entry," *Ferrell v. Lamar*, 1 Wis. 8, 15; and it would include every unlawful withholding of possession from the person entitled to it, whether defendant's entry was lawful or unlawful. *Winterfield v. Stauss*, 24 Wis. 394, 406. See, also, *O'Connell v. Gillespie*, 17 Ind. 459, 460; *Burgett v. Bothwell*, 86 Ind. 149, 151.

When necessary to carry out the intention of the Legislature in a statute, "or" may be read as "and," and is so used in an act authorizing a city to purchase or erect waterworks "or" to authorize the erection of the same, so that the grant to a corporation of a franchise does not prevent the city from afterwards erecting its own system. *North Springs Water Co. v. City of Tacoma*, 58 Pac. 773, 777, 21 Wash. 517, 47 L. R. A. 214 (citing *Thomson-Houston Electric Co. v. City of Newton* [U. S.] 42 Fed. 723); *Thomas v. City of Grand Junction*, 56 Pac. 665, 667, 13 Colo. App. 80.

The word "or," in Code Civ. Proc. § 978, providing that an appeal from a justice is not effectual unless an undertaking be

filed for the payment of costs on appeal, "or" if a stay of proceedings be claimed in a sum equal to twice the amount of the judgment, is to be read "and." *McConky v. Superior Court of Alameda County*, 56 Cal. 83.

Under Rev. St. 1879, § 1878, providing for applications for change of venue and for the election of a special judge "for the trial of a particular case pending 'or' to decide defendant's application for the change of venue," the word "or" will be construed to mean "and," and the election of the special judge merely to decide the defendant's application for the change of venue is unauthorized. *State v. Bulling*, 100 Mo. 87, 93, 12 S. W. 356.

As used in Gen. Laws 1881, c. 148, § 2, providing that a receiver may be appointed when it shall appear that a debtor is insolvent "or" has been giving or is about to give a preference to any creditor, "or" should be construed "and." *Weston v. Loyhed*, 14 N. W. 892, 893, 30 Minn. 221.

The word "or," in Act June 13, 1826, § 4, requiring an affidavit for a capias ad respondendum that to the best of deponent's knowledge "or" belief the defendant was not an inhabitant of the commonwealth, etc., should be construed to signify "and," for the spirit of the act confines the use of the capias to cases in which the plaintiff has reason to know and fully believes that defendant is about to quit the commonwealth. *Diehl v. Perie* (Pa.) 2 Miles, 47, 49.

Under Act April 18, 1884, § 4, providing that "this act shall not apply to railway, canal, or banking corporations, \* \* \* or manufacturing companies or mining companies carrying on business in this state," it was held that the word "or" was used in its copulative and not in its disjunctive sense, in that the qualifying words "carrying on business in this state" related to all the corporations designated in the act, and not merely to mining companies. *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. (1 Dick.) 270, 277, 19 Atl. 733, 735, 19 Am. St. Rep. 394.

"Or," as used in a statute, construed to mean "and." *Sparrow v. Davidson College*, 77 N. C. 35, 36; *State v. Bulling*, 12 S. W. 356, 100 Mo. 93; *Toomey v. Hughes* (Pa.) 25 Wkly. Notes Cas. 66, 67.

The word "or" will be construed to mean "and" in order to give effect to the intention of the Legislature. *Price v. Forrest*, 35 Atl. 1075, 1080, 54 N. J. Eq. 669.

The word "or" in a statute read "and," because evidently a misprint. *Sparrow v. Davidson College*, 77 N. C. 35, 36.

"Or" may be read "and" if the sense requires it. *Bates' Ann St. Ohio* 1904, § 6794;

Bates' Ann. St. Ohio 1904, § 23; Bates' Ann. St. Ohio 1904, § 4947.

"Or" may be read "and." Rev. St. Wyo. 1899, § 2724.

**Same—In penal statutes.**

The doctrine is elementary that the word "and" may be interpreted as a disjunctive, and the word "or" as a conjunctive, when the sense absolutely requires it. *State v. Brandt*, 41 Iowa, 593, 614. In Code, § 3870, providing that "if the father and mother of any child under the age of 6 years \* \* \* exposes, etc., the same," etc., with intent to abandon it, etc., the word "and" may be construed to mean "or," and the offense charged therein may be committed by either parent. *State v. Smith*, 46 Iowa, 670, 673.

"Or," as used in Revision, § 243, providing that certain acts of a state officer charged with the collection, safe-keeping, transfer, and disbursement of public money should be deemed an embezzlement of so much of such money as is taken, converted, invested, used, loaned, "or" unaccounted for, should be construed to mean "and." *State v. Brandt*, 41 Iowa, 593, 606.

"Or," as used in Act March 31, 1860, § 135, providing that the defendant must break "or" enter in order to constitute the common-law offense of burglary, is to be construed to mean "and." *Rolland v. Commonwealth*, 82 Pa. 306, 326, 22 Am. Rep. 758.

As used in Battle's Revisal, c. 32, § 154, providing for the punishment of any person who willfully puts any obstruction, except for the purpose of utilizing water as a motive power, in any natural passage for water, whereby the natural flow of water is lessened or retarded, "or" whereby the navigation of such course by any raft or flat may be impeded, "or" means "and," so that the section will read "whereby the natural flow of the water is retarded, 'and' whereby the navigation of such course may be impeded." *State v. Pool*, 74 N. C. 402, 404.

Act 1729 provided a penalty to be imposed on any justice of the peace who shall marry the minor daughter of any person, or who shall subscribe his name to the publication of any intended marriage of a minor, without having produced to him a certificate of the consent of the parent, guardian, or master, "If such parent, guardian, or master or mistress live within this province 'or' can be consulted with." Held, that the word "or" in the last clause should be construed to mean "and," since it was not the intention of the Legislature to send a justice or other person on a voyage of discovery out of the state to consult with the parent or guardian, and hence no penalty

was recoverable against a justice for marrying the minor daughter of a citizen of another state, not resident in Pennsylvania, without the consent of her parents. *Bollin v. Shiner*, 12 Pa. (2 Jones) 205, 206.

As used in Rev. St. U. S. § 3893 [U. S. Comp. St. 1901, p. 2658], imposing a penalty for knowingly mailing any obscene, lewd, "or" lascivious book, "or" is construed as meaning "and," so that a publication, to be within the prohibition, must be not only obscene, but also lewd and lascivious. *United States v. Moore* (U. S.) 104 Fed. 78.

Under Act 1866, c. 42, providing that a person who may be able to labor, "or" who neglects to employ himself, and have some honest occupation for the support of himself or his family, "or" if any person shall be found spending his time in dissipation, etc., the word "or" must be construed "and," otherwise it will follow that any person whatever sauntering about without employment, though he might have ample means of subsistence, would be a vagrant. *State v. Custer*, 65 N. C. 339, 342.

Laws 1890, c. 110, § 1, declares that any person, association, or incorporation which shall manufacture any spirituous, malt, vinous, fermented, or other intoxicating liquor, or shall import any of the same for sale or gift, as a beverage, or shall keep for sale, or sell, or offer for sale or gift, barter, or trade, any of such intoxicating liquors, as a beverage, shall be punished. Held, that the disjunctive conjunction "or," used in such statute, might be construed to mean "and," and therefore an indictment charging that defendant sold "and" gave was not objectionable for duplicity, since the pleader may allege in a single complaint that the vendor did as many of the forbidden things as he chose, employing the conjunction "and," and will be able to secure conviction at the trial by proof of any one of the alleged acts. *State v. Kerr*, 58 N. W. 27, 28, 3 N. D. 523.

"Or," as used in 1 Jac. I, c. 15, enumerating acts of creditors constituting acts of bankruptcy, and specifying acts "to the intent 'or' whereby his creditor may be defeated," the word "or" must be construed "and," as the intent and the act must both concur to constitute the crime. *Fowler v. Padget*, 7 Term R. 509, 514.

Where a statute uses the words "willfully or maliciously" to qualify the act therein declared an offense, the indictment may charge the act as willfully "and" maliciously done. *State v. Philbin*, 33 La. Ann. 964, 966.

"Or," as used in Rev. St. U. S. § 5294 [U. S. Comp. St. 1901, p. 3607], authorizing the Secretary of the Treasury, on application therefor, to remit "or" mitigate any fine or

penalty relating to steam vessels, or discontinue any prosecution to recover penalties, denotes that the power granted is to do either—that is, to do both—of the two things mentioned, which is the use of the word “or” quite as frequently as it is used in a sense indicating that the power is to do one only of two things. *Pollock v. The Laura* (U. S.) 5 Fed. 133, 135.

As used in that part of the statutes relating to crimes and criminal procedure “or” may be read “and.” *Rev. St. Wyo.* 1899, § 5190.

#### Same—In pleading.

“Or,” when used not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact attended with the same result, as assigning, disposing, or of secreting property as a ground for attachment, states but a single ground, and not in the alternative. *Sturz v. Fischer*, 36 N. Y. Supp. 893, 894, 15 Misc. Rep. 410.

In the last clause of an equity rule, providing for an affidavit that the amendment is not made for delay “or” that the matter is material, “or” should be read “and.” *Toomey v. Hughes* (Pa.) 25 Wkly. Notes Cas. 66, 67.

“Or,” as used in an indictment for selling liquor “without having obtained a license therefor as a tavern keeper ‘or’ without being in any way authorized to sell the same as aforesaid,” should be construed to mean “and,” the use of “or” instead of “and” being fatal only where it renders the statement of the offense uncertain. *People v. Gilkinson* (N. Y.) 4 Parker, Cr. R. 26.

Where a warrant of attachment recites as a ground therefor that the defendant has disposed “or” is about to dispose of property, etc., the use of the disjunctive “or” instead of the conjunction “and” will be construed as a mere irregularity, and the word “or” held to mean “and.” *Rothschild v. Mooney*, 13 N. Y. Supp. 125, 59 Hun, 622.

“Or” will be construed “and,” and “and” will be construed “or,” as the necessities of the case may require, so that a complaint for surety of the peace is not bad because using “or” instead of “and.” *Conklin v. State*, 8 Ind. 458.

#### Same—In wills.

Whenever it is necessary in order to ascertain the intent with which words are used, and to give them effect when their meaning is ascertained, the disjunctive “or” will be read conjunctively, and vice versa. *Noble v. Teeple*, 49 Pac. 598, 599, 58 Kan. 398 (citing *Janney v. Sprigg* [Md.] 7 Gill, 197, 48 Am. Dec. 557); *Brown v. Mugway*, 15 N. J. Law

(8 J. S. Green) 330, 331; *Nevison v. Taylor*, 8 N. J. Law (3 Halst.) 43, 47; *Holcomb v. Lake*, 24 N. J. Law (4 Zab.) 686, 689; *Harris v. Taylor*, 5 N. J. Law (2 Southard) 413, 420; *In re Gilmore's Estate*, 26 Atl. 614, 616, 154 Pa. 523, 35 Am. St. Rep. 855; *Hawn v. Banks* (N. Y.) 4 Edw. Ch. 664; *Hauer's Lessee v. Sheetz* (Pa.) 2 Bin. 532, 544; *In re Sheetz's Estate* (Pa.) 3 Serg. & R. 487, 488, note; *Turner v. Whitted*, 9 N. C. 613; *Neal v. Cosden*, 34 Md. 421, 427; *Waller v. Ward* (S. C.) 2 Speers, 786, 798; *Massie v. Jordan*, 69 Tenn. (1 Lea) 646, 648.

Courts of justice will transpose the clauses of a will, and construe “or” to be “and,” and “and” to be “or,” in such cases when it is absolutely necessary so to do to support the evident meaning of the testator. *Griffith's Lessee v. Woodward* (Pa.) 1 Yeates, 316, 318. But where a testator's will gives his wife a life estate, property to be divided on her death between “his children ‘or’ their heirs as the law directs,” a construction of “or” as “and” would render the clause meaningless, and therefore the will means that the heirs of a child dying before the life tenant should take under the will, and not by descent. *Taylor v. Taylor*, 92 N. W. 71, 118 Iowa, 407.

The word “or,” in a will, will be construed to mean “and,” only where such a construction is necessary to prevent absurdity, or to prevent a destruction of the devise for uncertainty. *Robb v. Belt*, 51 Ky. (12 B. Mon.) 643, 647; *Harrison v. Bowe*, 56 N. C. 478, 481.

The word “or” in a bequest is never changed to “and” except in cases where it is absolutely necessary to carry into effect the manifest intention of the testator, and where, without such alteration, the plain intention of the testator would be defeated. *McGraw v. Davenport* (Ala.) 6 Port. 319, 332.

The word “or” is ordinarily disjunctive in its office, but not always so. In the expression “You may ride or walk,” an alternative is presented to the person addressed, and he is assured that he may choose whether he will ride or walk. In the clause of a will giving all testator's residuary estate to his spinster “or” unmarried nieces, six of his nieces never having been married, and two being widows at the time of his death, it was held that the word “or” was not used disjunctively, and that testator did not mean to present an alternative to his executor, and authorize him to pay to either class of nieces at his own election, but under the will the widows took equally with the spinsters. *In re Conway's Estate* (Pa.) 40 Wkly. Notes Cas. 193, 194, 37 Atl. 204.

The word “or,” in a power in a will to sell or dispose of land, is to be construed to have the meaning of “and.” *Elle v. Young*, 23 N. J. Law (3 Zab.) 478, 483.

As used in a will providing that in case testator's son-in-law should marry, "or" should for any cause become unable properly to maintain and educate his children, they should receive one-third of the income of the property, "or" should be construed to mean "and." The disjunctive conjunction "or" is not a technical word, and the courts substitute the copulative conjunction "and" when it is necessary to carry out an evident intention. In *re Boyd's Estate* (Pa.) 9 Phila. 337, 338 (citing *Kelso v. Dickey* [Pa.] 7 Watts & S. 279).

Where a will gives an estate to a devisee "or" his heirs or legal heirs, or issue, the word "or" will be construed as "and." *Noble v. Teeple*, 49 Pac. 598, 599, 58 Kan. 398; *Parkin v. Knight*, 15 Sim. 83, 87; *Penny v. Turner*, Id. 368, 371; *Lachlan v. Reynolds*, 9 Hare, 796, 798; *Read v. Snell*, 2 Atk. 642; *Harris v. Davis*, 1 Colly. 416, 423; *Wright v. Wright*, 1 Ves. Sr. 409, 411; *Miller v. Gilbert*, 38 N. E. 979, 980, 144 N. Y. 68; *Sorver v. Berndt*, 10 Pa. (10 Barr) 213, 214; *Slingluff v. Johns*, 39 Atl. 872, 875, 87 Md. 273; *Williams v. Williams*, 16 S. W. 361, 363, 91 Ky. 547.

In a will devising certain realty, and providing that, on the death of the devisee "before maturity 'or' without issue," the estate should go to another named, the word "or" will be construed to mean "and," so that the limitation over cannot take effect except upon the happening of both contingencies, this construction being necessary to effectuate the intention of the testator to provide for the issue of the first taker in any event. *Carpenter v. Boulden*, 48 Md. 122, 129; *Raborg's Adm'r v. Hammond's Adm'r* (Md.) 2 Har. & G. 42, 53; *Watkins v. Sears* (Md.) 3 Gill, 492, 496; *Walsh v. Peterson*, 3 Atk. 193, 194; *Soulle v. Gerrard*, Cro. Eliz. 525; *Mortimer v. Hartley*, 3 Eng. Law & Eq. 532, 537; *Morris v. Morris*, 21 Eng. Law & Eq. 152, 154; *Fairfield v. Morgan*, 5 Bos. & P. 38; *Right v. Day*, 16 East, 66, 69; *Brown v. Mugway*, 15 N. J. Law (3 J. S. Green) 330; *Holcomb v. Lake*, 25 N. J. Law (1 Dutch.) 605, 608; *Shreve v. MacCrellish*, 46 Atl. 581, 60 N. J. Eq. 198; *Wardell v. Allaire*, 20 N. J. Law (Spencer) 6, 19; *Shands v. Rogers* (S. C.) 7 Rich. Eq. 422, 424; *Hauer's Lessee v. Sheetz* (Pa.) 2 Bin. 532, 545; *Appeal of Doebler*, 64 Pa. (14 P. F. Smith) 9, 14; *Beltzhoover v. Costen*, 7 Pa. (7 Barr) 13, 20; *Ray v. Enslin*, 2 Mass. 554; *Parker v. Parker*, 46 Mass. (5 Metc.) 134, 137; *Hunt v. Hunt*, 52 Mass. (11 Metc.) 88, 98; *Ward's Lessee v. Barrows*, 2 Ohio St. 241, 247; *Jackson v. Blanshaw* (N. Y.) 6 Johns. 54, 56, 5 Am. Dec. 188; *Tennell v. Ford*, 30 Ga. 707; *Munro v. Holmes* (S. C.) 1 Brev. 319; *China v. White* (S. C.) 5 Rich. Eq. 426, 433; *Witsell v. Mitchell* (S. C.) 3 Rich. Law, 289, 290; *Waller v. Ward* (S. C.) 2 Speer, 786, 794; *Phelps v. Bates*, 5 Atl. 301, 302, 54 Conn. 11, 1 Am. St. Rep. 92; *Kindig*

*v. Deardorf*, 39 Ill. 300, 301; *Taylor v. Meder* (Ky.) 58 S. W. 801, 803. Contra, see *Mortimer v. Hartley*, 6 Exch. 47, 61; *Van Vechten v. Pearson* (N. Y.) 5 Paige, 512, 513; *Green v. Harvey*, 1 Hare, 428, 431.

As used in a will directing that, at the majority "or" marriage of all the children named, the property should be sold and equally divided among the children, "or" should be construed to mean "and," it being employed in a conjunctive, and not a disjunctive sense. *Massey v. Davenport*, 23 S. C. 453, 455.

Where testator gave his premises to a devisee, his heirs and assigns, but, in case he dies before he attains the age of 21 years "or" marriage, then the premises should go to another, the word "or" should be construed "and." *Barker v. Suretees*, 2 Strange, 1175; *Framlingham v. Brand*, 3 Atk. 390, 391; *Read v. Snell*, 2 Atk. 643, 645; *Grimshawe v. Pickup*, 9 Sim. 591, 595; *Bostick v. Lawton* (S. C.) 1 Speer, 258, 262; *Carpenter v. Heard*, 31 Mass. (14 Pick.) 449, 453; *Hunt v. Hunt*, 52 Mass. (11 Metc.) 88, 91; *Arnold v. Buffum* (U. S.) 1 Fed. Cas. 1170, 1175; *Weddell v. Mundy*, 6 Ves. 341, 343. Contra, see *Lindsey v. Burfoot*, 5 N. C. 494, 495.

The word "or," in a will in which the testator gave the income of his estate to his grandson and his granddaughter, and the survivor of them, neither to receive more than one-half thereof, and which provided that in case of the death of the grandson "or" the daughter, without leaving children, the property should be divided among testator's heirs, was construed to mean "and." "Uncertainty is sometimes the result of the improper use of 'or' for 'and,' or vice versa. The general rule in such cases is that the one word will be construed to have been used for the other where the plain intent of the testator will be defeated without such substitution, but such construction is not admissible unless it be necessary to carry out the manifest design of the will." "Unless 'or' is read 'and,' the proceeds of the entire estate of the decedent are to be divided among his heirs at law upon the death of either grandchild, leaving no child to survive him or her, whereas the manifest intention was that only upon the death of both of them, leaving no children surviving, his estate was to be distributed among his heirs at law." In *re Tripp's Estate*, 51 Atl. 983, 985, 202 Pa. 260.

As used in a will providing that in case of the death of any of the legatees previous to the probating "or" execution of the will, the share of the decedent should go to his or her surviving children, the word "or" will be construed to mean "and," the words "probating" and "executing" not being synonyms. In *re Lamb's Estate*, 80 N. W. 1081, 1082, 122 Mich. 239.

In a devise to A. for life, remainder to B. and her heirs, but if B. die before A., "or" if she die without heirs of her body, then to C. and his heirs, the word "or" will be read as "and." *Wilkins v. Kemeys*, 9 East, 366, 376. See, also, *Miles v. Dyer*, 5 Sim. 435; *Id.*, 8 Sim. 330, 332.

#### Not construed as and.

"Or," in its ordinary and proper sense, is a disjunctive particle, and it will be so construed, unless there be something in the context to give it a different meaning. *Oxshier v. Watt*, 44 S. W. 67, 68, 91 Tex. 402.

The word "or" is said to be a disjunctive particle that marks an alternative, generally corresponding to "either," as "either this or that." It is said by Webster to be a connective that marks an alternative, as, "You may read or may write"; that is, you may do one of the things, but not both. *Austin v. Oakes*, 48 Hun, 492, 498, 1 N. Y. Supp. 307, 310. See, also, *Third Nat. Bank v. Bond*, 67 Pac. 818, 819, 64 Kan. 346; *Elliott v. Turner*, 2 Man., G. & S. 446, 461.

The word "or" in a contract will not be construed to mean "and," where it connects propositions reasonably in the alternative. Thus, the word in a contract which binds the contractor to supply so many pounds, more or less, of oats, "or" such other quantity, more or less, as may be required for the wants of certain government stations between a certain time, cannot be construed to mean "and," and does not entitle the contractor to furnish all the oats which may be needed at the station. *Merriam v. United States* (U. S.) 14 Ct. Cl. 289-300.

"Or" is a conjunction, marking distribution, an alternative, or opposition, and the conjunction "nor" performs the same office in negative propositions. The first is properly used in connection with "either," and the latter with "neither." *Coxson v. Doland* (N. Y.) 2 Daly, 66, 67.

The conjunction "or" is not always disjunctive in signification. There are familiar instances given in lawbooks in which the conjunction "or" is held to be equivalent in meaning to the copulative conjunction "and," and such meaning is often given to the word "or" in deeds and in wills for the purpose of carrying out the intention of the party. There are also cases in which the word "or" may be permitted to retain its primary signification as a disjunctive conjunction, and yet the use of it will not vitiate an affidavit for attachment. There are cases where the word "or" is used in the statement of two or more phases of the same general fact, and not to connect two distinct facts. For illustration, where the statute says that, if the debtor "absconds or secretes himself" so that process cannot be served on him, an attachment may issue, here the general fact, so to speak, is that the party cannot be

found by the officer so that process may be served. This may be either because he has absconded, or because he secretes himself. *Hopkins v. Nichols*, 22 Tex. 206, 208.

The word "or" is often used to express an alternative of terms, definitions, or explanations of the same thing in different words. The word "or," as used in a judgment against parties named therein, "or such of them as are now survivors," was used to explain the meaning of the preceding clause, and the same persons were meant by both, and therefore the judgment was valid against the survivors. *Downs v. Allen* (U. S.) 22 Fed. 805, 809.

A bond given at the port of New York, where certain goods were imported, was conditioned that the importer should pay \$425, that being the estimated duty based on the invoice, "or" the amount that should be subsequently ascertained to be due, or that he should within three years withdraw and export them or transport them to the Pacific port. Held, that the word "or," in the phrase "or the amount which should be subsequently ascertained," was implied literally, and not as synonymously with "and." *Dumont v. United States*, 98 U. S. 142, 143, 25 L. Ed. 65.

A city ordinance provided that no person to whom a license to sell liquor should be granted should, after the hour of 8 o'clock p. m. from the 20th of September to the 20th of March, admit into his or her premises any person of color, "or" in any manner sell or retail to the same, or any of them, any liquor whatsoever, should not be construed to mean "and," so that the statute would read "admit into his or her premises," etc., "and in any manner," etc. *City Council v. Van Roven* (S. C.) 2 McCord, 465, 468.

As used in Act April 11, 1779, § 2, providing that the indenture of apprenticeship extended to assigns, and providing the apprentice "or" his or her parent or parents, guardian or guardians, should give his or her consent to such assignment, "or" will not be construed as meaning "and." *Commonwealth v. Vanlear* (Pa.) 1 Serg. & R. 248, 250.

"Or their treasurer," as used in a note by the maker promising to pay a certain sum to an association "or their treasurer," does not make it payable to one of two persons, but are either surplusage, or declarative of the agent by whom the payee will receive payment. *Wells v. Monihan*, 13 N. Y. Supp. 156, 158, 59 Hun, 617.

Where a bequest is made to a class of persons or their heirs, it is held that the word "or" is tantamount to the words "in the case of the death." *Brent v. Washington's Adm'r* (Va.) 18 Grat. 526, 533.

#### Same—In civil statutes.

As used in St. c. 36, art. 17, § 1, providing that no execution shall issue to any other

county than that in which the judgment is rendered, "or" that in which the defendant resides, until execution has been issued to one of the counties named and been returned by the proper officer "no property found," "or" should be construed in its alternative sense. *Vance's Adm'x v. Gray*, 72 Ky. (9 Bush) 656, 658.

As used in General Corporation Act, art. 9, § 21, conferring power on the corporate authorities of cities and villages to make local improvements by special assessment or by special taxation, or both, on contiguous property, or by general taxation "or" otherwise as they shall by ordinance prescribe, "or" is used in its ordinary and disjunctive sense, and corresponds with "either," meaning one or the other of two, but not both. *Kuehner v. City of Freeport*, 32 N. E. 372, 374, 143 Ill. 92, 17 L. R. A. 774.

In a statute providing that, if any school land be not sold on the day of sale, it may be offered at the next "or" any succeeding term, "or" means "either," and will not be construed "and." *Brown v. Rushing* (Ark.) 66 S. W. 442, 446.

The word "or" is ordinarily employed to indicate an alternative, as one or the other, but not both of two or more persons or things. The courts have sometimes, in the construction of a statute, declared that "or" was used in the sense of "and," and vice versa, but that is only done in cases where the context or other provisions of the statute, or from former laws relating to the same subject, and indicating the policy of the state thereon, such clearly appears to have been the legislative intent. As used in Greater New York Charter, § 41, requiring the owner "or" general contractor engaged in the construction or erection of any building over five stories in height, to build a temporary roof from the sidewalk in front of the building, and to secure permission for such construction from the commissioner of public works, the word cannot be construed as meaning "and," but rather in the sense of "either." *Koch v. Fox*, 75 N. Y. Supp. 913, 916, 71 App. Div. 288.

"Or" generally indicates an alternative, corresponding to "either," as "either this or that"; that is to say, either one thing or another thing. Thus, in a city charter authorizing the granting of licenses to barrooms on written consent of the bona fide householders "or" property holders within 300 feet, "or" means "either." *Shepard v. City of New Orleans*, 25 South. 542, 544, 51 La. Ann. 847.

As used in Rev. St. art. 153, providing that an affidavit in attachment shall state that it is not sued out for the purpose of "injuring 'or' harassing the defendant," the word "or" is not to be construed as "and," the words "injuring" and "harassing," as

used in the statute, relating to distinct and independent subjects. *Moody v. Levy*, 58 Tex. 532, 534.

Gen. St. 1878, c. 39, §§ 21, 22, as amended by Laws 1883, c. 38, provide that a seed-grain contract, or a copy thereof, in order to constitute a lien, shall be filed in the office of the "town clerk of the town, or the clerk or recorder of the city or village in which the borrower resides, 'or' in which land on which the grain to be sown is situated." Held that the word "or" cannot be construed as meaning "and," so as to require the contract to be filed both where the borrower resides and where the land is situated. *Minnesota Agricultural Co. v. Northwestern Elevator Company*, 60 N. W. 671, 58 Minn. 536.

The word "or," occurring in a provision that "if any person shall recover by verdict 'or' judgment less than fifty pounds, he shall not recover costs," is disjunctive, and the phrase "verdict 'or' judgment" equally embraces verdicts on trial and judgments by default. *White v. Hunt*, 6 N. J. Law (1 Halst.) 415, 418.

The word "or," in section 4201, subsec. 4, Shannon's Code, providing that willful "or" malicious desertion of either party without reasonable cause for two whole years is a ground for divorce, will not be construed as "and," the Legislature, in revising the law, having deliberately changed the word to "or." *McBride v. McBride* (Tenn.) 69 S. W. 781, 782.

The word "or," in Sess. Laws 1890, c. 80, § 130, providing that in the canvass of the votes any ballot which is not indorsed by the official stamp, "or" has not the name or initials of the judge of election, as provided in the act, shall be void and shall not be counted, cannot be construed to mean "and," and therefore both the official stamp and the name or initial of the judge must appear on the ballot. *Slaymaker v. Phillips*, 42 Pac. 1049, 5 Wyo. 453, 47 L. R. A. 842.

Under section 31 of the charter of the city of Niles, providing that the amount that may be voted "or" raised in any year under the provisions of that section shall not exceed 2 per cent. of the assessed valuation of the property, the word "or" will not be construed to mean "and," so as to authorize the levy of taxes in excess of the 2 per cent. by allowing the council to levy  $1\frac{1}{2}$  per cent. and the freeholders 2 per cent. additional. *Schneewind v. City of Niles*, 61 N. W. 498, 499, 103 Mich. 301.

The use of the word "or," in a statute imposing a tax upon persons keeping or exhibiting for use a billiard table or tables, must be taken distributively, and renders any one subject to the tax who either keeps a billiard table for use or exhibits it for use. *Germania v. State*, 7 Md. 1, 6.

**Same—In penal statutes.**

"Or," as used in the penal statutes, can never be construed to mean "and." *Buck v. Danzenbacker*, 37 N. J. Law (8 Vroom) 359, 361.

"Or" cannot in penal statutes be interpreted to mean "and," when the effect is to aggregate the offense or increase the punishment. If there be reasonable doubt, the accused party is entitled to the benefit of the doubt. This is the rule of justice as well as mercy. *State v. Walters*, 2 S. E. 539, 540, 97 N. C. 489, 2 Am. St. Rep. 310; *State v. Kearney*, 8 N. C. 53, 55.

If "or" could at any time be construed "and" in a penal law, it must be to lessen, not to aggravate, the evil of the punishment; and under a statute adjudging a "public whipping 'or' to pay" a moderate pecuniary fine in the discretion of the court, both punishments cannot be inflicted. *State v. Kearney*, 8 N. C. 53, 55.

The word "or," being used in a statute providing that if any free person shall be aiding or assisting, or in any wise concerned with any slave or slaves, in any actual or meditated rebellion, or conspiracy, or shall in any manner, devise, plot or consult with any slave or slaves, for the purpose of inciting insurrection, shall be punished, etc. The statute is to be construed as creating separate offenses, and therefore to "advise" is one offense, to "plot" another, to "consult" a third, if done for the purpose of encouraging or exciting or aiding or assisting. *State v. McDonald* (Ala.) 4 Port. 449-460.

The use of the word "or," in a statute providing a penalty against any one who shall cut down, carry away, "or" destroy trees, prevents a construction of the act as precluding the imposition of a penalty for merely cutting down the trees. *Givens v. Kendrick*, 15 Ala. 648, 651.

"Or," as used in St. 38 Eliz. c. 4, making sheriffs liable to a penalty for taking more than a certain sum on executions "upon the body, lands, goods or chattels," does not mean "and," and a declaration stating that defendant had taken more than such sum on an execution against "body, lands, goods and chattels" was defective. *King v. Marsack*, 6 Term R. 771.

As used in Rev. Code 1893, p. 944, providing that it shall be unlawful, without first having obtained the consent of the owner or legal proprietor, to take possession of, use, ride off, "or" drive off a horse, "or" is disjunctive, and distinguishes between riding off and driving off. *State v. Nicholson* (Del.) 43 Atl. 251, 252, 2 Marv. 448.

As used in Act March 2, 1860, making it an offense to sell liquor to a minor "without the written consent or request" of father or

mother "or" guardian of the minor, "or" does not mean "and," and an indictment charging the sale of such liquor to a minor without the "written consent and request of the father, mother 'and' guardian" is defective. *Commonwealth v. Hadcraft*, 69 Ky. (6 Bush) 91, 93.

"Or," as used in Rev. St. § 854, providing for the punishment of any one who, with intent to kill, rob, or steal, shall in the day-time break "or" enter any shop, excludes the idea that both entry and breaking are essential ingredients of the offense. *State v. Allen* (La. Ann.) 5 South. 531.

**Same—In pleading.**

Where a statute makes it a crime to do a certain thing "or" another thing, mentioning several things disjunctively, an indictment or information, as a general rule, may charge a doing of all the things prohibited in a single count, but, in doing so, the different acts must be joined by the conjunctive conjunction and not the disjunctive, otherwise the indictment will be rendered uncertain as to the elements of the offenses intended to be charged. *Tompkins v. State*, 4 Tex. App. 161.

The use of the disjunctive "or" in charging a criminal offense is fatal, but is proper in enumerating the negative averments required to exclude the exceptions of a statute. *State v. Carver*, 12 R. I. 285, 286.

The use of the word "or" in a devise to A. or B., without more, renders the devise void for uncertainty, but if the devise is to A. or B., at the discretion of C., the devise is good. *Longmore v. Broom*, 7 Ves. 124, 128.

"Or," as used in a plea in abatement to an indictment of arson that one of the jurors was not duly "or" legally elected, qualified, impaneled, sworn, or charged, makes the plea defective in presenting several issuable facts disjunctively. *State v. Ward*, 14 Atl. 187, 192, 60 Vt. 142.

"Or," as used in a complaint alleging that the defendant abandoned his wife and failed to maintain "or" provide for her, should be construed to mean that the husband neither maintained nor provided for the wife. *State v. Larger*, 45 Mo. 510, 511.

A declaration recited a statute as providing that the sheriff should not take above the sum limited in the act for the serving or executing of any extent or execution on the bond, lands, goods, "and" chattels of any person, but the words of the statute were "body, lands, goods 'or' chattels." Held, that the natural and obvious sense of the words, as recited in the declaration, was to confine the provisions of the statute to executions against all, which was materially different from the words in the statute, which spoke distributively of writs against either



of the objects of execution, and inflicted a penalty on the sheriff for taking more than was allowed for executing any execution against either body, lands, "or" chattels, and the variance was material. *King v. Marsack*, 6 Term R. 771, 775.

The use of the word "or," in an indictment for retailing ardent spirits without a license, in speaking of the various kinds of spirituous liquors charged to have been sold, is not erroneous. *Morgan v. Commonwealth* (Va.) 7 Grat. 592.

#### Same—In wills.

As used in a will devising real estate to testator's son charged with the support of his wife, and directing that the son should, at the expiration of a certain time from the testator's decease "or" the decease of his wife, pay certain sums, the word "or" should not be construed "and." *Miller v. Philip* (N. Y.) 5 Paige, 573, 574.

As used in a will providing that if a certain person should decease previous to the death of another, "or" fail to discharge recited payments, land should be sold, the word "or" cannot be construed to mean "and." The courts have interpreted "or" to mean "and" when such interpretation was necessary to reconcile it to conflicting clauses in a will. *Toothman v. Barrett*, 14 W. Va. 301, 319.

As used in a will providing that after the termination of his wife's life estate the whole should be equally divided among testator's surviving children "or" the heirs of their body, "or" must have its common and natural signification, which is alternative. *Anderson v. Smoot* (S. C.) Speers, Eq. 312, 319.

As used in a will directing, on the death of testator's wife, the share to go to J. and C. to be held by trustees during the lives of the cestuis que trust, and at their death the principal to go to their issue, if any, and, if none, the same to fall into the general estate, "or" as my said wife by her will shall direct, "or" was used in the alternative. *Austin v. Oakes*, 1 N. Y. Supp. 307, 48 Hun, 492.

In holding that the word "or," in a devise of the rents and profits of lands to M. until his youngest child should become of age, and providing that at such time the property shall vest absolutely in M. and his heirs and could be disposed of by him or them, as he or they should judge best for his or their interests, was not to be construed as meaning "and," it was said "that it is unquestionably true that the word 'or' may often be assigned a conjunctive instead of a disjunctive effect. But changes of this nature are only made where it is clearly necessary to effectuate the intention of the testator,

or give meaning and force to the will. We know of no case that the word 'or' will be read 'and' for the purpose of defeating the effect of words accurately and clearly devising an estate of that nature." *Shimer v. Mann*, 99 Ind. 190, 195, 50 Am. Rep. 82.

Where a devise was to a class "or" their heirs, the word "or" was held to be in the alternative, so as to vest an estate in the children of a deceased legatee. In re *Shade's Estate*, 15 Montg. Co. Law Rep'r, 195, 198.

#### As being or consisting of.

Where a contract for public work provided that 15 per cent. of the amount earned each month should be reserved until the whole was completed, and within 90 days thereafter a final estimate should be made showing what remained due, and the contractor assigned "all of the reserved money 'or' 15 per cent. held by the state on monthly or all estimates," the word "or" should be construed as equivalent to the word "being," making the phrase of the assignment read "all of the reserved money being 15 per cent." etc. *People v. Third Nat. Bank*, 54 N. E. 35, 37, 159 N. Y. 382.

Testatrix bequeathed one-tenth of all she possessed to charitable objects, and the rest, "or" nine-tenths of my available stock, to a certain person. Held, that "or," as so used, was not equivalent to "consisting of," and the will did not therefore specify the articles of property to be understood as alone embraced in the preceding word. Its object was to express the quantum or extent of the property given. In re *Swetzer's Estate*, 21 Atl. 885, 142 Pa. 541.

"Or," as used in a judgment against the parties named therein, "or" such of them as are now surviving, should be construed to have been used to explain the meaning of the preceding clause, and both expressions to mean the same persons. *Downs v. Allen* (U. S.) 22 Fed. 805, 809.

#### As indicating difference.

The use of the word "or" in the tariff act of 1872, fixing a duty on all oilcloth foundations "or" floorcloth canvas made of flax, etc., was construed not to show that the articles so designated were different, but they were held, in view of commercial usage, to be synonymous, and to have been used by the Legislature for the purpose of leaving no doubt upon the subject. *Arthur v. Cumming*, 91 U. S. 362, 23 L. Ed. 438.

The use of the word "and" to unite the words "assessments" and "taxes," in Comp. St. c. 12a, § 91, providing for the listing of "assessments and taxes" by the proper city officer and the subsequent sale of the land affected thereby, show that the words were not synonymous; but had the disjunctive

word "or" been used, then there would have been some ground upon which to base such a construction. *State v. Irey*, 60 N. W. 601, 606, 42 Neb. 186.

#### **As conferring discretionary power.**

"Or," as used in a statute requiring tenement houses to have a supply of water on each floor occupied, and providing that the water shall be furnished in sufficient quantity in one "or" more places on each floor, should not be construed so as to leave the number of places of supply entirely to the discretion of the board of health, but the word simply authorized them to require on each floor one such place, fairly accessible to all the occupants of the floor. *Health Department v. Trinity Church*, 39 N. E. 833, 840, 145 N. Y. 32, 45 Am. St. Rep. 579.

The word "or," as used in a will giving the executors authority to pay taxes and assessments on the property until the sale "or" division of it, and to lease or rent any of the real estate until such sale or division, declares an intention that the direction for sale is not absolute. The executors are either to sell or to divide, as in their judgment may appear to the best interest of their cestui que trust. *Story v. Palmer*, 18 Atl. 363, 366, 46 N. J. Eq. (1 Dick.) 1.

Where a will directs the executors to sell all or any of the residuary estate, the words "or any" necessarily imply the power or option of selling or not selling some of the land, in their discretion. *Condit v. Bigalow*, 54 Atl. 160, 162, 64 N. J. Eq. 504.

The word "or," as used in a will which gives an estate to certain devisees for life, and, upon the survivor's death, one-tenth of the estate to a certain city in trust, the income to be applied for the purchase of books for the Young Men's Institute "or" any public library which may from time to time exist in the city, should be construed as an alternative, vesting in the city a discretion to use the income for either the institute or the libraries. *New Haven Young Men's Institute v. City of New Haven*, 22 Atl. 447, 448, 60 Conn. 32.

As used in a power given to a donee in a will to appoint the property to any or either of three sisters, "or" to all or any or either of their lawful issue, "or" is to be construed as being used in a discretionary rather than a substitutional sense, and to authorize the donee to pass the property to the children, though the sisters may still be living. *Drake v. Drake*, 32 N. E. 114, 118, 134 N. Y. 220, 17 L. R. A. 664.

Act March 2, 1863, §§ 1, 2, provided that for certain offenses committed by any one in the military service the punishment should be fine "and" imprisonment, or such other punishment as the court-martial should adjudge, etc., while a person in civil life guilty

of the offense was punishable by imprisonment "or" by fine, etc., when the military offense was transferred to the Military Code, as it appears in the sixtieth article of war, the word "and" was changed to "or." Held, that it does not necessarily follow from this that it was intended to confine the punishment of the Military Code to either fine or imprisonment, but it would rather seem that the word was used to give play to discretion, so as to authorize a punishment by either fine or imprisonment, or both. The decision of the case does not, however, rest upon this holding, but upon the fact that the prisoner at bar had been convicted of two offenses, and that the punishment of both fine and imprisonment was thereby justified. *Carter v. McLaughry*, 22 Sup. Ct. 181, 192, 183 U. S. 365, 46 L. Ed. 236.

A city charter which requires street improvements to be made by "or" under the direction of a superintendent of streets makes either method allowable. *City of Schenectady v. Trustees of Union College*, 21 N. Y. Supp. 147, 151, 68 Hun, 179.

#### **As limiting or extending.**

The words "or triable therein," in Rev. St. Wis. § 3477, relating to the power of courts of record to punish misconduct, etc., in an action or proceeding depending, "or triable therein," are intended to cover cases which are not covered by the word "depending," and must be interpreted, not as limiting, but extending, the statute to cases not covered by the word "depending." *Heymann v. Cunningham*, 8 N. W. 401, 402, 51 Wis. 506.

#### **As nor.**

In Const. art. 8, § 11, providing that no county containing a city of over 100,000 inhabitants, or any such city, "shall be allowed to become indebted, for any purpose 'or' in any manner, to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of its real estate," "or" is a disjunctive conjunction connecting the two clauses, and expressing at the same time a separation, and has the same effect, where it stands, as the word "nor." *Adams v. East River Sav. Inst.*, 20 N. Y. Supp. 16, 64 Hun, 635.

"Or," as used in Sp. Laws 1885, c. 7, § 19, providing that no action shall be maintained against the city of St. Paul on account of any injuries from a defect in a bridge or highway unless such action shall be commenced within one year from the happening of the injury, "or" unless notice shall first have been given in writing to the mayor or the city clerk within 30 days of the injury, should be read as "nor." *Maylone v. City of St. Paul*, 42 N. W. 88, 89, 40 Minn. 406.

In the charter of the city of Amsterdam, providing that "when the grade of a street

has been established and the street graded accordingly, the grade shall not be changed and the street graded according to the changed grade except upon petition of the owners of the majority of the lineal feet fronting on a part of the street to be graded, 'or' unless compensation be made to the owners of the property injured by the regrading," the word "or" should be "and" or "nor," to effect the plain purpose of the statute. *Folmsbee v. City of Amsterdam*, 36 N. E. 821, 822, 142 N. Y. 118.

#### As on.

In Act 1831, § 15, providing that on the confirmation of the report of arbitrators, or upon final judgment "or" appeal therefrom, etc., the title of the property involved shall invest in a certain railroad, "or" should be construed to mean "on." *Levering v. Philadelphia, G. & N. R. Co. (Pa.)* 8 Watts & S. 459, 463.

Const. art. 6, § 4, reads: "The Supreme Court shall have appellate jurisdiction in all cases where the matter in dispute exceeds \$200, when the legality of any tax, toll or impost or municipal fine is in question and in criminal cases amounting to felony on questions of law alone." The word "or" is substituted for "on" in the printed copy of the Constitution, and, by reference to the engrossed copy on file in the office of the Secretary of State, it is apparent that this is a misprint which alters the whole scope of the section. *People v. Appelgate*, 5 Cal. 295.

#### As to.

The word "or," in Rev. St. U. S. § 5480 [U. S. Comp. St. 1901, p. 3696], providing that any person having devised or intending to devise any scheme or artifice to defraud, "or" be effected by either opening or intending to open correspondence or communication with any other person, etc., shall be punishable, etc., is to be construed to mean "to," the word "or" having been inserted by reason of a clerical mistake. *Brand v. United States (U. S.)* 4 Fed. 394, 395.

#### As to wit.

The word "or" is not always disjunctive. It is sometimes interpretative or expository of the preceding word. So, it is often used in the sense of "to wit" (that is to say), and it is held to be so used in a question in an application for insurance as to whether applicant had ever had chronic "or" persistent hoarseness. *Blumenthal v. Berkshire Life Ins. Co. (Mich.)* 96 N. W. 17, 18.

Anderson, in his *Dictionary of Law*, p. 737, says: "'Or' may be used in the sense of 'to wit'—explaining what precedes. The word 'or' in the statute is often used in the sense of 'to wit'—that is, in explanation of what precedes—and gives to that which pre-

cedes the same signification which follows it." *People v. Latham*, 67 N. E. 403, 407, 203 Ill. 9 (quoting 2 Bouv. Law Dict. p. 262; *Commonwealth v. Grey*, 68 Mass. [2 Gray] 501, 502, 61 Am. Dec. 476; *Brown v. Commonwealth*, 8 Mass. 59).

Pub. St. c. 57, § 5, provides that no person shall sell, or have in his possession with intent to sell, adulterated milk, "or" to which water or any foreign substance has been added. Held, that the word "or" should not be construed in the sense of "to wit," but that the section describes several offenses, its purpose being to prohibit the sale of impure milk and of milk of an inferior quality. *Commonwealth v. Keenan*, 29 N. E. 477, 139 Mass. 193.

The word "or" in Township Organization Act, art. 7, § 7, requiring the judges of an election to make a written statement "or" certificate of the number of votes cast, is to be construed in the sense of "to wit," or "that is to say," and operates to make the words "written statement" of the same meaning as the term "certificate." *People v. Nordheim*, 99 Ill. 553, 560.

As used in a complaint charging a person with selling spirituous "or" intoxicating liquor without authority or license, "or" cannot be construed in the sense of "to wit"—that is, in explanation of what precedes, and making it signify the same thing—for "spirituous" and "intoxicating" are not synonymous. *Commonwealth v. Grey*, 68 Mass. (2 Gray) 501, 502, 61 Am. Dec. 476.

In a complaint charging the sale of intoxicating "or" malt liquors, "or" is used to explain the kind of intoxicating liquor sold, to wit, malt, as distinguished from ardent or spirituous liquors. *State v. Boncher*, 18 N. W. 335, 336, 59 Wis. 477.

In Rev. St. 1874, c. 38, div. 1, § 100, providing that whoever, by the game of "three-card monte," so called, "or" any other game, device, sleight-of-hand pretensions to fortune telling, trick, or other means whatever by the use of cards or other implements or instruments, fraudulently obtain from another person property of any description, "or" is used in the sense of "to wit"—that is, in explanation of what precedes—and makes it signify the same thing. *Blemer v. People*, 76 Ill. 265, 271.

#### As word of substitution.

The strong tendency of modern cases is to construe the word "or" as introducing a substituted gift in the event of the first legatee dying in the lifetime of the testator, and to prevent a lapse. 1 Jarm. Wills, 453. But this is not conclusive, and the intent must be ascertained from the whole will. *Staples v. D'Wolf*, 8 R. I. 74, 122; *Williams v. Williams*, 16 S. W. 361, 363, 91 Ky. 547.

The word "or," as used in a will giving property to a certain person "or" his legal representatives, generally speaking, implies substitution so as to prevent a lapse. *Phyfe v. Phyfe* (N. Y.) 3 Bradf. Sur. 45, 52; *Gittings v. McDermott*, 2 Mylme & K. 69, 73; *Kerrigan v. Tabb* (N. J.) 89 Atl. 701, 702.

A gift in a will to certain children "or" their issue will be construed a gift to the issue by way of substitution. *Lee v. Welch*, 39 N. E. 1112, 1113, 163 Mass. 312.

The word "or," as used in a will providing for the distribution of testator's property equally among the children, and if any of such children, "or" any person or persons who might succeed to the interest of them, should interfere with the execution of the will, such child or person should forfeit his share in the estate, implies a substitution in case of the predecease of sons or daughters of their surviving children. By the force of the provision the issue of the deceased child of testator are substituted for the child, and his share in the estate would be distributed among such issue per stirpes. In *re Paton*, 18 N. E. 625, 627, 111 N. Y. 480.

Laws 1897. c. 212, providing that a life insurance policy shall not be forfeited within a year after nonpayment of a premium, when due, unless a prescribed notice shall have been given to "the person whose life is insured 'or' the assignee of the policy," if notice of the assignment has been given to the corporation, is to be construed, not as giving the company option to give the notice to either the insured or the assignee, or requiring notice to both; the statute must, according to an established rule of construction, be construed with a view to its object; that is, to require notice to be given to the person in interest for his protection, i. e., to the insured, unless he has assigned the policy, in which case the assignee is the person in interest. *Strauss v. Union Cent. Life Ins. Co.*, 67 N. Y. Supp. 509, 510, 33 Misc. Rep. 333.

In construing a will by which testator left certain property to her daughter "or" to her children then living, the court said: "To her 'or' her children' necessarily excludes the one or the other. The disjunctive 'or' has unusual force and significance, and cannot be converted into 'and,' but upon clear evidence that the testator's intention requires it." *Sawyer v. Baldwin*, 37 Mass. (20 Pick.) 378, 385.

"Or," as used in a bequest to persons "or" their heirs, is a word of substitution. *Bartine v. Davis*, 46 Atl. 577, 578, 60 N. J. Eq. 202 (citing *Congreve v. Palmer*, 16 Beav. 435); *Reiff v. Strite*, 54 Md. 298, 304; *O'Rourke v. Beard*, 23 N. E. 576, 151 Mass. 9; *McCormick v. Burke* (N. Y.) 2 Dem. Sur. 137, 139; *Girdlestone v. Doe*, 2 Sim. 225, 226.

By the charter of a beneficiary association, persons whom the insured could designate as beneficiaries were limited to his widow, his orphan children, and other persons dependent upon him, and the by-laws of the association provided that if the insured made no designation the amount should be paid to his widow, or, if he left no widow, to a guardian or trustee of his minor children. The insured, at the time of making his designation, had a wife and two daughters, and in his application for membership, in answer to the question, "To whom will you have your death loss paid?" answered, "To my heirs," and, in a reply to a request to state the relationship of any of the persons to whom payable, answered "Wife or daughters." Held, that the word "or" should not be construed to mean "and," but that it meant that the payment should be to his widow, or, if he left no widow, to his surviving daughters; that hence upon his death the money was to be paid to the widow. *Addison v. New England Commercial Travelers' Ass'n*, 12 N. E. 407, 409, 144 Mass. 591.

## ORAL CONTRACT.

An oral contract is a contract which is partly in writing and partly oral, or none of which is in writing. *Railway Passenger & Freight Conductors' Mutual Aid & Benefit Ass'n v. Loomis*, 82 N. E. 424, 426, 142 Ill. 560 (citing *Bish. Cont.* § 163); *Snow v. Nelson* (U. S.) 113 Fed. 353, 357. "It occurs where an incomplete writing, or one expressing only a part of what is meant, is by oral words rounded into the full contract; or where there is first a written contract, and afterward it is changed orally." *Snow v. Nelson* (U. S.) 113 Fed. 353, 357.

## ORAL EXAMINATION.

An oral examination is an examination in presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness. *Code Civ. Proc. Cal.* 1903, § 2005; *Ann. St. Ind. T.* 1899, § 2028; *Gen. St. Kan.* 1901, § 4791; *Rev. Codes N. D.* 1899, § 5668; *Rev. St. Okl.* 1903, § 4530; *Ann. Codes & St. Or.* 1901, § 817.

## ORAL TESTIMONY.

Oral testimony is that delivered from the lips of the witness. *Bates' Ann. St. Ohio*, 1904, § 5262; *Rev. St. Wyo.* 1899, § 3704.

## ORANGE LEAD.

Orange or red lead is made by roasting dry white lead in a furnace, and exposing it to the air which is admitted into the heated

receptacle. By this process the white lead loses a portion of its carbonic acid, and absorbs oxygen from the air. Orange or red lead is used by paper stainers, manufacturers of wall paper, and for highly colored cards. *Meyer v. Arthur*, 91 U. S. 570, 571, 23 L. Ed. 455.

## ORCHARD.

The term "orchard" signifies an inclosure or assemblage of fruit or nut-bearing trees, and would not be applicable to land planted to mulberry trees. *Attorney General v. Judges*, 38 Cal. 291, 295.

"Orchard," as used in Gen. St. c. 94, art. 1, § 19, providing that no road shall be opened through any "orchard" without the owner's consent, means a collection of fruit trees set out for the use of the farm, or for any other purpose, the number of trees being immaterial. *Nischen v. Hawes* (Ky.) 21 S. W. 1049.

An old field in which, forty years ago, there was an orchard, but nearly all the trees in which are dead, not more than six or eight being living, none of which bear any fruit, is not an "orchard," within the meaning of a statute providing that "no road shall be ordered to be opened through any orchard without the consent of the owner." *Wilson v. Creekmore* (Ky.) 27 S. W. 809.

## ORCHITIS.

Orchitis is inflammation of the secreting structure of the testicle. It occurs sometimes spontaneously in an acute way. It is apt to result from local injury. The pain in orchitis is intense, and often of a peculiar, sickening character. A chill may precede its outbreak. The natural terminations are in resolution, atrophy, or abscess. The first two occur in the spontaneous variety of orchitis, and in that seen with mumps. Abscess is not often seen except after local violence. See *The Wanderer* (U. S.) 20 Fed. 140, 142 (citing Wood, Household Practice).

## ORDAIN—ORDINATION.

The terms "make," "ordain," "constitute," "establish," and "pass," as used with relation to a grant of legislative authority to a municipal corporation to enact ordinances, mean the same thing. *Kepner v. Commonwealth*, 40 Pa. (4 Wright) 124, 129.

"Ordain and establish," as used in the Constitution, providing that the judicial power shall be vested in the Supreme Court and such inferior courts as Congress may from time to time "ordain and establish," means instituted; formed; modeled; set in office;

settled firmly. *United States v. Smith*, 4 N. J. Law (1 South.) 33, 38.

To "ordain," according to the etymology and general use of the term, signifies to appoint, to institute, to clothe with authority. When the word is applied to a clergyman, it means that he has been invested with ministerial functions or sacerdotal power. *Kibbe v. Antram*, 4 Conn. 134, 139.

As used in a will by which the testator devised all his property to his wife for life, and after her death to the Roman Catholic Church, under the following "ordination," that in each year after the death of himself and wife a high mass should be celebrated for their souls respectively, and a part of the estate should be used in aiding poor students intending to become Catholic priests, and a part to establish a Catholic newspaper, the word "ordination" had no specific legal meaning, and did not create a trust, but the intention must have been that the church should take absolutely, trusting to its gratitude and generosity to say the masses, and do something for the students named, and something towards establishing the newspaper. *Ruppel v. Schlegel*, 7 N. Y. Supp. 936, 937, 55 Hun, 183.

### Of a minister.

"Ordination," is the putting a man into his place and office in the church, whereunto he had a right before by election, being like the installation of a magistrate in the commonwealth, which is therefore not to go before, but to follow, election. *Baker v. Fales*, 16 Mass. 487, 512.

When the word "ordain," which, according to its etymology and general use, signifies to appoint, to institute, to clothe with authority, is applied to a clergyman, it means that he has been invested with ministerial functions or sacerdotal power. "Ordination," properly speaking, is restrained to the investiture of authority. In a state where the person ordained is invested with spiritual authority, and at the same time receives the charge of a particular church and congregation, it is not wonderful that all the rights of the clergyman, on the visible exercise of which he contemporaneously enters, should be inaccurately referred to his ordination, but in reality they are derived from different sources. His authority to preach the Gospel and celebrate its ordinances results from the ordination of the clergy, but the right to perform his ministerial functions in a particular church depends on compact, and implies the assent of the persons over whom they are exercised. Hence it follows that the ordination of a clergyman remains after his separation from a church of which he once had the charge, and his spiritual authority continues, although he is not settled

over a particular congregation. *Kibbe v. Antram*, 4 Conn. 134, 139.

### ORDAINED MINISTER.

The term "ordained minister" in Rev. St. § 6386, authorizing the licensing, to solemnize marriages, of any ordained minister of any religious sect or society, has no regard to any particular form of administering the rite or any special form of ceremony. The moment an attempt is made to limit or restrict ordination to some special form of ceremony we begin to discriminate between the diverse modes and forms of ordination practiced by the various religious societies. The laws of Ohio make no discrimination in any respect between Catholic or Protestant, Greek, Gentile, Jewish, or any other religious societies or denominations; much less do they attempt to prescribe any mode or form of ministerial ordination, which is defined in the Standard Dictionary as "the act or rite of admitting and setting apart to the Christian ministry or to holy orders, especially in the Roman Catholic, Anglican, and Greek churches; consecration to the ministry by the laying on of hands of a bishop or bishops; in other churches, consecration by a presbytery, synod, or council of ministers." It has been the practice of this court, therefore, to grant the license to authorize the solemnization of marriages to duly commissioned officers in the Salvation Army who were engaged under such authority in ministering in religious affairs to all Protestant ministers, Catholic priests, Jewish rabbis, teachers and ministers of spiritualistic philosophy, and in fact all persons who can prove to the satisfaction of the court that they have been duly appointed or recognized in the manner required by the regulations of their respective denominations, and are devoting themselves generally to the work of officiating and ministering in the religious interest and affairs of such societies or bodies. The term includes an ordained minister of the Disciples of Christ. In *re Reinhart*, 9 Ohio S. & C. P. Dec. 441, 445.

"Ordained minister," within the meaning of the statute exempting ordained ministers from certain taxes, is to be construed as meaning a minister who is ordained over some particular society, either incorporated or unincorporated, which is entitled to his services and obligated to him for his support in some form or other. The term does not include a minister who is merely authorized to preach. *Ruggles v. Kimball*, 12 Mass. 337, 338.

"Ordained ministers," within the meaning of Act Dec. 19, 1803, exempting ordained ministers from taxation, does not include an ordained minister not settled over a corporate society. *Kladder v. French* (N. H.) Smith, 155, 156.

"Ordained," as used in the statute which provides that "every ordained minister of the gospel in the county where he is settled or hath his permanent residence, and in no other place, shall be and is hereby authorized and empowered to solemnize marriages," means ordained in conformity to the customs of any denomination of Christians who demean themselves quietly as good subjects of the state. *Town of Londonderry v. Town of Chester*, 2 N. H. 268, 271, 9 Am. Dec. 61.

Code, § 1812, authorizing the solemnization of marriage by an ordained minister of any denomination includes a colored preacher who is the elder of the Colored M. E. Church, it appearing from the Book of Discipline that such elders are always ordained. *State v. Parker*, 11 S. E. 517, 518, 106 N. C. 711.

A statute authorizing the solemnization of marriage by "stated and ordained ministers of the gospel" should be construed to include a person ordained as minister of the gospel according to the form observed in Baptist churches, and afterwards engaged by two public societies, in the town where he lives, to preach to them alternately. *Commonwealth v. Spooner*, 18 Mass. (1 Pick.) 235.

### ORDER.

See "General Order"; "Good Order and Condition"; "In Order to"; "Perfect Order"; "Shipping Order"; "Sound Order."

Rev. St. pp. 573, 605, which provide that where, in a will, lands are ordered to be sold by the executors in case of the death or removal of one, the power shall be executed by the remaining executor, includes a power of sale in a will which declared that the testator's wish was that the executors should sell the land when they deemed it advisable, since the word "ordered" is not to be restrained to the signification of peremptory command, but comprehends the wider meaning of the word "authorized." *Welman v. Fath*, 43 N. J. Law (14 Vroom) 1, 3, 7.

"Ordered," as used in Code Civ. Proc. § 1705, providing that, when any publication is ordered, the judge or court may order a publication for a less number of times than each issue of the paper, means "required." In *re Cunningham's Estate*, 15 Pac. 136, 137, 73 Cal. 558.

An "order," within the meaning of Act Cong. Feb. 28, 1795, which provides that the President may issue an order for the purpose of calling out the militia, is a mandatory act of the president, who is commander in chief of the militia of the United States, to officers of the militia, for the purpose of calling forth the militia. *Mills v. Martin* (N. Y.) 19 Johns. 7, 26.

A will executed in the usual form is not an order such as is required by a stipulation of a contract of life insurance, which makes the insurance payable to a person therein designated unless a different payee is appointed by an order acknowledged before a justice of the peace. *Mellows v. Mellows*, 61 N. H. 137.

#### As the public peace.

"Order," as used in a New York statute entitled "An act to preserve the public peace and order on Sunday," means proper state or condition, or established or settled mode of proceeding, and is practically synonymous with "public peace," which means that quiet, order, and freedom from agitation or disturbance guarantied by the laws. *Neuendorf v. Duryea* (N. Y.) 6 Daly, 276, 280.

#### Ordinance distinguished.

See "Ordinance."

#### ORDER (In Commercial Law).

See "County Order"; "Money Order";

"To the Order of"; "Town Order."

All orders, see "All."

Pen. Code (7th Div.) § 1, enacting that, if any person falsely makes an order for money or goods or other thing of value with intent to defraud, he shall be punished, means a mere request, and nothing more. We send orders to tradesmen by our children, servants, and neighbors, and through the mails for merchandise, without supposing that we possess the power to compel their compliance. The "order" in the statute does not mean one imparting a right on the part of the person who is supposed to have it made, and a duty on the part of the person on whom it is made. *Hoskins v. State*, 11 Ga. 92, 102.

An order is a brief note, resembling a single bill of exchange, requesting the payment of money or the delivery of personalty to the bearer of the note. *Carr v. Summerfield*, 34 S. E. 804, 812, 47 W. Va. 155.

The word "order" in a bill of exchange has a positive, fixed meaning, and means an order indorsed on or accompanying the bill. *Buckner v. Real Estate Bank*, 5 Ark. 536, 41 Am. Dec. 105.

An "order for money" has a well-understood meaning, and usually contains a request or direction to a third party, who is indebted to the maker of the order, to pay such money to the person named. *People v. Smith*, 112 Mich. 192, 70 N. W. 466, 67 Am. St. Rep. 392; *Leslie v. State*, 69 Pac. 2, 3, 10 Wyo. 10.

The word "order," as used in Rev. St. c. 14, § 3, enacting that the protest of any bill of exchange, note, or order duly certified

by any notary public shall be evidence of the facts stated in such protest, was meant to include a class of instruments not comprised under the preceding term of "bill of exchange," and would therefore include other than written orders or requests by one person to another for the payment of money at a specified time, absolutely and at all events. *Dakin v. Graves*, 48 N. H. 45, 47.

As commonly understood, an order is something in the nature of a bill payable in money or something else, but in a more extensive sense it includes a direction or request to pay over money or other things upon the credit of the drawer, although to be carried by the payee as the mere servant of the drawer to him, or to be applied to his use. *State v. Nevins*, 23 Vt. 519, 521.

An instrument, otherwise negotiable in form, payable to a person named, but with the words added "or to his order" or "to bearer," or words equivalent thereto, is in the former case payable to the written order of such person, and in the latter case payable to the bearer. Civ. Code Idaho 1901, § 2867.

#### Bills of exchange distinguished.

An order for the payment of a certain sum in merchandise is not a bill of exchange. "It does not come within the provisions of the law merchant, and none of its doctrines can apply to it. It is too well settled to need the citation of authority that it is essential to a bill of exchange that it should be drawn for money, and all drafts or orders drawn for other commodities operate only as an authority to receive the contents, and the holders of them are not bound to apply either the speed or the formalities required in conducting a bill of exchange, and, when they sue, must resort to the original cause of action." *Coyle's Ex'rs v. Satterwhite's Adm'r*, 20 Ky. (4 T. B. Mon.) 124; *Auerbach v. Pritchett*, 58 Ala. 451, 457.

Orders are not put upon the footing of bills of exchange, but differ from bills and notes in that they are not negotiable, and are only prima facie evidence of a debt, of themselves not sufficient to sustain a recovery without proving a consideration. It is not an extinguishment of a precedent demand, and, if an action be brought on the original liability, evidence of the demand, protest, and notice is not necessary. *Johnson v. Warden*, 1 Tenn. Cas. 670, 671.

An order payable in lumber is not a bill of exchange. An order for the payment of a certain sum in chattels does not legally import an undertaking by the drawer that the payee shall obtain the chattels, nor that the drawer will be answerable to him for the value of them on the drawee's refusal to accept or pay the order. The law and incidents of a bill of exchange do not attach to

such an instrument. *Sears v. Lawrence*, 81 Mass. (15 Gray) 267, 269; *Hyland v. Blodgett*, 9 Or. 166, 167, 42 Am. Rep. 799.

#### Check.

The word "orders," as used in Act III. Nov. 5, 1849, § 2, providing that "all actions founded upon \* \* \* bills of exchange, orders," etc., shall be commenced within five years after the cause of action shall have accrued, means informal bills of exchange, and includes a check. *Rogers v. Durant*, 11 Sup. Ct. 754, 755, 140 U. S. 298, 35 L. Ed. 481.

#### As equitable assignment.

See "Equitable Assignment."

#### As evidence of debt.

It has been declared by this court that, by the common law, orders were not such evidences of debt as could be sued upon, and that the drawer, in the event of nonpayment, could only be sued upon his original liability. *Lancaster v. Arendell*, 49 Tenn. (2 Helsk.) 434, 439.

An order is only prima facie evidence of a debt, of itself not sufficient to make a recovery without proving a consideration according to the principles of the common law. The giving of a bill of exchange, and much less an order, is not of itself an extinguishment of a prece dent debt. It may eventually be so in relation to a bill of exchange by receiving payments, or negligence in keeping it too long without presenting it, by which means the holder makes it his own; and this may be the case with an order where it appears the drawer had funds in the hands of the drawee, and, owing to the negligence of the payee for a long time, the money was lost. *Harwell v. McCulloch*, 2 Tenn. (2 Overt.) 275, 277.

#### As good order.

"Order," as used in a contract to canvass for subscriptions or orders for serial publications, and for the payment of a certain sum of money for each and every order obtained, means good orders. *Newhall v. Appleton*, 9 N. Y. Supp. 306, 57 N. Y. Super. Ct. (25 Jones & S.) 343.

#### As instrument in writing.

"Order," as used in Acts 1861-62 (58 Ohio Laws, 7), providing that the compensation of the auditor is "to be paid out of the county treasury on the order of the county commissioners," means a written order, the original or an authenticated copy of which will constitute a warrant and a voucher to the treasurer for the money paid in pursuance of it. *Cricket v. State*, 18 Ohio St. § 23.

"Order," as contained in a writing acknowledging the receipt by a third person

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of legacies from an executor, to be held in trust, which such person agreed to retain until the legatees should become of full age, and to pay the same, with interest, to them, by an order from the executor, did not mean a written instrument, but any express direction for such payment. *Treat v. Stanton*, 14 Conn. 445.

#### As rendering instrument negotiable.

"Order" or "bearer," when used in a note or bill, are words of negotiability, without which, or other equivalent words, the instrument will not possess that quality; and the use of either of these expressions by the drawer of a bill or the maker of a note must be regarded as indicating his intention that the papers should be negotiable. *Mechanics' Bank v. Straiton*, \*42 N. Y. 365, 366; *United States v. White* (N. Y.) 2 Hill, 59, 62, 37 Am. Dec. 374; *Porter v. City of Janesville* (U. S.) 3 Fed. 617, 619.

The words "order" or "bearer," or some word of similar import, are essential to the negotiability of a bill of exchange, but are not essential to its validity as a bill. *Salamon v. Pioneer Co-operative Co.*, 21 Fla. 374, 381, 58 Am. Rep. 667 (citing *Daniel*, Neg. Inst. 104).

The terms "order" or "bearer" are convenient and expressive to be used in negotiating instruments, to communicate the quality of negotiability, but they are not the only words that can be so used, but there are some equivalent words which will answer the same purpose. *Whitney Nat. Bank v. Cannon*, 27 South. 948, 950, 52 La. Ann. 1484.

So commonly are the terms "or order" and "or bearer" employed in commercial instruments that we are apt to suppose them essential to negotiability. It is otherwise. Words are but the signs; thought is chiefly valuable. "Order" or "bearer" are convenient and expressive, but clearly not the only words that will communicate the quality of negotiability. *Raymond v. Middleton*, 29 Pa. (3 Casey), 529, 530.

#### Particular instruments.

The following written request: "Mr. Campbell, please give John Kepper \$10.00. Frank Neff"—is an "order for the payment of money," within Gen. St. c. 162, § 1, relating to the crime of forgery, though the person to whom it is addressed is not indebted to the drawer or bound to comply with the request. *Commonwealth v. Kepper*, 114 Mass. 278, 280.

A forged instrument of writing in the following terms: "Mr. Davis, please let the boy have 6 dollars for me. B. W. Earl"—is an "order for the payment of money," within the statute relating to forgery. *Evans v. State*, 8 Ohio St. 196, 199, 70 Am. Dec. 98.



A paper purporting to authorize the bearer to solicit subscriptions for a labor organization is not an "order for money," within the statute making such an instrument the subject of forgery. An "order for money" has a well-understood meaning, and would hardly include the case of one who requests or directs another to solicit and receive subscriptions. *People v. Smith*, 70 N. W. 466, 112 Mich. 192, 67 Am. St. Rep. 392.

An "order" for the delivery of goods, within the meaning of a statute making it criminal to forge an order for the delivery of goods, does not include the element that the person whose name is forged should have goods in the hands of the drawee. *Commonwealth v. Fisher*, 17 Mass. 46, 47.

An instrument reading: "Mr. Seward, Sir, Let the bearer trade \$13.25 and you will oblige, yours, etc. August 16, 1809, Samuel Layton"—is an "order for the delivery of goods," the forging of which will justify a conviction under a statute affixing a penalty for forging an order for the delivery of goods. *People v. Shaw* (N. Y.) 5 Johns. 236.

An order as follows: "D., let A. have the amount of \$5 in goods, and I will settle with you next week," signed "D."—is not an "order for the delivery of goods," within the meaning of section 3702 of the Revised Code, providing that the false making, etc., of an order for the delivery of goods, shall constitute forgery. *Horton v. State*, 53 Ala. 488, 494.

An order for the delivery of goods is given when the party has a right to have the goods delivered; a warrant is when the person has a right and warrants the person who has the goods to deliver them as far as he is concerned. *Reg. v. Illidge*, 2 Car. & K. 871, 874.

#### ORDER (In Parliamentary Law).

A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance cannot be repealed or sustained by an order or resolution. *Chicago & N. P. R. Co. v. City of Chicago*, 51 N. E. 596, 598, 174 Ill. 439.

An order of a municipality is not a law, but merely the form in which the legislative body expresses an opinion, while an ordinance prescribes a permanent rule of government. An order is of a special temporary character. *Village of Altamont v. Baltimore & O. S. W. Ry. Co.*, 56 N. E. 340, 341, 184 Ill. 47.

"Ordered," as used in Act April 17, 1874, c. 45, repealing Acts 13th Gen. Assem. c. 65, relating to the empowering of cities to provide for the improvements of their streets and to assess the cost thereof upon adjacent

lots, section 7 providing that the repeal should not prevent the completion of any public improvement "now ordered or in progress," means something more than a resolution of the council of the city, which simply authorizes the proper committee to advertise for bids for the work of improving a street, indicating that payment would be made therefor by special assessments upon the abutting property, and which did not authorize the letting of the contract. No one was or was to be, by the terms of the resolution, employed to make the improvement, and no committee directed to contract therefor. The resolution was but a preliminary step to the ordering or contracting for the work, simply containing directions whereby the committee might ascertain the cost at which it could be done; hence the work was not "ordered" and was not within the proviso of the repealing act. *Christ Church v. City of Burlington*, 39 Iowa, 224, 225.

Pub. St., providing that every way shall be deemed to be laid out under the provisions of that chapter unless an "order laying out the way" declares the same to be laid out under the law authorizing the assessment of betterments, will be construed to refer to the whole proceedings by which the way is laid out, rather than meaning some particular step or stage in the proceedings; and hence, where two orders which are connected by reference are adopted for the purpose of laying out the way, such orders, though passed at different times, should be taken together and regarded as one order constituting the order laying out the way within the meaning of the statute. *Masonic Bldg. Ass'n v. Brownell*, 41 N. E. 306, 309, 164 Mass. 306.

#### ORDER (In Practice).

See "Agreed Order"; "Common Order"; "Final Order"; "Interlocutory Order"; "Intermediate Order"; "Lawful Orders"; "Restraining Order"; "Speaking Order"; "Special Order."

Every direction of a court or judge made or entered in writing, and not included in a judgment or decree, is denominated an "order." Ann. Codes & St. Or. 1901, § 534; Rev. St. Okl. 1903, § 4730; Rev. Codes N. D. 1899, § 5714; Comp. Laws N. D. § 5323; In re Weber, 59 N. W. 523, 524; 4 N. D. 119, 28 L. R. A. 621; Code Civ. Proc. S. D. 1903, § 548; Rev. St. Wis. 1898, § 2812; Rev. St. Wyo. 1899, § 3751; Code Civ. Proc. S. C. 1902, § 401; Clark's Code N. C. 1900, § 594; Ballinger's Ann. Codes & St. Wash. 1897, § 5080a; Spokane & I. Lumber Co. v. Stanley, 66 Pac. 92, 93, 25 Wash. 653; Code Iowa 1897, § 3842; Smith v. Shawhan, 37 Iowa, 533, 535; Gen. St. Kan. 1901, § 5015; Code Civ. Proc. Cal. 1903, § 1003; In re Smith's Estate, 33 Pac.

744, 745, 96 Cal. 636; Ann. St. Ind. T. 1899, § 3408; Rev. St. Utah 1896, § 3293; Bates' Ann. St. Ohio 1904, § 5310; Bentley v. Jones (N. Y.) 4 How. Prac. 335; Wesley v. Bennett (N. Y.) 6 Abb. Prac. 12, 13.

A direction of a court or judge made as prescribed by law in an action or special proceeding, unless it is contained in a judgment, is an order. Code Civ. Proc. N. Y. 1899, § 767; In re Lima & H. F. Ry. Co., 22 N. Y. Supp. 967, 969, 68 Hun, 252; Meyers v. Becker (N. Y.) 29 Hun, 567, 573.

The word "order" refers to an order made in a civil action or special proceeding. Code Civ. Proc. N. Y. 1899, § 3343, subd. 20.

Every direction of a court or judge is an order, whether merely made in writing or entered in the minutes. Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109, 110 (citing Code Civ. Proc. § 1003).

An "order" is defined by Code, § 2922, as a direction of a court entered in writing. Berryhill v. Smith, 50 N. W. 495, 496, 51 Iowa, 127.

As used in the Probate Code, an order is every direction entered of record or given in writing by a county court, and not included in a decree. Rev. Codes N. D. 1899, § 6235.

An order is interlocutory, and made on motion or petition. An "order" has been defined to be "any direction of a court other than a judgment or decree made in a cause." People v. Circuit Court of Cook County, 48 N. E. 717, 722, 169 Ill. 201 (citing And. Law Dict. p. 738).

An "order" or judgment is the decision of the court. It may be formulated in writing by the judge or declared by him orally. Allen v. Voje, 89 N. W. 924, 926, 114 Wis. 1.

Under the Code the word "order" means a written direction of a court or judge, other than a judgment, and not included in it; so that where the notice of motion asked to strike out the answer on the ground of the frivolousness thereof, or for such other or further order as should be deemed proper, judgment on account of the frivolousness of the answer could not be given. Darrow v. Miller (N. Y.) 5 How. Prac. 247.

In considering whether a certain order was appealable under a statute giving an appeal from "any special order made after judgment," the court said: "The question is, what is an order? It may be defined to be the judgment or conclusion of the court upon any motion or proceeding. It means cases where a court or judge grants affirmative relief and cases where relief is denied. This is apparent from the language of the statute itself, which gives an appeal from an order refusing to change the place of trial, etc."—and held that an appeal would lie from an order refusing to quash

an execution. Gillman v. Contra Costa Co., 8 Cal. 52, 57, 68 Am. Dec. 290.

The order from which an appeal is allowed when "it involves the merits of the action or some part thereof, or affects a substantial right," must be something different from a decision during the actual progress of the trial, disposing of some claim made by either party, affecting the relief to be granted, and something other than a conclusion of law included in the decision on which the judgment, in whole or in part, is to be entered. But by the definition of an "order," as given by the Legislature and written in the Code, no direction of a court or judge, made and entered in writing and included in a judgment, is an order. So, when an action is tried before the court without a jury, and a decision is made disposing of the case, except that a reference is directed to take an account, and an order is entered in conformity to the decision, an appeal from such order will be dismissed. The decision can only be reviewed on an appeal from the judgment. Until the account has been taken, and all questions arising upon it have been disposed of at Special Term, the order entered on the final decision does not become a "judgment," within the meaning of that word as defined by the Code. Lawrence v. Farmers' Loan & Trust Co. (N. Y.) 15 How. Prac. 57, 60, 61.

A direction of a court not contained in a judgment is an order. Phipps v. Carman (N. Y.) 26 Hun, 518, 519.

A bill of exceptions reciting the doing of a certain act without any order of court is to be construed as meaning without a special order for that purpose, and not as meaning without authority from the court or sanctioned by it. Blanchard v. Ferdinand, 132 Mass. 389, 391.

#### As judgment.

An order of court "as distinguished from a final judgment, is the judgment or conclusion of the court upon any motion or proceeding." In re Rose's Estate, 22 Pac. 86, 87, 80 Cal. 166.

The distinction between an order and a judgment is clearly made in the Code. An order is the decision of a motion; a judgment is the decision of a trial. Bentley v. Jones (N. Y.) 3 Code Rep. 37, 38. A decision of the court upon demurrer is not an order, but a judgment. Bentley v. Jones (N. Y.) 4 How. Prac. 335.

An order can in no sense be considered a judgment. People v. Logan, 1 Nev. 110, 114.

A judgment is a final determination of the rights of the parties to an action, while every direction of a court made or entered in writing, but not included in the judg-

ment, is denominated an "order." *Sellers v. Union Lumbering Co.*, 36 Wis. 398, 400.

By Code, § 400, an order is a decision on a motion, and is expressly distinguished from a judgment. *Rae v. Hartean* (N. Y.) 7 Daly, 95, 99.

The distinction between an order and a final judgment is that the former is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment. The latter is the determination of the court upon the issues presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject-matter in litigation, and puts an end to the suit. *Loring v. Illsley*, 1 Cal. 24, 27, 28.

The terms "judgment," "decree," "decision," and "order" are more or less cognate as applied in legal proceedings, and closely allied in meaning, especially under our system of practice, where we do not distinguish between forms of actions at law or suits in chancery. The term "order" is not infrequently used in a more restricted sense than the word "judgment." It may be defined to be a command, direction, or decision of the court or judge on some intermediate point or issue in the case, but without finally disposing of the main issue or issues in the cause. Then it is a mere interlocutor. But the term is sometimes given a more extensive signification, even in legal controversies, and is occasionally used as a synonym of "judgment" or "decree." *Halbert v. Alford* (Tex.) 16 S. W. 814, 815.

Under a notice that plaintiff would move for an order that the answer to the complaint be stricken out on the ground of the frivolousness thereof, with costs, or for such other or further order as the justice shall deem proper to grant, the plaintiff is not entitled to a judgment. Under the Code, defenses may be stricken out on motion, and, if the answer be frivolous, the plaintiff may move for judgment. In the notice of motion for an order, had the word "judgment" or "relief" been used in its stead, the objection might possibly have been disregarded, but in the Code the word "order" is made to exclude the idea of the judgment. It means a written direction of a court or judge other than a judgment and not contained in it. Under the Code the words "rule" and "order" in no case mean a judgment. *Darrow v. Miller* (N. Y.) 3 Code Rep. 241, 243.

#### **As order as entered by clerk.**

The term "order," as used in Code, § 332, authorizing an appeal from an order within 30 days after written notice of the order shall have been given to the party appealing, means the order as entered with the clerk, and not the mere decision of the judge. *Gallit v. Finch* (N. Y.) 24 How. Prac. 193, 194.

Under the definition in Code Civ. Proc. § 1003, it is held that an instrument signed by the court, adjudging an injunction no longer in force, and not filed with the clerk or entered in the minutes of the court, was not an order dissolving the injunction. *Devlin v. Rydberg*, 64 Pac. 396, 397, 132 Cal. 324.

#### **Order on motion for new trial.**

In Nevada it was held that the word "order," in section 332 of the Practice Act, providing for a statement on appeal from a judgment or order, does not refer to an ordinary order upon a motion for a new trial. *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245.

#### **Peremptory mandamus.**

Within the contemplation of a statute providing for the punishment, as for a contempt, of disobedience of any lawful order, decree, or process of any court of record, a peremptory mandamus is an order, and the violation of such writ may be punished as a contempt of court. *People v. Rochester & S. L. R. Co.*, 76 N. Y. 294, 300.

#### **Rule distinguished.**

The words "rule" and "order," when used in a statute, have a definite signification. They are different in their nature and extent. A rule, to be valid, must be general in scope and indiscriminating in its application; an order is specific and limited in its application. The function of an order relates more particularly to the execution or enforcement of a rule previously made. Thus, a provision that a board of pilot commissioners may make rules for the government of pilots does not authorize the commissioners to order pilots who own and operate their boats, and have the same fully manned, to allow another pilot to cruise on the boat. *Morris v. Board of Pilot Com'rs*, 30 Atl. 667, 669, 7 Del. Ch. 138.

#### **Ruling on appeal from an order.**

A decision of the general term upon appeal for an order is also an order. *Phipps v. Carman* (N. Y.) 26 Hun, 518, 519; *Ford v. David* (N. Y.) 13 How. Prac. 193, 195.

#### **Ruling on demurrer.**

The distinguishing characteristic of a judgment is that it is final, while that of an order, where it relates to proceedings

in an action, is that it is interlocutory. The decision upon an issue of law either sustaining or overruling a demurrer is final in its character, since, unless reversed on appeal, judgment must be entered in conformity to the decision; but it is very much a matter of course, when a demurrer is allowed, to permit the party whose pleading is found defective to amend, or when the demurrer is overruled, and it appears to have been interposed in good faith, to allow the party to plead over upon payment of costs. That part of the decision which allows further pleading in the action cannot, of course, be regarded as final in its character. The most that can be said of such a decision is that it is a conditional judgment. It is analogous to the old rule for judgment interlocutory. It is therefore no very great misnomer to call such a decision an "order." *Nolton v. Western R. Corp.* (N. Y.) 10 How. Prac. 97, 99.

The adjudication of a demurrer is the trial of an issue of law, and the decision thereon is a judgment, and not an order. *Bentley v. Jones* (N. Y.) 3 Code Rep. 37, 38.

An appeal from an order sustaining a demurrer is sufficient, and in effect an appeal from a judgment on the demurrer. *People v. Jordan*, 4 Pac. 683, 684, 65 Cal. 644.

Under Code, § 400, providing that a judgment is the final determination of the rights of the parties in the action, a decision overruling a demurrer to the complaint and giving leave to answer is, while the privilege to answer continues, an order, and not a judgment. *Ford v. David* (N. Y.) 3 Abb. Prac. 385, 387; *Id.* (N. Y.) 13 How. Prac. 193, 195.

Under Code, § 245, providing that a judgment is the final determination of the rights of the party in the action, the decision of the Special Term sustaining a demurrer, and ordering judgment for defendant unless the plaintiff shall amend within a specified time, is not a judgment, but is an order. *Phipps v. Van Cott* (N. Y.) 4 Abb. Prac. 90, 92.

#### **Ruling on evidence.**

Under Code Civ. Proc. § 1003, defining an order as every direction of a court or judge made or entered in writing and not included in a judgment, a rule made during the progress of a trial, excluding or admitting evidence, is not an order. *McGuire v. Drew*, 23 Pac. 312, 314, 83 Cal. 225.

#### **Unwritten order.**

In judicial proceedings an order, as contradistinguished from a judgment, is often defined as one reduced to writing and entered in the records of the court, but that is by no means saying that such only is

an order. There must, in the nature of things, be an order of the court before it is or can be written out in the records of the court by the clerk. The natural ordinary meaning of the word includes written as well as unwritten orders, and there is no reason in the policy of the law or in the nature of things for excluding unwritten orders when the term "order" is used in the statute providing that every person who necessarily or willfully abstracts any rule or order of any court of the United States shall be imprisoned not more than 12 months and fined not more than \$300. *United States v. Terry* (U. S.) 41 Fed. 771, 773.

#### **ORDER AFFECTING PUBLIC RIGHT.**

See "Public Right."

#### **ORDER AFFECTING SUBSTANTIAL RIGHT.**

See "Substantial Right."

#### **ORDER INVOLVING THE MERITS.**

See "Merits."

#### **ORDER OF APPEAL.**

An appeal is a method of revising a defective judgment. Code Prac. art. 556. An order of appeal, which is absolutely necessary, is the first step in the process by which the cause is brought within the jurisdiction of the Supreme Court. *Gagneaux v. Desonier*, 29 South. 282, 284, 104 La. 648.

#### **ORDER OF CONDEMNATION.**

The order of condemnation made by the circuit court of the county on return of the execution and the justice's judgment and the papers in the case, after a levy of the execution from the justice's court on land, is not a judgment for money such as awards execution, but is merely an action of the court of record in aid of the magistrate's judgment and execution. It gives no lien, but merely continues a lien of the levy. *Courtland Wagon Co. v. Shields* (Tenn.) 56 S. W. 275, 277 (citing *Mann v. Roberts* [Tenn.] 11 Lea, 57; *Ashworth v. Demier* [Tenn.] 1 Baxt. 323).

#### **ORDER OF PUBLICATION.**

An order of publication is a mode of service as a requisite to jurisdiction. A person may know that an action is pending against him, and he may know that notice by an order of publication was intended for him, yet such knowledge will not supply the place of a proper order published with substantial correctness. *Green v. Meyers*, 72 S. W. 128, 129, 98 Mo. App. 438.

**ORDER OF SALE.**

A writ issued under Code Civ. Proc. § 684, reciting the judgment, and directing the officer to execute the judgment by making a sale required for its enforcement, in analogy to the former equity practice, is usually termed an "order of sale." *Tregear v. Etiwanda Water Co.*, 18 Pac. 658, 660, 76 Cal. 537, 9 Am. St. Rep. 245.

The terms "order of sale," and "execution" are used interchangeably. Whether the writ which the officer holds be called an execution or an order of sale, it is but a written command, under the seal of the court, authorizing and directing him to execute its judgment. *Burkett v. Clark*, 64 N. W. 1113, 1115, 46 Neb. 466 (citing *Kelley v. Vincent*, 8 Ohio St. 415).

**ORDER TO SHOW CAUSE.**

An order to show cause why a party should not be punished for contempt is a "paper to bring a party into contempt," within the meaning of Code, § 1016, providing that service of any paper to bring a party into contempt cannot be made on an attorney instead of on the party. *Golden Gate Consol. Hydraulic Min. Co. v. Superior Court of Yuba*, 3 Pac. 628, 631, 65 Cal. 187.

**ORDERLY.**

Ky. St. § 4203, provides for the granting of licenses to merchants to sell liquor, and declares that no such licenses shall be granted to any person of bad character, or who does not keep an orderly, law-abiding house. The term "orderly, law-abiding house" is not defined in the statute, and it was contended that the phrase meant a house where no brawls or fights take place, where the citizen, gentleman, or lady may deal undisturbed by violence or fear of violence and insult, where everything is done peaceably and orderly, and that, though a person may have engaged in the illegal sale of liquor prior to his application for a license, he may keep an orderly, law-abiding house. It was held, however, that the county court, within whose discretion the granting of such licenses is placed, did not abuse that discretion by refusing to grant to one who had sold liquor without a license, and who had further violated the law by selling to minors. *Appeal of Caudill (Ky.)*, 60 S. W. 723.

**ORDINANCE.**

See "Proper Ordinance."

All ordinances, see "All."

All other ordinances, see "All Other."

In Dill. Mun. Corp. (4th Ed.) § 307, it is said that in this country the word "ordinance" is limited in its application to the

acts or regulations in the nature of local laws, passed by the proper assembly or governing body of the corporation. An "ordinance" means a local law prescribing a general and permanent rule. *Citizens' Gas & Mining Co. v. Town of Elwood*, 16 N. E. 624, 626, 114 Ind. 332; *Shattuck v. Smith*, 69 N. W. 5, 11, 8 N. D. 56.

Webster defines an ordinance to be a rule established by authority. Dillon says: "Under the general term of 'ordinance' has sometimes been included all the regulations by which a corporation is governed. \* \* \* Indeed, in general and professional use the term 'ordinance' is almost, though not quite, equivalent in meaning to the term 'by-law.'" *State v. Swindell*, 45 N. E. 700, 701, 146 Ind. 527, 58 Am. St. Rep. 375.

"Ordinances," as defined in *Horr & B. Mun. Ord. § 1*, are laws passed by the governing body of a municipal corporation for the regulation of the affairs of the corporation. The term "ordinance" is now the usual denomination of such acts, though in England and in some of the states the technically more correct term of "by-law" or "bye-law" is in common or more approved use. *Bills v. City of Goshen*, 20 N. E. 115, 117, 117 Ind. 221, 3 L. R. A. 261.

The terms "ordinance," "by-law," and "municipal regulation" have substantially the same meaning, and are defined to be the laws of the corporate district made by the authorized body, in distinction from the general laws of the state. They are local regulations for the government of the inhabitants of the particular place, and, though given the force of law by the charter for the purposes of the municipal government, yet relate to that solely, and prosecutions for their violation have no reference, as a general rule, to the administration of criminal justice by the state. *State v. Lee*, 13 N. W. 913, 29 Minn. 445.

An ordinance is in the nature of a local statute, and whether it is reasonable or unreasonable is a question of law for the court. *Evison v. Chicago, St. P., M. & O. R. Co.*, 45 Minn. 370, 375, 48 N. W. 6, 11 L. R. A. 434.

The word "ordinance," as applicable to the action of a municipal corporation, should be deemed to mean local laws passed by the governing body. The Legislature of the state passes laws and makes rules for the government of its procedure. So, a municipal corporation passes laws, called "ordinances," and enacts rules. The same distinction that exists between laws and rules made by the Legislature should be held to exist between rules and ordinances enacted by a municipal corporation. *Laws 1883, c. 298, § 24*, providing that no ordinances shall be adopted except by a two-thirds vote, does not apply to rules of order of a city council. *Armatage v. Fisher*, 26 N. Y. Supp. 364, 367, 74 Hun. 167.

The word "ordinance" means something more than a verbal motion subsequently reduced to writing by a clerk or secretary of the local board. Its use in a statute providing that, when any grade is to be established, it shall be the duty of the township committee to establish it by ordinance, which ordinance shall be entered on file in the township book, intended to prescribe a certain formality which would perpetuate the action of the committee, and leave no doubt as to its true character. Maps, however, may be annexed to and filed with the ordinance in order to make it intelligible. *Vanderbeck v. Ridgewood Tp.*, 14 Atl. 598, 599, 50 N. J. Law (21 Vroom) 514.

An ordinance passed by the common council of a municipality is a species of legislation as much as an act passed by the Legislature, though the body passing it is subordinate in its character and created by the Legislature itself; hence the rule which makes void a contract for a contingent compensation for obtaining legislation applies as well as to the common council of a city as the Legislature of the state. *Crichfield v. Bermudez Asphalt Paving Co.*, 51 N. E. 552, 556, 174 Ill. 466, 42 L. R. A. 347.

An "ordinance" authorizing an electric light company to use the streets, when passed, was a mere license or offer to grant a license to the company, and only became a binding contract between the city and the company when the latter accepted it. *McWethy v. Aurora Electric Light & Power Co.*, 67 N. E. 9, 12, 202 Ill. 218 (citing *People v. Central Union Tel. Co.*, 61 N. E. 428, 192 Ill. 307, 85 Am. St. Rep. 338).

#### Writing essential.

An ordinance must of necessity be in writing before it can be acted on by a city council. *Stevenson v. Bay City*, 26 Mich. 44, 47.

#### As public record.

The ordinances of municipal corporations are public records. *Florida Cent. & P. R. Co. v. Seymour (Fla.)* 33 South. 424, 426.

#### By-laws, rules, and regulations synonymous.

A by-law is a law made by a municipality for the regulation of affairs within its authority; an ordinance. Cent. Dict. In general and professional use the term "ordinance" is almost, if not quite, equivalent in meaning to the term "by-law," and is the word most generally used to denote the by-laws adopted by municipal corporations; so that an ordinance granting a franchise is a by-law of general or permanent nature, within Code 1873, § 492, requiring publication of such by-laws, and providing that they shall take effect and be in force at the expiration

of five days after they have been published. *State v. Omaha & C. B. Railway & Bridge Co.*, 84 N. W. 983, 984, 118 Iowa, 80, 52 L. R. A. 815, 86 Am. St. Rep. 357.

Where a city charter authorizes the council to ordain by-laws, resolutions, and regulations, those passed are ordinances, for ordinances are regulations ordained. *Kepner v. Commonwealth*, 40 Pa. 124, 129.

The terms "by-law" and "ordinance" may be used interchangeably, being synonymous. *Horr & B. Mun. Ord. § 1*, defining "ordinances," says: "Municipal ordinances are laws passed by the governing body of a municipal corporation for the regulation of the affairs of the corporation." The term "ordinance" is the usual denomination of such acts, though in England and in some of the states the technically more correct term "by-law" or "bye-law" is in common and approved use. The main feature of such enactment is their local, as distinguished from their general, applicability of the state laws; hence the word "law," with the prefix "by" or "bye," should in strictness be preferred to the word "ordinance." *Bills v. City of Goshen*, 20 N. E. 115, 117, 117 Ind. 221, 8 L. R. A. 261.

"By-laws," as used in Gen. St. § 3323, providing that all by-laws of a general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published, and that such by-laws and ordinances shall not take effect and be in force until the expiration of five days after they have been published, is used in its ordinary sense, and is synonymous with "ordinances." The terms imply one and the same thing. *National Bank of Commerce v. Town of Grenada (U. S.)* 44 Fed. 262, 263.

The terms "ordinances, rules, regulations and by-laws" in a charter providing that the common council shall have power to establish, publish, modify, amend, or repeal ordinances, rules, regulations, and by-laws, etc., are all equivalent to the term "ordinances," so that, in order to validly exercise a power given, the passage of an ordinance is necessary. *Taylor v. City of Lambertville*, 10 Atl. 809, 811, 43 N. J. Eq. (16 Stew.) 107; *Hunt v. Common Council of City of Lambertville*, 45 N. J. Law (16 Vroom) 279, 282.

The term "ordinances," as used in Gen. St. Colo. § 3323, providing that by-laws and ordinances shall not take effect and be in force until the expiration of five days after they have been published, is used in its ordinary sense, and is synonymous with "by-laws," the terms implying one and the same thing. *National Bank of Commerce v. Town of Grenada (U. S.)* 44 Fed. 262, 263.

The word "ordinance," as applied to cities, shall be synonymous with the word "by-law." *Rev. Laws Mass. 1902, p. 89, c. 9, § 5, subd. 15.*

**Law distinguished.**

See, also, "Law."

As state law, see "State Law."

As statute, see "Statute."

Mill. & V. Code, § 47, providing that the repeal of a statute does not affect any penalty incurred, nor any proceedings commenced, under and by virtue of the statute repealed, does not apply to the repeal of a city ordinance, which is defined to be "a rule or regulation adopted by a municipal corporation." Quoting And. Law Dict. 738. The terms "by-laws," "ordinances," and "municipal regulations" have substantially the same meaning, and are the laws of the corporate district made by the authorized body, in distinction from the general laws of the state. They are local regulations for the government of the inhabitants of the particular place. They are not laws in the legal sense, though binding on the community affected. They are not prescribed by the supreme power of the state, from which alone a law can emanate, and therefore cannot be statutes, which are the written will of the Legislature, expressed in the form necessary to constitute parts of the law. *Rutherford v. Swink*, 35 S. W. 554, 555, 96 Tenn. (12 Pickle) 564.

An ordinance is not, in the constitutional sense, a public law. It is a mere local rule or by-law, a police or domestic regulation, devoid in many respects of the characteristics of the public or general laws. *State v. Fourcade*, 13 South. 187, 191, 45 La. Ann. 717, 40 Am. St. Rep. 249; *McInerney v. City of Denver*, 29 Pac. 516, 519, 17 Colo. 302.

An ordinance is not a public or general law, but a local rule or by-law. A police regulation for the city, and proceedings thereunder, are penal actions for the enforcement of local domestic regulations. *City of Greeley v. Hamman*, 20 Pac. 1, 2, 12 Colo. 94.

**Order distinguished.**

An order of a municipality is not a law, but merely the form in which the legislative body expresses an opinion, while an ordinance prescribes a permanent rule of government. An order is of a special and temporary character. *Village of Altamont v. Baltimore & O. S. W. R. Co.*, 56 N. E. 340, 341, 184 Ill. 47.

**Resolution included.**

"Ordinance" is the generic term for acts of council affecting the affairs of corporations, and a resolution is only a less solemn or less usual form of an ordinance. *Fuller v. City of Scranton*, 1 Pa. Co. Ct. R. 405, 407.

"Ordinance" is the generic term for acts of council affecting the affairs of the corporation, and we can make no distinction between them, founded on a difference of de-

gree in which they affect those affairs. "Resolution" is only a less solemn and less usual form of an ordinance. It is an ordinance still if it is anything intended to regulate any of the affairs of the corporation. *Kepner v. Commonwealth*, 40 Pa. 124, 130.

The term "ordinance," as used in a city charter requiring the board of mayor and aldermen at its first meeting after the election and qualification to fix the salaries of officers by ordinance, should be construed as synonymous with "resolution," so that an officer is bound by a resolution passed by the board fixing his salary. *Chandler v. Town of Johnson City*, 59 S. W. 142, 143, 105 Tenn. 633.

"A distinction is sometimes drawn between an ordinance and a resolution, by which the one prescribes a permanent rule of conduct or government, while the other is of a temporary character and prescribes no permanent rule of government." But it is apparent that such distinction between the words does not exist in Rev. St. § 1694, providing that by-laws, resolutions, and ordinances of a general or permanent nature shall be fully and distinctly read on three different days, except, etc., as the resolution there referred to is made of a general or permanent nature by the express terms of the statute. *Campbell v. City of Cincinnati*, 31 N. E. 606, 607, 49 Ohio St. 463, 470.

Where the powers conferred on a town are to be exercised by "ordinances" to be passed by the town council, an order or resolution adopted by the council and entered on its records held, in point of form, a valid exercise of the power. *Town of Tipton v. Norman*, 72 Mo. 380, 383.

Under an act requiring the annual appropriations of cities and towns to be first ascertained, and that the levy and assessment should then be made by ordinance, the term "ordinance" is not limited in its meaning to by-laws or permanent local regulations which must be published in order to be valid, but any resolution or other proceeding of the board of trustees entered upon their journal or record, declaring the ascertained amount of all appropriations, and indicating their determination that such an amount shall be levied and assessed upon the taxable property within the town, is an "ordinance," within the meaning of the statute. *People v. Lee*, 1 N. E. 471, 112 Ill. 113.

A resolution or order is not a law, but merely the form in which the legislative body expresses an opinion. An ordinance prescribes a permanent rule of conduct or government, while a resolution is of special and temporary character. Acts of legislation by a municipal corporation which are to have continuing force and effect must be embodied in ordinances, while mere minia-

terial acts may be in the form of resolutions. *Chicago & N. P. R. Co. v. City of Chicago*, 51 N. E. 596, 598, 174 Ill. 439; *People v. Mount*, 58 N. E. 360, 364, 186 Ill. 560; *City of Paxton v. Bogardus*, 66 N. E. 853, 858, 201 Ill. 628; *McDowell v. People*, 68 N. E. 379, 381, 204 Ill. 499.

#### **Election of city officer.**

The word "ordinance," as used in a city charter providing that ordinances and regulations shall be approved by the mayor, is not appropriate to the appointment of a city officer. An election is usually ordered by motion, and may be by ballot, not by ordinance or resolution, and the word is inapt to signify the election of an officer; and a provision in the charter that a city charter may by ordinance regulate the manner in which a city council shall remove police officers and appoint their successors does not confer power to appoint police officers by ordinance. *Volk v. City of Newark*, 47 N. J. Law (18 Vroom) 117, 122.

#### **Grant of land.**

The word "ordinance," in its usual and primary sense, means a local law—a rule of conduct prospective in its operation, and applying generally to the persons and things subject to the local jurisdiction. It does not, in its ordinary use or signification, include a grant of lands. Conceding it to be true that a grant of lands may be made by municipal ordinance, it is equally true that the idea of such a grant is not suggested by the use of the word, and this because it is a very unusual mode of granting lands. It is to be presumed, therefore, that the legislative use of the word "ordinance" is used in its ordinary and restricted sense. Therefore, Act May 15, 1861, amending the charter of the city of Oakland, the successor of the town of Oakland, and providing that "the ordinances of the board of trustees of the town are hereby ratified and confirmed," did not thereby ratify and confirm an ordinance that had been made by the trustees of the town, conveying the entire water front of the town, contrary to the provisions of its charter. *City of Oakland v. Oakland Water Front Co.*, 50 Pac. 277, 289, 118 Cal. 160.

#### **Rule of city council.**

See "Rule."

#### **Tax levy.**

A tax levy comes within none of the definitions of an ordinance. It is not a law; not a rule of action. It has no permanency. Once acted upon, it is *functus officio*. It carries no command to the public generally. It is not a thing that can be violated. It has no single element of what is generally understood to be an ordinance. It never properly, and seldom in fact, as-

sumes the form or name of an ordinance. It is generally made by a resolution of the proper body. *Shuttuck v. Smith*, 69 N. W. 5, 11, 6 N. D. 56.

### **ORDINARY.**

See "Courts of Ordinary."

"'Ordinary' is a civil-law term for any judge who hath authority to take cognizance of causes in his own right and not by deputation. By the common law, it is taken for him who hath ordinary or exempt and immediate jurisdiction in cases ecclesiastical." *Murden v. Beath* (S. C.) 1 Mill, Const. 244, 269 (citing *Jac. Law Dict.* [4th Ed.] 446; *Co. Litt.* 344).

An ordinary is a place of eating where the prices are settled. *Werner v. Washington* (U. S.) 29 Fed. Cas. 705, 707.

### **ORDINARY (ADJ.).**

The word "ordinary," a synonym of "regular," is defined by Webster as methodical, regular, according to established order. *Zulich v. Bowman*, 42 Pa. (6 Wright) 83, 87. See, also, *State v. O'Conner*, 49 Me. 594, 599.

The word "ordinary" is defined as common, usual, often recurring. *Chicago & A. R. R. v. House*, 50 N. E. 151, 153, 172 Ill. 601.

Johnson assigns to the word "ordinary" the meaning of established, regular, common, usual. *Crenshaw v. Slate River Co.* (Va.) 6 Rand. 245, 263.

In construing an instruction in an action against a surgeon for malpractice, which stated that it was his duty to use fair or ordinary knowledge and skill, it was said that the court used the words "fair" and "ordinary" as synonymous. The instruction was held to be proper for the reason that the word "fair" was synonymous with "reasonable." *Jones v. Angell*, 95 Ind. 376, 382.

### **ORDINARY AND YEARLY TAXES.**

A condition in a lease providing that the lessee should pay the ordinary and yearly taxes includes the annual water rent charged on the premises according to the rates established by the Croton department of the city of New York, though such department was not established until after the execution of the lease. *Garner v. Hannah*, 13 N. Y. Super. Ct. (6 Duer) 262, 269.

### **ORDINARY BAGGAGE.**

See, also, "Baggage."

Ordinary baggage is made up of two elements: First, certain things which may become such; second, bags, trunks, valises,



satchels, packages, or other receptacles in which these things are to be put before they can be deemed baggage; in other words, the bag and other receptacle and the contents are both necessary components of the legal idea conveyed by the term "baggage." As to the things which may become baggage when properly contained, or as to what may be called the subjects of baggage, the definitions given in the decisions and by the text writers, though necessarily wanting in explicitness from the difficulty of enumerating all the articles which may become baggage, are yet full, comprehensive, and in perfect accord in their statements of the rules of law. Probably the best definition is as follows: "Whatever the passenger takes with him for his personal use or convenience, according to the habits of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, must be considered as personal luggage." All other things can only be taken as baggage when accepted as such by the carrier. Bicycles are held not to be baggage, within the meaning of the law. *State v. Missouri Pac. Ry. Co.*, 71 Mo. App. 385, 390.

#### ORDINARY BANK DEPOSIT.

An ordinary bank deposit is where a voluntary credit is taken with a bank for which no bond, no bill, or similar evidence of debt is given, and for which there exists a right to draw unconditionally. Such a deposit carries no interest; no action lies with it until demand and refusal. *Catlin v. Savings Bank*, 7 Conn. 487, 495.

#### ORDINARY BUSINESS.

"Ordinary business," as used in a declaration alleging that plaintiff had been injured so as to be prevented from attending to his ordinary business, should only be construed as characterizing the injury and indicating its extent in a general way, and is not sufficient to lay the foundation for proof of special damage. *Tomlinson v. Town of Derby*, 43 Conn. 562, 567.

A by-law enacting that a certain number of directors shall form a quorum for the transaction of the ordinary business of the company embraces such business which is not within the usual and daily range of duties performed by clerks and agents engaged in the conduct and management of the details of such business. It contemplates the performance of business which, but for the by-law, would have required the action of the board at a meeting at which a legal quorum of the whole number of directors were present. *Hoyt v. Shelden*, 16 N. Y. Super. Ct. (3 Bosw.) 267, 290.

"Ordinary business," as used in defining the duties of the cashier of a bank, mean

only such things as are done by cashiers in general in the customary everyday routine of banking, and does not include the making of a contract by the cashier without express delegation of authority from the board of directors, which involves the payment of money, unless it shall be such as has been loaned in the usual and customary way. A cashier under power to perform the ordinary business of the bank has no power to purchase or sell property or create an agency of any kind for the bank, which he had not been authorized to make by others to whom has been confided the power to manage its business, both ordinary and extraordinary. *Bank of Commerce v. Hart*, 55 N. W. 631, 632, 37 Neb. 197, 20 L. R. A. 780, 40 Am. St. Rep. 479.

On the trial of an indictment against a person as a common seller of intoxicating liquor, an instruction that the jury must be satisfied from the evidence that selling intoxicating liquor was defendant's common and ordinary business, and they might be so authorized to find her guilty without proof of any particular number of sales, held sufficiently favorable to defendant. *State v. O'Conner*, 49 Me. 594, 599.

#### ORDINARY CALLING.

The words "ordinary calling" do not include a contract of hiring made on a Sunday between a farmer and a laborer for a year, within the meaning of 29 Car. 2, c. 7, § 5, enacting that no tradesmen, etc., shall do or exercise any worldly labor or work of their ordinary calling on the Lord's day. *Rex v. Inhabitants of Whitnash*, 7 Barn. & C. 596.

The purchase of a horse by a horse dealer is an exercise of the person's "ordinary calling," within the meaning of the Sunday law. *Fennell v. Ridler*, 5 Barn. & C. 406.

A marriage contract is not one which falls within the ordinary calling of the parties to the same, and is not invalidated by the Code, providing that "no tradesman, artificer, workman, laborer, or any person whatsoever shall do or exercise any worldly labor, work or business of their ordinary calling upon the Lord's day, works of charity and necessity excepted." *Hayden v. Mitchell*, 30 S. E. 287, 103 Ga. 431.

Enlisting is not the ordinary calling of a soldier. His ordinary calling is to attend drill and fight the battles of his country. The enlisting of recruits is an extraordinary employment. *Wolton v. Garvin*, 16 Q. B. 48, 62.

The term "ordinary calling," in Pen. Code, § 422, providing that any person who shall pursue his ordinary calling on the Lord's day shall be guilty of a misdemeanor.

does not include the execution of a contract, unless made in the prosecution of the ordinary business or calling of the party making the same, and hence a deed of gift is not rendered invalid by reason of the fact that it is executed on Sunday. *Dorough v. Equitable Mortg. Co.*, 45 S. E. 22, 118 Ga. 178.

### ORDINARY CARE.

In *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304, it is held that "negligence" and "ordinary care" are correlative terms. *Barrickman v. Marion Oil Co.*, 32 S. E. 327, 331, 45 W. Va. 634, 44 L. R. A. 92.

There can be no partial exercise of ordinary care. It exists as a degree in completeness or it is totally wanting in any given case. *Missouri Pac. Ry. Co. v. Shuford*, 10 S. W. 408, 411, 72 Tex. 165.

The term "ordinary care," like the term "reasonable care," is an apt term to use in an instruction to describe the care required by a contractor in keeping a street in a safe condition. *Tompert v. Hastings Pavement Co.*, 55 N. Y. Supp. 177-179, 35 App. Div. 578.

#### As care exercised by one accustomed or skilled.

Ordinary care is the care usually bestowed on the matter in hand by persons accustomed to deal with such matters, and having the prudence of the general class of society to which the person whose conduct is in question belongs. *Spokane Truck & Dray Co. v. Hoefer*, 25 Pac. 1072, 1073, 2 Wash. St. 45, 11 L. R. A. 689, 28 Am. St. Rep. 842.

"Ordinary care" means that degree of care which prudent men skilled in the business would be likely to exercise under the circumstances. *Kelley v. Cable Co.*, 14 Pac. 633, 635, 7 Mont. 70.

"Ordinary care," as used with relation to the degree of care required of railways in the management of their locomotives, means that degree of care which prudent men skilled in the particular business would be likely to exercise under the circumstances. *Diamond v. Northern Pac. Ry. Co.*, 13 Pac. 367, 372, 6 Mont. 580.

Ordinary care is such care as a prudent man of requisite skill will take under the circumstances of the particular case. In the practical application of the doctrine and principles of the law of negligence to the affairs of the present time, the old method of classification is sometimes found to be inconvenient, because we need a measure with more than three marks on it—an instrument with more gradations and capable of more

accurate adjustment to the facts of the particular case; hence the present tendency, in a large class of cases, is to take ordinary care as a quantity, variable as the occasion may require, to measure the duty, sliding it up and down so as to adjust it as near as may be to the reasonable requirements of the particular case, so that, instead of using the measure with three marks on it made beforehand, we go on the ground to make a special measure for the occasion, by surrounding a prudent man of requisite skill with the facts of the case, and determining what he ought to do under the circumstances. That is the measure of ordinary care; the ordinary care measures the duty, and the violation of the duty is the negligence complained of. *Gunn v. Ohio River R. Co.*, 14 S. E. 465, 467, 38 W. Va. 165, 32 Am. St. Rep. 842.

#### As care exercised in person's own affairs.

Ordinary care is such care as is usually exercised under like circumstances by men of ordinary prudence in their own affairs. *Houston & G. N. R. Co. v. Parker*, 50 Tex. 330, 345; *Dallas Rapid Transit Ry. Co. v. Dunlap*, 26 S. W. 877, 878, 7 Tex. Civ. App. 471; *Ohio & M. R. Co. v. Thillman*, 32 N. E. 529, 532, 143 Ill. 127, 36 Am. St. Rep. 359; *Duthie v. Town of Washburn*, 58 N. W. 380, 87 Wis. 231; *Madden v. Port Royal & W. C. Ry. Co.*, 19 S. E. 951, 959, 41 S. C. 440; *Briggs v. Taylor*, 28 Vt. 180, 184.

"Ordinary care" means such care as men of common prudence usually exercise in the management of their own concerns. *Sullivan v. Scripture*, 85 Mass. (3 Allen) 564, 566.

Ordinary care is such care as an ordinarily prudent man would use under similar circumstances involving his own interests. *Mills v. Louisville & N. R. Co.* (Ky.) 76 S. W. 29-31.

Ordinary care is such care as a reasonable, prudent man would use under similar circumstances involving his own interests. *Illinois Cent. R. Co. v. Coleman* (Ky.) 59 S. W. 13, 14.

Ordinary care is such care as men of ordinary prudence would exercise with reference to their own property. *Cooper v. Lee*, 21 S. W. 998, 1002, 1 Tex. Civ. App. 9.

Ordinary care is such care and caution as a man of ordinary prudence would exercise under similar circumstances if all the property to be affected was his own. *Osborn v. Woodford Bros.*, 1 Pac. 548, 549, 31 Kan. 290.

Ordinary care is that care which a person of common prudence takes of his own concerns, or that degree of care which men of common prudence exercise about their own affairs in the age and country in which

they live; and, in determining what would be ordinary care in a particular case, reference must be had to the actual state of society, the business habits, and general usages peculiar to the time and country. *Derosia v. Winona & St. P. R. Co.*, 18 Minn. 133 (Gil. 119, 133).

Ordinary care means that degree of care which a man of ordinary prudence, similarly situated, would give to his own property or affairs. *Mason v. St. Louis Union Stockyards Co.*, 60 Mo. App. 93, 99.

Ordinary care is that degree of care which persons of ordinary prudence are accustomed to employ under the same circumstances in order to conduct their enterprises to a successful termination. *Moberly v. Kansas City, St. J. & C. B. Ry. Co.*, 17 Mo. App. 518, 547; having due regard to the rights of others, and the objects to be accomplished, *Cleveland, C. & C. Ry. Co. v. Terry*, 8 Ohio St. 570, 581.

One is bound to observe ordinary care, that is to say, such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise to preserve himself and his property from injury; and this, of course, imports such a man entirely sober at the time, and in full possession of his faculties of observation, attention, and reflection. *McCoy v. Philadelphia, W. & B. R. Co. (Del.)* 5 Houst. 599, 606.

Ordinary care, as required of a railroad company holding freight in its capacity as a warehouseman after the termination of the carriage, is such care as every prudent man takes of his own goods. *Chicago & A. Ry. Co. v. Scott*, 42 Ill. 132, 143.

"Ordinary care," as to the liability of a vessel for cargo stowed on deck, means such a degree of care as a prudent owner would exercise. *The Hettie Ellis (U. S.)* 20 Fed. 393.

Ordinary care or diligence is such as persons of ordinary prudence usually exercise about their own affairs of ordinary importance. Rev. Codes N. D. 1899, § 5109; Rev. St. Okl. 1903, § 2782.

An instruction that ordinary care and prudence is such care and prudence as is exercised by the mass of mankind in their daily affairs was erroneous. *Rhyner v. City of Menasha*, 83 N. W. 303, 306, 107 Wis. 201.

**As care of generality or majority of people.**

Ordinary care is such care as the great majority of men would use under like or similar circumstances. *Olwell v. Milwaukee St. Ry. Co.*, 66 N. W. 362, 92 Wis. 330; *Jung v. City of Stevens Point*, 43 N. W. 513, 515, 74 Wis. 547.

Ordinary care must be such care as the great mass of mankind, or the majority, ob-

serve in the transactions of human life. *Duthie v. Town of Washburn*, 58 N. W. 350, 87 Wis. 231.

"Ordinary care is that diligence which the generality of mankind use in their own concerns." *McGrath v. Hudson River R. Co. (N. Y.)* 19 How. Prac. 211, 220.

Ordinary care is such care as people in general would exercise under the special circumstances of each particular case. *State v. Manchester & L. R. R.*, 52 N. H. 528; *Driscoll v. Market St. Cable Ry. Co.*, 32 Pac. 591, 592, 97 Cal. 553, 33 Am. St. Rep. 203.

Ordinary care is such care as people in general are accustomed to exercise. *Sleeper v. Town of Sandown*, 52 N. H. 244, 253.

In its general sense, ordinary care means such care as is commonly exercised by the majority of the community, or by persons of ordinarily prudent habits, placed under similar circumstances. And when used in reference to the duty of those conducting railroads, it is that degree of care which the majority of men of prudent and careful habits would exercise under the same or like circumstances to avoid injury to their own persons, in the same risks which others undergo in their services or in obedience to their orders, or by reason of the conduct of their hazardous business. *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403-409.

By ordinary care is meant that degree of care which a majority of men of ordinary prudence would exercise under like or similar circumstances to protect their persons or property from injury. *Canton, C. & H. Turnpike Co. v. McIntire*, 48 S. W. 980, 982, 105 Ky. 185.

**As care of observed by person of common or average prudence.**

Ordinary care is generally defined as such care as men of common prudence would use in like position and circumstances. *Alabama G. S. R. Co. v. Arnold*, 2 South. 337, 342, 80 Ala. 600, 607; *Groom v. Kavanagh*, 71 S. W. 362, 365, 97 Mo. App. 362.

Ordinary care is that care which every prudent man observes; and to describe it as synonymous with, or about equivalent to, "common prudence," is not misleading, especially when this exposition is applied alike to the conduct of both parties. *Richmond & D. R. Co. v. Howard*, 3 S. E. 426, 427, 79 Ga. 44.

Ordinary care is that degree of care which constitutes the average of common prudence, and would have been employed by most persons under the same circumstances. The failure of a boarding house keeper to rid her house of a boarder who had twice failed to securely close the front door after entering late at night does not show a want of ordinary care to protect her boarders' ef-

fects. *Slegman v. Keeler*, 24 N. Y. Supp. 821, 822, 4 Misc. Rep. 528.

Ordinary care is such care as is fairly proportionate to the danger to be avoided or risk to be incurred, judging by the standard of common prudence and experience. *Casper v. Dry Dock, E. B. & B. R. Co.*, 48 N. Y. Supp. 352, 354, 23 App. Div. 451.

Ordinary care is such care as is usually exercised by persons of average prudence. *Sleeper v. Town of Sandown*, 52 N. H. 244, 253; *City of Junction City v. Blades*, 41 Pac. 677, 680, 1 Kan. App. 85; *City of Boulder v. Fowler*, 18 Pac. 337, 11 Colo. 396.

Ordinary care is that measure of prudence and carefulness which an average prudent man might be expected to exercise under the circumstances of the situation. *Thackston v. Port Royal & W. C. Ry. Co.*, 18 S. E. 177, 178, 40 S. C. 80.

The ordinary care which a person must exercise, to entitle him to recover for injuries, means such care as men of common prudence usually exercise in positions of like exposure and danger. *Walsh v. Oregon Ry. & Nav. Co.*, 10 Or. 250, 255.

#### As care of ordinarily prudent person.

The words "ordinary care" are not susceptible of exact definition, applicable to every possible case, for the reason that there is no absolute standard to which the conduct of individuals in each particular case can be brought, and to which it can be compared and tested. For want of a more perfect standard, the courts have set up that somewhat shadowy personage, "the man of ordinary prudence," by defining ordinary care as such care as ought reasonably to be expected of an ordinarily prudent person in the same situation as the person whose conduct is in question. *Paden v. Van Blarcom*, 74 S. W. 124, 126, 100 Mo. App. 185.

Ordinary care is that care which ordinarily prudent persons would exercise under the same, like, or similar circumstances, and the want of such care is negligence. *Osborn v. Woodford Bros.*, 1 Pac. 548, 549, 31 Kan. 290; *Atchison, T. & S. F. R. Co. v. Plaskett*, 26 Pac. 401, 403, 47 Kan. 107; *Chicago, K. & N. Ry. Co. v. Brown*, 24 Pac. 497, 499, 44 Kan. 384; *Chicago, K. & W. R. Co. v. Fisher*, 30 Pac. 462, 467, 49 Kan. 460; *Pecos & N. T. Ry. Co. v. Rebeley*, 58 S. W. 845, 846, 24 Tex. Civ. App. 293; *Houston & T. C. R. Co. v. Milam (Tex.)* 58 S. W. 735, 736; *Missouri, K. & T. Ry. Co. of Texas v. Milam*, 50 S. W. 417, 418, 20 Tex. Civ. App. 688; *Austin Rapid Transit Ry. Co. v. Cullen (Tex.)* 29 S. W. 256, 257; *Houston & T. C. Ry. Co. v. Berling*, 14 Tex. Civ. App. 544, 548, 37 S. W. 1083; *Texas & P. R. Co. v. Buckalew (Tex.)* 34 S. W. 165, 166; *San Antonio & A. P. Ry. Co. v. Manning*, 50 S. W. 177, 178, 20 Tex. Civ. App. 504; *Gulf, C. & S. F. Ry.*

*Co. v. Shieder (Tex.)* 26 S. W. 509, 510; *St. Louis, A. & T. Ry. Co. v. Finley*, 15 S. W. 266, 267, 79 Tex. 85; *Texas M. R. R. v. Taylor (Tex.)* 44 S. W. 892; *Galveston, H. & H. R. Co. v. Bohan (Tex.)* 47 S. W. 1050, 1054; *Waco Artesian Water Co. v. Cauble*, 47 S. W. 538, 542, 19 Tex. Civ. App. 417; *San Antonio & A. P. R. Co. v. Gillum (Tex.)* 30 S. W. 697, 699; *Paris, M. & S. P. Ry. Co. v. Nesbitt (Tex.)* 38 S. W. 243, 244; *St. Louis S. W. Ry. Co. of Texas v. Rice*, 29 S. W. 525, 9 Tex. Civ. App. 509; *Austin & N. W. R. Co. v. Saunders (Tex.)* 26 S. W. 128, 129; *Citizens' Ry. Co. v. Gifford*, 47 S. W. 1041, 19 Tex. Civ. App. 631; *Poling v. San Antonio & A. P. R. Co. (Tex.)* 75 S. W. 69, 71; *Louisville & N. R. Co. v. Semonis (Ky.)* 51 S. W. 612, 613; *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403, 409; *Louisville & N. R. Co. v. Chism*, 20 Ky. Law Rep. 584, 587, 47 S. W. 251; *Louisville, H. & St. L. R. Co. v. Chandler's Adm'r (Ky.)* 70 S. W. 666, 667; *Scott v. Pennsylvania R. Co.*, 9 N. Y. Supp. 189, 191, 56 Hun. 640; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 26, 27, 90 Am. Dec. 761; *Holwerson v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 778, 157 Mo. 216, 50 L. R. A. 850; *Helfenstein v. Medart*, 36 S. W. 863, 866, 136 Mo. 595; *Quirk v. St. Louis United Elevator Co.*, 28 S. W. 1080, 1083, 126 Mo. 279; *Missouri, K. & T. Ry. Co. v. Webb*, 49 S. W. 526, 529, 20 Tex. Civ. App. 431; *Sanders v. Southern Electric Ry. Co.*, 147 Mo. 411, 421, 422, 48 S. W. 855, 860; *Cook v. Southern Ry. Co.*, 38 S. E. 925, 926, 128 N. C. 333; *Chapin v. Chicago, M. & St. P. Ry.*, 44 N. W. 820, 821, 79 Iowa, 582; *Rhyner v. City of Menasha*, 83 N. W. 303, 305, 107 Wis. 201; *McGrath v. Village of Bloomer*, 40 N. W. 585, 73 Wis. 29; *Hanlon v. Milwaukee Electric Ry. & Light Co.*, 95 N. W. 100, 104, 118 Wis. 210; *Swift v. Rutkowski*, 67 Ill. App. 209, 210; *Brown v. Lynn*, 31 Pa. (7 Casey) 510, 512, 72 Am. Dec. 768; *Borough of Nanticoke v. Warne*, 106 Pa. 373, 374; *Stanfield v. Anderson (Ariz.)* 43 Pac. 221, 222; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869 (cited in *Norfolk & W. Ry. Co. v. Steven's Adm'r*, 34 S. E. 525, 526, 97 Va. 631, 46 L. R. A. 367).

Ordinary care is such care as a person of ordinary prudence would exercise under the circumstances. *Receivers of Missouri, K. & T. Ry. Co. v. Pfleger (Tex.)* 25 S. W. 792; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; *Barrickman v. Marion Oil Co.*, 32 S. E. 327, 331, 45 W. Va. 634, 44 L. R. A. 92.

Ordinary care is such care as an ordinarily prudent man would exercise in the place of, and under the same circumstances as, the party charged with negligence. *St. Louis & S. F. Ry. Co. v. Dodd*, 27 S. W. 227, 229, 59 Ark. 317.

"What constitutes ordinary care depends on the circumstances of each particular case,

and is such care as a person of ordinary prudence might exercise under the circumstances." *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, 294, 55 Am. Rep. 304.

Ordinary care is such care as a man of ordinary prudence might reasonably be expected to exercise under like circumstances. *Louisville & N. R. Co. v. Logsdon (Ky.)* 71 S. W. 905, 906.

The words "or ought to" should be omitted from the definition of ordinary care as that degree of care which an ordinarily prudent person would or ought to use in regard to a similar matter under similar circumstances. *Chicago, R. I. & T. Ry. Co. v. James (Tex.)* 75 S. W. 930.

It is not what might be reasonably expected of persons, but what might be expected of ordinarily prudent persons. *Paris, M. & S. P. R. Co. v. Nesbitt (Tex.)* 38 S. W. 243, 244.

Ordinary care, prudence, and caution mean that degree of care which a person of ordinary prudence and caution is accustomed to exercise under the same or like circumstances. *St. Louis S. W. R. Co. of Texas v. Smith*, 70 S. W. 789, 790, 30 Tex. Civ. App. 336.

Ordinary care means that degree of care which an ordinarily prudent and careful person would exercise under like circumstances. *Winters v. Kansas City Cable Ry. Co.*, 12 S. W. 652, 655, 99 Mo. 509, 6 L. R. A. 536, 17 Am. St. Rep. 591.

Ordinary care means that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances. *McLaughlin v. Louisville Electric Light Co.*, 18 Ky. Law Rep. 693, 699, 37 S. W. 851, 100 Ky. 173, 34 L. R. A. 812; *Houston & T. C. R. Co. v. Kelley*, 13 Tex. Civ. App. 1, 7, 34 S. W. 809, 811.

Ordinary care is such care as a person of ordinary prudence and caution would exercise under the same or like circumstances. *Lloyd v. St. Louis, I. M. & S. Ry. Co.*, 29 S. W. 153, 155, 128 Mo. 595; *Martin v. Texas & P. Ry. Co.*, 26 S. W. 1052, 1053, 87 Tex. 117.

Ordinary care means such care as persons of ordinary prudence and caution would exercise in the same situation and under the same circumstances. *Lamb v. Missouri Pac. Ry. Co.*, 48 S. W. 659, 662, 147 Mo. 171; *Stanley v. Union Depot R. Co.*, 21 S. W. 832, 834, 114 Mo. 606; *Missouri, K. & T. Ry. Co. v. Russell*, 28 S. W. 1042, 1043, 8 Tex. Civ. App. 578.

Ordinary care means just what the words say. It is defined by our courts all over the civilized world in very plain terms, and is this: Just such care as a reasonably careful and prudent man—not a cautious

man, not an extraordinarily cautious man, but a reasonably careful and prudent man—would exercise under the circumstances then existing and surrounding him. That is a very simple and plain definition. It is not the highest care, it is not extraordinary watchfulness, but such reasonable care as a man, under the circumstances, being reasonably prudent and careful, would exercise and ought to exercise. *Kestner v. Pittsburgh & B. Traction Co.*, 27 Atl. 1048, 158 Pa. 422.

A good test of ordinary care is: "Where a person in the observance or performance of a duty to another has neither done nor omitted to do anything which an ordinarily careful and prudent person in the same relation, and under the same conditions and circumstances, would not have done or omitted to do, he has not failed to use ordinary care, and therefore is not guilty of negligence, even though damages may have resulted from his action or want of action." *Carter v. Cape Fear Lumber Co.*, 39 S. E. 828, 831, 129 N. C. 203; *Prue v. New York, P. & B. R. Co.*, 27 Atl. 450, 453, 18 R. I. 360.

#### As care ordinarily or usually used.

It is very plain that ordinary diligence or care is that measure of care and diligence ordinarily employed in a given business. *Zell v. Dunkle*, 27 Atl. 38, 39, 156 Pa. 353.

"Ordinary care" means the usual care of an ordinarily prudent man. *Reynolds v. City of Burlington*, 52 Vt. 300, 308.

Ordinary care is such a degree of care, skill, and diligence as men of ordinary prudence, under similar circumstances, usually employ. *Gerlach v. Edelmeyer*, 47 N. Y. Super. Ct. (15 Jones & S.) 292, 296; *Brown v. Lynn*, 31 Pa. (7 Casey) 510, 512, 72 Am. Dec. 768.

Ordinary care is that degree of care which prudent persons usually exercise under similar circumstances. *Florida Cent. & P. R. Co. v. Mooney (Fla.)* 33 South. 1010, 1012.

Ordinary care is such care as would be ordinarily used by prudent persons performing a like service under similar circumstances. *Frick v. St. Louis, K. C. & N. P. R. Co.*, 75 Mo. 595, 609.

By ordinary care is understood that degree of caution, attention, activity, or skill which are habitually employed by persons in the situation of the respective parties under all circumstances surrounding them at the time. *United Rys. & Electric Co. v. Beldeman*, 52 Atl. 913, 915, 95 Me. 480 (citing *Central Ry. Co. v. Smith*, 74 Md. 212, 21 Atl. 706).

A definition of "ordinary care" as that degree of care and caution that a person of ordinary prudence is accustomed to use un-

der like or similar circumstances was not objectionable on the ground that it should have been such care as a person of ordinary prudence would ordinarily use under similar circumstances. *St. Louis S. W. R. Co. of Texas v. Brown*, 69 S. W. 1010, 30 Tex. Civ. App. 57. See, also, *McCoy v. Philadelphia, W. & B. R. Co. (Del.)* 5 *Houst.* 599, 606.

Ordinary care on the part of an employer, as respects his duty toward the servant as to the furnishing of a safe place to work, implies not simply the degree of diligence which is customary among those entrusted with the management of the machinery and appliances used, but such as, having respect to the exigencies of the particular service, is reasonable to be observed. *Bean v. Oceanic Steam Nav. Co. (U. S.)* 24 *Fed.* 124, 125.

Ordinary care is such care as persons of ordinary prudence would have exercised under like circumstances. It does not depend on custom. It would be no excuse for want of care that carelessness was universal about the matter involved, or at the place of the accident, or in business generally. *Sawyer v. J. M. Arnold Shoe Co.*, 38 *Atl.* 333, 335, 90 *Me.* 369 (citing *Mayhew v. Sullivan Min. Co.*, 76 *Me.* 100).

#### As care of ordinary man.

Ordinary care is what the ordinary run of men would do under similar circumstances. *Stokes v. Ralpho Tp.*, 40 *Atl.* 958, 961, 187 *Pa.* 333.

In a charge as to ordinary care, it is erroneous to define the requisite degree of care as that exercised by an ordinary man. In this connection the court says: "A man may be ordinary in stature, in personal appearance, or otherwise, and yet be utterly reckless and have no sense of prudence or caution, or he may be extraordinarily careful and prudent. Whether applied to the negligence of a defendant, or the contributory negligence of a plaintiff, we believe the correct definition of the degree of care to be exercised by either, in determining whose negligence occasioned the injury, is expressed in these words: 'Such care and caution as an ordinarily prudent person would exercise under similar circumstances.'" *Austin & N. W. Ry. Co. v. Beatty*, 11 S. W. 858, 859, 860, 73 *Tex.* 592.

#### As care of prudent, careful, or cautious man.

An instruction in an action against a railway company for injury resulting in the death of an employé, caused by a defective car, that "ordinary care and caution is such as a prudent person would exercise under the same or similar circumstances," is not objectionable because the word "ordinarily" is omitted before the words "prudent person," or because of the use of the words "in

similar circumstances." *Texas & N. O. R. Co. v. Black (Tex.)* 44 S. W. 673, 675.

Ordinary care is such care and caution as a prudent man would exercise under like or similar circumstances. *Houston & T. R. Co. v. Oram*, 49 *Tex.* 341, 346; *Fassett v. Town of Roxbury*, 55 *Vt.* 552, 556. Ordinary care and caution is such as a prudent man would exercise in similar circumstances. *Texas & P. R. Co. v. Gorman*, 21 S. W. 158, 2 *Tex. Civ. App.* 144; *Texas & P. R. Co. v. Barrett*, 17 *Sup. Ct.* 707, 708, 166 *U. S.* 617, 41 *L. Ed.* 1136.

Ordinary care is that degree of care which a prudent man would exercise in view of the circumstances that surround him at a given time. *Grant v. Union Pac. R. Co. (U. S.)* 45 *Fed.* 673, 674.

Ordinary care is that care which a prudent person ordinarily uses under like circumstances, which is another and different thing from such care as persons ordinarily use under like circumstances. *Johnson v. City of St. Joseph*, 71 S. W. 106, 108, 96 *Mo. App.* 663 (citing *Cohn v. City of Kansas*, 108 *Mo.* 387, 392, 18 S. W. 973).

By ordinary care is meant such care as would be ordinarily used by prudent persons performing like services under similar circumstances. So, when a brewer invites a customer to visit a dangerous part of his brewery, he must give such visitor warning of the danger, to enable him by the use of ordinary care to avoid the same, or he will be liable for any injury resulting; and this, too, whether the customer's visit is with or without benefit to the brewer. *Hartman v. Muehlebach*, 64 *Mo. App.* 505, 579.

Ordinary care is that degree of care which persons of prudence are accustomed to use under the same or similar circumstances. *Chicago & A. R. Co. v. Pearson*, 82 *Ill. App.* 605, 616.

Ordinary care is such care as a prudent, careful man would take under like circumstances. *Meredith v. Reed*, 26 *Ind.* 334, 336.

Ordinary care is such care as a reasonably prudent and careful man would exercise under similar circumstances. *Adams v. Wilmington & N. C. Electric R. Co. (Del.)* 52 *Atl.* 264, 265, 3 *Pennewill*, 512. "Negligence" has been variously defined in the courts of this state, but, after all, the different definitions means substantially one and the same thing. It has been termed the want of ordinary care; that is, the want of such care as a reasonably prudent and careful man would exercise under similar circumstances. *Murphy v. Hughes (Del.)* 1 *Pennewill*, 250, 40 *Atl.* 187, 188; *Mills v. Wilmington City Ry. Co. (Del.)* 1 *Marv.* 269, 40 *Atl.* 1114; *Knopf v. Philadelphia, W. & B. R. Co. (Del.)* 2 *Pennewill*, 392, 46 *Atl.* 747; *Tully v. Philadel*

phia, W. & B. R. Co., 50 Atl. 95, 96, 3 Pennell, 455.

Ordinary care is that care which a prudent person ordinarily uses under similar circumstances, and it is held that an instruction defining ordinary care as such care as a person should ordinarily exercise under like circumstances is erroneous. *Cohn v. City of Kansas*, 18 S. W. 973, 974, 108 Mo. 387.

Ordinary care is defined to be that degree of care which a prudent person would be likely to exercise under given circumstances. *McGrath v. New York Cent. & H. R. Co.*, 59 N. Y. 468, 471, 17 Am. Rep. 359.

"Ordinary care," as applicable to cases where negligence is to be determined as a question of fact, means such care as a prudent and cautious man would exercise under like circumstances. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 11 N. E. 855, 858, 120 Ill. 587; *Chicago & A. R. Co. v. Adler*, 21 N. E. 846, 848, 129 Ill. 335.

Ordinary care is such care and prudence as a careful and prudent man would exercise under the circumstances. *Fassett v. Town of Roxbury*, 55 Vt. 552, 556; *Cronk v. Chicago, M. & St. P. R. Co.*, 52 N. W. 420, 422, 3 S. D. 93.

#### **As care of reasonable and intelligent man.**

"Ordinary care means simply that degree of vigilance which a reasonable and prudent person would exercise under like circumstances." *Carter v. Kansas City Cable Ry. Co. (U. S.)* 42 Fed. 37, 38; *Union Ins. Co. v. Smith*, 8 Sup. Ct. Rep. 534, 538, 124 U. S. 405, 31 L. Ed. 497; *Cayzer v. Taylor*, 76 Mass. (10 Gray) 274, 280, 69 Am. Dec. 317; *Lake Shore & M. S. Ry. Co. v. McIntosh*, 38 N. E. 476, 479, 140 Ind. 261.

Ordinary care is the care which reasonable men of ordinary prudence, having reasonable and proper regard for the rights and interests of those whom their acts may affect, use under like circumstances. *Inhabitants of Topsham v. Inhabitants of Lisbon*, 65 Me. 449, 455.

The phrase "ordinary care" necessarily involves the idea that such care was to be used as a reasonable person under like circumstances would adopt to avoid an accident. *Fallon v. City of Boston*, 85 Mass. (3 Allen) 38, 39.

Ordinary care is such care as a man of ordinary judgment, intelligence, and prudence would exercise under like circumstances. *Missouri Pac. Ry. Co. v. Mackey*, 6 Pac. 291, 296, 33 Kan. 298.

"Ordinary diligence, care and skill are such care and diligence as are usually bestowed by ordinary persons of ordinary com-

mon sense under like circumstances." *Brady v. Jefferson (Del.)* 5 Houst. 60, 79.

Ordinary care is such as any man of average intelligence would employ under like circumstances. *City of Boulder v. Fowler*, 18 Pac. 337, 11 Colo. 396.

Ordinary care is that degree of caution which a reasonably prudent person would exercise under the existing condition. *Whisteen v. Bengal*, 37 N. Y. Supp. 813, 814, 16 Misc. Rep. 37.

The term "ordinary care" is defined in varying language, but generally means such care as the ordinarily prudent man in the particular occupation, with ordinary experience and intelligence, would use to protect himself. *Crooker v. Pacific Lounge & Matress Co.*, 69 Pac. 359, 361, 29 Wash. 30.

#### **As care reasonably to be expected.**

Ordinary care means that degree of care which may reasonably be expected of a person in the situation of the person required to exercise such care. *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 234, 39 Am. Rep. 503; *Nolan v. New York, N. H. & H. R. Co.*, 4 Atl. 106, 111, 53 Conn. 461; *Nesbit v. Crosby*, 51 Atl. 550, 553, 74 Conn. 554; *Central R. Co. v. Moore*, 24 N. J. Law (4 Zab.) 824, 832; *Central Ry. Co. v. Smith*, 21 Atl. 706, 707, 74 Md. 212; *United Railways & Electric Co. v. Beldelman*, 52 Atl. 913, 915, 95 Md. 480; *Atchison, T. & S. F. R. Co. v. Sadler*, 16 Pac. 46, 48, 38 Kan. 128, 5 Am. St. Rep. 729; *Town of Norman v. Teet*, 69 Pac. 791, 792, 12 Okl. 69.

Ordinary care means that degree of care which might reasonably be expected of an ordinarily prudent person under like circumstances. *Georgia Cotton Oil Co. v. Jackson*, 37 S. E. 873, 874, 112 Ga. 620; *Driscoll v. Market St. Cable Ry. Co.*, 32 Pac. 591, 592, 97 Cal. 553, 33 Am. St. Rep. 203.

Ordinary care means the care that would be expected of a reasonable, careful, prudent, and competent person in a like business under all the circumstances. *Matthews v. Freker*, 57 S. W. 262, 265, 68 Ark. 190.

In a suit for injuries received while riding with other passengers on top of a caboose, a charge that "by ordinary care is meant that degree of care which may be reasonably expected of a person in the situation of the plaintiff at the time the injury was received, and negligence is the absence of ordinary care," was error. Under the law, ordinary care is that care that a person of ordinary prudence would exercise under the same circumstances. The charge fixes no criterion or measure to guide the jury in determining what degree of care was necessary to be used under the circumstances. From the charge the jury were unable to decide whether the care necessary was such

as an ordinarily prudent person would use under similar circumstances, or whether it was such as might be reasonably expected of an imprudent person. An imprudent or reckless person would reasonably be expected to take more risk than one of ordinary prudence. *St. Louis S. W. Ry. Co. v. Rice*, 29 S. W. 525, 9 Tex. Civ. App. 509.

#### As due care.

"The term 'ordinary care,' when used in a general sense, without reference to the facts of any particular case, comes nearer expressing, perhaps, a definite measure of responsibility than the expression 'due care,' yet the degree of diligence which it implies greatly varies according to the character of the circumstances to which it relates. A slight examination of the precedents, as found in Chitty and other standard authors, will show that in actions for personal injuries the expressions 'due care' and 'due and proper care' are uniformly used in charging the degree of diligence or care alleged to have been exercised by the plaintiff at the time of receiving the injury complained of." *Schmidt v. Sinnott*, 103 Ill. 160, 165.

"Ordinary care," in the law of negligence, is synonymous with "due care." *Chicago, B. & Q. R. Co. v. Yorty*, 42 N. E. 64, 65, 158 Ill. 321.

The expressions "due care" and "ordinary care" are convertible terms, and therefore it is not erroneous to substitute one for the other in instructions. *Baltimore & O. S. W. Ry. Co. v. Faith*, 51 N. E. 807, 808, 175 Ill. 58.

#### As reasonable care.

"Ordinary care" is synonymous with "reasonable care," and the terms may be used interchangeably. *Black v. Chicago, B. & Q. R. Co.*, 46 N. W. 428, 430, 30 Neb. 197; *Nolan v. New York, N. H. & H. R. Co.*, 4 Atl. 106, 111, 53 Conn. 461; *Chicago, B. & Q. R. Co. v. Yorty*, 42 N. E. 64, 65, 158 Ill. 321; *Baltimore & O. S. W. Ry. Co. v. Faith*, 51 N. E. 807, 808, 175 Ill. 58; *Central R. Co. of New Jersey v. Moore*, 24 N. J. Law (4 Zab.) 824, 832; *Fallon v. City of Boston*, 85 Mass. (3 Allen) 38.

"Ordinary care" means the reasonable care which anybody ought to exercise in the use of machinery. *Harmer v. Reed Apartment & Investment Co.*, 53 Atl. 402, 403, 68 N. J. Law, 332.

Ordinary care is such reasonable care to avoid injury as ordinary prudence would suggest; that is, such a degree of care and attention as experience has found reasonable and necessary to prevent injury to others in like cases. *Philadelphia, W. & B. R. Co. v. Kerr*, 25 Md. 521, 530.

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The words "ordinary" and "reasonable," used in defining the nature of the care and skill expected of a physician or surgeon in his employment, have been interchangeably used. *Ritchey v. West*, 23 Ill. 385. Perhaps the word "ordinary" would indicate more clearly to the common mind the degree of care and skill which he is bound to exercise in his professional engagements, or answer any damage for the want of it. *Kendall v. Brown*, 74 Ill. 232, 237.

"Ordinary care" is reasonable care; that care which a person of ordinary prudence and capacity would take under like circumstances. *Carter v. Cape Fear Lumber Co.*, 39 S. E. 828, 831, 129 N. C. 203.

#### As a relative term.

Ordinary care depends on the circumstances of each particular case. *Chaplin v. Chicago, M. & St. P. Ry. Co.*, 44 N. W. 820, 821, 79 Iowa, 582; *Gerlach v. Edlemeyer*, 47 N. Y. Super. Ct. (15 Jones & S.) 292, 296; *Barrickman v. Marion Oil Co.*, 32 S. E. 327, 331, 45 W. Va. 634, 44 L. R. A. 92; *Berns v. Gaston Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; *Missouri, K. & T. Ry. Co. of Texas v. Webb*, 49 S. W. 526, 529, 20 Tex. Civ. App. 431; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 26, 27, 90 Am. Dec. 761.

The Supreme Court of the United States has said that "there is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. What may be deemed ordinary care in one case may under different circumstances be gross negligence." *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 683, 36 L. Ed. 485 (cited in *Omaha St. Ry. Co. v. Craig*, 58 N. W. 209, 212, 213, 39 Neb. 601).

"Ordinary care" is altogether a relative term, and means the use of those precautions which under the circumstances of each particular case a just regard to the persons and property of others demands. But there is no inflexible rule, either of the river or of the road, the neglect of which by one party will dispense with the exercise of common caution by the other. *The Farmer* (Ala.) 4 Am. Law Reg. 249.

"Ordinary care" means that degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. Ordinarily careful and prudent persons regulate their conduct by the differences in circumstances surrounding the act. This is generally known and recognized by all people. That is what makes it ordinary care. *Gorman's Adm'r v. Louisville R. Co.*, 72 S. W. 760, 761, 24 Ky. Law Rep. 1938.



The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence. *Kinyon v. Chicago & N. W. Ry. Co.*, 92 N. W. 40, 44, 118 Iowa, 349, 96 Am. St. Rep. 382.

Ordinary care is altogether a relative term, and means the use of those precautions which under the circumstances of each particular case a just regard to the persons and property of others demands. *The Farmer (Ala.)* 4 Am. Law Reg. 249.

Ordinary care is that degree of care which a person of ordinary prudence would exercise under the particular circumstances of the case. *Cronk v. Chicago, M. & St. P. Ry. Co.*, 52 N. W. 420, 3 S. D. 83; *Lago v. Walsh*, 74 N. W. 212, 214, 98 Wis. 348; *Chesapeake & O. Ry. Co. v. Gunter*, 56 S. W. 527, 528, 108 Ky. 362. The ordinary care which it is the duty of a railroad engineer to exercise in his work is that care which persons of ordinary care and prudence would exercise under the circumstances. *Hall v. Chicago, B. & N. R. Co.*, 49 N. W. 239, 243, 46 Minn. 439; *Norfolk & P. R. Co. v. Ormsby (Va.)* 27 Gr. 455, 17 Am. Ry. Rep. 321; *Missouri Pac. R. Co. v. Shuford*, 10 S. W. 408, 411, 72 Tex. 165.

Ordinary care is not such care as people in general would exercise, but such care as they would exercise under the special circumstances of each particular case. *State v. Manchester & L. B. Co.*, 52 N. H. 528, 557.

"Ordinary care" is not an absolute, but a relative, term, the standard of which is necessarily variable, and is influenced and controlled by the extraneous circumstances surrounding the particular transaction. *City of Winchester v. Carroll*, 40 S. E. 37, 39, 99 Va. 727.

What is the precise legal intent of the term "ordinary care" must, in the nature of things, depend upon the circumstances of each individual case. It is a relative, and not an absolute, term. *International & G. N. R. Co. v. Johnson*, 55 S. W. 772, 788, 23 Tex. Civ. App. 160.

The terms "ordinary care," "reasonable prudence," and such like terms as are applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence. *Crane Elevator Co. v. Lipfert (U. S.)* 63 Fed. 942, 947, 11 C. C. A. 521; *Consumers' Electric Light & St. R. Co. v. Pryor (Fla.)* 32 South. 797, 805; *Tacoma Ry. & Power Co. v. Hays (U. S.)* 110 Fed.

496, 499, 49 C. C. A. 115; *Chesapeake & O. Ry. Co. v. Gunter (Ky.)* 56 S. W. 527, 528; *Cayzer v. Taylor*, 76 Mass. (10 Gray) 274, 280, 69 Am. Dec. 317; *Crooker v. Pacific Lounge & Mattress Co.*, 69 Pac. 359, 361, 29 Wash. 30.

Want of ordinary care cannot be defined, for the degree of care and vigilance required varies according to the exigencies which require attention, and vigilance conforms in amount and degree to the particular circumstances under which they are to be exercised, and there is no fixed standard by which a court is enabled to arbitrarily say what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care. *Cameron v. Kenyon-Connell Com. Co.*, 58 Pac. 358, 360, 22 Mont. 312, 44 L. R. A. 508, 74 Am. St. Rep. 602; *Consumers' Electric Light & St. R. Co. v. Pryor (Fla.)* 32 South. 797, 805.

That degree of care which a man of average prudence and diligence would use under the like circumstances is denominated "ordinary care." *Higman v. Camody*, 112 Ala. 267, 272, 20 South. 480, 57 Am. St. Rep. 33.

In deciding whether a party has exercised ordinary care, consideration must be given to the position of the party, and his duties, business, and responsibilities; and the same act or omission which under some circumstances would not show any degree of negligence might under others show want of ordinary care, and under still different circumstances might show gross negligence. *State v. Manchester & L. R. R.*, 52 N. H. 528.

What is ordinary care depends on the circumstances of the particular instance. When the circumstances are such that an ordinarily careful and prudent person would deem it essential to exercise a greater degree of care and caution than under less threatening circumstances, such greater degree of care would be but ordinary care. The test always is not that the highest possible care and caution shall be exercised, but such degree of care only as an ordinarily careful and prudent person would exercise in like situation. *West Chicago St. Ry. Co. v. Manning*, 48 N. E. 958, 960, 170 Ill. 417.

Ordinary care is not always the same degree of care. A reasonable man in some situations will exercise extraordinary care, and he should do it, and it is yet ordinary care in reference to the circumstances or exigencies of the case. We sometimes say that, the greater the danger, the greater the necessity of care. *Nesbit v. Crosby*, 51 Atl. 550, 553, 74 Conn. 554.

"Ordinary care" has not only an absolute, but also a relative signification. It is such care as prudent persons are accustomed to exercise under the peculiar circumstances

of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous, because prudent and careful persons, having in view the object to be attained and the just rights of others, are in such cases accustomed to exercise more care than in cases less perilous. The amount of care is, indeed, increased, but the standard is still the same. It is still nothing more than ordinary care under the circumstances of that particular case. *Cleveland, C. & O. R. Co. v. Terry*, 8 Ohio St. 570, 581.

What is ordinary care cannot be determined abstractly. It is necessarily a relative term. It must be measured by the nature of the work to be done, the instruments to be used, and the hazard and peril of the situation. The law, by "ordinary care," means simply the caution and vigilance which reasonable and prudent men exercise under like circumstances. *Flynn v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo. 196, 202, 47 Am. Rep. 99.

"Ordinary care" is a relative term, always dependent on relationship and circumstances. "Want of ordinary care" means nothing more than the failure to use those precautions which a just regard to the persons or property of others demand should be used under the circumstances of the particular case. Ordinary care depends upon the performance of a duty which one of the parties owes to the other, and this duty arises out of the various relationships of life, and varies in obligation under different circumstances. In one case the duty is high and imperative; in another it is the imperfect obligation, thus it may be dependent on a mere license to enter upon land or the bare obligation to avoid inflicting a willful injury upon a trespasser; while, upon the other hand, it may be a duty to care for the safety of an invited guest or of a passenger for hire." *Smith v. Day* (U. S.) 88 Fed. 62, 64.

What may constitute ordinary care under some circumstances may not under others. This varies, and is materially affected by the nature, situation, bulk, and value of the article or thing to be cared for. *Ward v. Milwaukee & St. P. Ry. Co.*, 29 Wis. 144, 149.

The exigencies of the particular occasion fix the amount of care that should be exercised. *Receivers of Missouri, K. & T. Ry. v. Pduger* (Tex.) 25 S. W. 792, 793; *Quirk v. St. Louis United Elevator Co.*, 28 S. W. 1080, 1083, 126 Mo. 279. This principle is well illustrated, in regard to the care to be taken of different articles of personal property, thus: "A man would not be expected to take the same care of a bag of oats as a bag of gold; a bale of cotton as a bag of diamonds." *Story*, *Balim.* §§ 15, 186. A

similar variation in the degree of care to be exercised of one's person must prevail, in order that such care may rise to the standard and equal the measure of ordinary care. *Quirk v. St. Louis United Elevator Co.*, 28 S. W. 1080, 1083, 126 Mo. 279.

Ordinary care is that degree of care which may reasonably be expected of one in the same situation, and would evidently be very small in a very young child. *City of St. Paul v. Kuby*, 8 Minn. 154, 168 (Gil. 125, 140); (citing *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67).

"Ordinary care" is a relative term. What would be ordinary care under one set of circumstances might be gross negligence under a different set of circumstances. *Ho- bert v. City of Seattle*, 73 Pac. 383, 385, 32 Wash. 330.

Ordinary care generally depends on the facts of the particular case, except in those instances where the law, by express terms or otherwise, establishes some more exact rule. Ordinary care is such as a person of ordinary care and caution, according to the standard of the usual and general experience of mankind, would exercise in the same situation and circumstances as those of the person whose conduct in that regard is in question in the given case. *Tetherow v. St. Joseph & D. M. R. Co.*, 11 S. W. 310, 313, 98 Mo. 74, 14 Am. St. Rep. 617.

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonably prudent,' and such like terms as apply to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence." *Hall v. Ogden City St. Ry. Co.*, 44 Pac. 1046, 1047, 13 Utah, 243, 57 Am. St. Rep. 726 (quoting *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485).

The term "ordinary care" is a difficult one to define, as it is relative, and always dependent on relationship and circumstances. In some relations a slight want of care is a want of ordinary care, because of the high duty that is owing; in other relations only a great failure of care is a want of ordinary care, because there is only a duty of imperfect obligation owing; while in some other relations only a degree of care between the two extremes would constitute ordinary care. Therefore, where the circumstances require great care, then great care is only ordinary care; when they require only slight care, then only slight care becomes ordinary care;

and so on between the two extremes on the same principle, according to the circumstances of each case. *Prue v. New York, P. & B. R. Co.*, 27 Atl. 450, 453, 18 R. I. 360.

In *Gulf, C. & S. F. Ry. v. Hodges*, 13 S. W. 64, 65, 76 Tex. 90, the court said: "What is ordinary care will vary with the surrounding circumstances and conditions." *Missouri, K. & T. Ry. Co. of Texas v. Webb (Mo.)* 49 S. W. 526, 529.

No fixed, arbitrary rule can be laid down in defining ordinary care. The degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised. The care and attention necessary on an employer's part in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm, as well as good. The employer is in duty bound to see that the machinery is fit and safe for the work only so far as due and reasonable care and diligence and prudence will go towards having it and keeping it safe and fit. He is not a warrantor of the safety of the machinery, and, when he has exercised the degree of care hereinbefore discussed, as ordinary or reasonable, his duty is done. *Mulligan v. Montana Union Ry. Co.*, 47 Pac. 795, 797, 19 Mont. 135 (citing *Whart. Neg.* § 211; *Johnson v. Boston Min. Co.*, 16 Mont. 164, 40 Pac. 298).

Under Acts 1891, c. 4071, § 1, providing that "a railroad company shall be liable for any damage done to persons, stock or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents had exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company," such companies, in every case falling within the purview of this statute, are bound to exercise all ordinary and reasonable care and diligence strictly commensurate with the exigencies of the occasion and demanded by the relationship that they bear for the time being to the party in question. *Morris v. Florida Cent. & P. R. Co.*, 29 South. 541, 546, 43 Fla. 10.

One who is a trespasser on a train is only required to exercise ordinary care to avoid injury to himself. But this requisite can only be complied with by the exercise of that degree of caution which persons of his age and intelligence, and of ordinary prudence, will use under the same conditions of danger, and with like knowledge of the situation. *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 14 Pac. 172, 175, 36 Kan. 655, 59 Am. Rep. 596.

The ordinary care or due care which a railroad company is required to exercise in the employment of its servants is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless. "Ordinary care in the selection or retention of servants in such cases implies that degree of diligence and precaution which the exigencies of the particular service reasonably require; that is, such care, in view of the consequences that may result from negligence on the part of the employes, as is fairly commensurate with the perils or dangers likely to be encountered." *Northern Pacific R. Co. v. Mares*, 8 Sup. Ct. 321, 326, 123 U. S. 710, 31 L. Ed. 296.

By "ordinary and proper care and diligence" is meant such care and diligence as a person of ordinary prudence and caution would commonly exercise under like circumstances, and the degree of care and diligence required in a case is proportioned to the amount of danger probably consequent on a failure to exercise care and diligence. *Martin v. Texas & P. Ry. Co.*, 26 S. W. 1052, 1053, 87 Tex. 117.

#### Same—Character of business affecting.

What is "ordinary care" must be measured by the character of the business, and the risks attending its prosecution. *Houston v. Brush*, 29 Atl. 380, 386, 66 Vt. 331; *Heckman v. Evenson*, 73 N. W. 427, 429, 7 N. D. 173; *Texas & P. Ry. Co. v. Barrett*, 17 Sup. Ct. 707, 708, 166 U. S. 617, 41 L. Ed. 1136.

Ordinary care has relation to the business in which the party is engaged. *Lamline v. Houston W. St. & P. Ferry R. Co.* (N. Y.) 14 Daly, 144.

"Ordinary care" is a relative term, and what is ordinary care is to be measured by the nature of the case, the hazard, and the situation. *Rutledge v. Hannibal & St. J. R. Co.*, 78 Mo. 286, 292.

What is ordinary care cannot be determined abstractly. It has relation to, and must be measured by, the work or thing done, and the instrumentalities used, and their capacity for evil as well as good. *Cayzer v. Taylor*, 76 Mass. (10 Gray) 274, 280, 69 Am. Dec. 317.

The term "ordinary care," within the rule that a physician or surgeon is only responsible for his failure to exercise ordinary care, is used in its ordinary acceptance of meaning. *Heath v. Glisan*, 3 Or. 64, 65.

"Ordinary care" may mean very slight care in one state of circumstances, and comparatively very great care in another. The ordinary care which is exacted from one person in the custody of a valuable jewel is the same in legal principle, though differ-

ent in degree, from the ordinary care required from another as the custodian of a grindstone. In the one case it is the care usually taken by prudent custodians of jewels, and in the other that usually taken by prudent custodians of grindstones. In each case it is the care which the nature of the subject and surrounding circumstances reasonably demand. *Blythe v. Birmingham Waterworks Co.*, 11 Exch. 781 (citing *Cooley*, Torts, 630; *Shear. & R. Neg.* § 7).

The ordinary care which the hirer of a slave is required to exercise with regard to such slave is that degree of it which in the same circumstances a person of ordinary prudence would take of the particular thing, were it his own. It is manifest that it may differ very much, according to the nature of the thing, the purpose for which it was hired, and the particular circumstances of risk under which a loss occurred. A coach, for example, is not kept like a casket of jewels. So a slave, being a moral and intelligent being, is usually as capable of self-preservation as other persons. Hence the same constant oversight and control are not required for his preservation as for that of a lifeless thing or of an irrational animal. Again, if an owner let his slave for a particular purpose, it is to be understood that he is fit for it, and therefore he may be set to that service, and kept at it in the way that is usual. *Heathcock v. Pennington*, 33 N. C. 640, 643.

The ordinary care which a railroad company must use in providing station platforms is that which a man of ordinary prudence would exercise under the circumstances to accomplish the end in view, namely, the safety of the passengers. *St. Louis, I. M. & S. Ry. Co. v. Barnett*, 45 S. W. 550, 551, 65 Ark. 255.

"Ordinary care and diligence," when applied to the management of railroad engines and cars in motion, imports all the care and circumspection, prudence and discretion, which the peculiar circumstances of the place or occasion reasonably require, and this will be increased or diminished accordingly as the ordinary liability of danger to others is increased or diminished in the movement and operation of them. *Parvis v. Philadelphia, W. & B. R. Co.*, 17 Atl. 702, 705, 8 Houst. 436; *Knopf v. Philadelphia, W. & B. R. Co.*, 46 Atl. 747, 748, 2 Pennewill, 392; *Tully v. Philadelphia, W. & B. R. Co.*, 50 Atl. 95, 97, 3 Pennewill, 455; *Patterson v. Philadelphia, W. & B. R. Co.* (Del.) 4 Houst. 103.

"Ordinary care towards its employés," as used with reference to a railroad, imposes a high degree of diligence for keeping the road and its appliances in perfect repair, but neither warrants nor insures against defects. *Wilson v. Denver, S. P. & P. Ry. Co.*, 2 Pac. 1, 3, 7 Colo. 1.

Ordinary care which a man is required to exercise in the selection and retention of servants and agents implies that degree of diligence and precaution which exigencies of the particular services reasonably require, or it is such care as, in view of the consequences that may result from negligence on the part of employés, is fairly commensurate with the perils or dangers likely to be encountered. *Wabash R. Co. v. McDaniels*, 2 Sup. Ct. 932, 937, 107 U. S. 454, 27 L. Ed. 605. See, also, *Lindvall v. Woods* (U. S.) 44 Fed. 855, 857.

Ordinary care in driving a horse or vehicle means such care as prudent men ordinarily use in like circumstances, taking into consideration the time, the place, the condition of the highway, the possible dangers, the known obstructions, and the damage likely to result from driving carelessly at that particular time and place. *Ford v. Whitman* (Del.) 45 Atl. 543, 544, 2 Pennewill, 355. See, also, *Ammerman v. Coal Tp.*, 40 Atl. 1005, 1007, 187 Pa. 326.

In discussing the question whether or not directors of a bank were negligent in failing sooner to detect the shortage of the president, the court says that the ordinary care of a business man in his own affairs means one thing, and the ordinary care of a gratuitous mandatory is quite another matter. One implies an oversight and knowledge of every detail of the business. The other suggests such care only as a man can give in a short space of time to the business of other persons, from whom he receives no compensation. *Sventzel v. Penn Bank*, 147 Pa. 140, 150, 23 Atl. 405, 15 L. R. A. 305, 30 Am. St. Rep. 718.

The law exacts from mechanics, such as masons, carpenters, etc., ordinary skill and care. It does not require the highest degree of these qualities, such as the most skillful and careful mechanics use, nor is it satisfied with the lowest degree, or such as the most ignorant and most careless exercise, but it takes the medium as the rule; that is, the average of skill and the average of care. *Fletcher v. Seekell*, 1 R. I. 267.

#### Same—In crossing railroads.

The law precisely defines what the term "ordinary care" means, with respect to passing over railway crossings. In the progress of the law in this respect, the question of care at railway crossings, as affecting a traveler, is no longer a rule and question for the jury. The quantum of care is exactly prescribed as a matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if

he did look, that he did not heed what he saw. *Lamport v. Lake Shore & M. S. R. Co.*, 41 N. E. 586, 587, 142 Ind. 269; *Citizens' St. R. Co. v. Hoffbauer*, 56 N. E. 54, 57, 23 Ind. App. 614; *Smith v. Wabash R. Co.*, 40 N. E. 270, 272, 141 Ind. 92; *Lake Shore & M. S. Ry. Co. v. Boyts*, 45 N. E. 812, 816, 16 Ind. App. 640; *Oleson v. Lake Shore & M. S. R. Co.*, 42 N. E. 736, 738, 143 Ind. 405, 32 L. R. A. 149; *Ohio & M. R. Co. v. Hill*, 18 N. E. 461, 463, 117 Ind. 56, 60; *Durbin v. Oregon Railroad & Navigation Co. (Cal.)* 17 Pac. 5, 7, 11 Am. St. Rep. 778.

The rule that the failure of a person to stop, look, and listen before driving on a railroad track constitutes negligence, as a matter of law, is not inflexible, even in the case of steam railroads, and is only applicable to street railroads on a public street where the attending conditions are such that reasonable care and prudence would require such precautions. *Tacoma Ry. & Power Co. v. Hays (U. S.)* 110 Fed. 496, 499, 49 C. C. A. 115.

At a crossing in a level stretch of country, where an uninterrupted view could be had for a long distance in either direction, it might not be necessary to either stop or listen, in order to exercise ordinary care; but at an exceptionally dangerous crossing a much greater degree of care would be expected, to constitute ordinary care. *Chesapeake & O. R. Co. v. Gunter*, 56 S. W. 527, 528, 108 Ky. 362. In proportion as the danger increases must the vigilance of the person attempting to cross increase. He is rigidly required to do all that care and prudence would suggest to avoid injury; and when, from physical infirmity, darkness, snow, fog, smoke, steam, the inclemency of the weather, and noise of any kind, large buildings, or other obstructions and hindrances, it is more difficult to see or hear, greater precautions must be taken to avoid injury than would otherwise be necessary, and under such circumstances there can be no excuse for a failure to use such reasonable precautions as would probably have prevented the injury. If the traveler by looking could have seen an approaching train, or by listening could have heard it, in time to have avoided injury, it would be presumed, if he is injured by a collision, that he did not look and listen, or, if he did look and listen, that he did not heed what he saw or heard. Such conduct is negligence per se. *Oleson v. Lake Shore & M. S. R. Co.*, 42 N. E. 736, 738, 143 Ind. 405, 32 L. R. A. 149.

More care and vigilance are required at a railway crossing of extremely dangerous character by all parties, trainmen, and travelers on the highway than at a place where there are no obstructions to interfere with the sight and the hearing; the difference be-

tween the parties being that the trainmen are presumed to know all about the peculiarities of the intersection, while the travelers on the highway are not presumed to have the same knowledge. That they are acquainted with the crossing may be shown. *Hendrickson v. Great Northern Ry. Co.*, 49 Minn. 245, 51 N. W. 1044, 16 L. R. A. 261. 32 Am. St. Rep. 540.

Ordinary care is such care as reasonably prudent and cautious persons exercise under like circumstances. Reasonably prudent people do frequently and habitually cross railroad tracks to go to a passenger train waiting at a station to receive passengers. The ordinarily prudent person does, perhaps, look ere he crosses any railroad track to see that no train is approaching upon it. *Chicago, St. P. & K. C. Ry. Co. v. Ryan*, 46 N. E. 208, 210, 165 Ill. 88.

#### Same—Danger as affecting.

The degree of care is always in proportion to the danger to be apprehended—as, for instance, greater care should be exercised in the management of a steam engine than the use of a plow. *Meredith v. Reed*, 26 Ind. 334, 336. See, also, *Martin v. Texas & P. Ry. Co.*, 26 S. W. 1052, 1053, 87 Tex. 117; *Diamond v. Northern Pac. Ry. Co.*, 13 Pac. 367, 372, 6 Mont. 580; *Kelley v. Cable Co.*, 14 Pac. 633, 635, 7 Mont. 70; *City of Terre Haute v. Mack*, 38 N. E. 476, 479, 139 Ind. 99; *Moore v. Central R. Co.*, 24 N. J. Law (4 Zab.) 268, 286; *Kelsey v. Barney*, 12 N. Y. (2 Kern.) 425.

Ordinary care is that degree of care which a person of ordinary prudence is presumed to use under particular circumstances to avoid injury to others, and is in proportion to the danger to be avoided. *Lamline v. Houston, West St. & P. Ferry Co. (N. Y.)* 14 Daly, 144; *Toledo & W. Ry. Co. v. Goddard*, 25 Ind. 185, 197.

In determining the question of ordinary care, the degree of care does not vary with the increase or diminution of the danger. It continues to be ordinary in degree, but the quantum of diligence to be used differs under different conditions. *Galveston, H. & S. A. Ry. Co. v. Gormley*, 91 Tex. 393, 399, 43 S. W. 877, 879, 66 Am. St. Rep. 894.

Ordinary care is that degree of care which a person of ordinary prudence is presumed to use, under the particular circumstances, to avoid injury. It must be in proportion to the danger to be avoided, and the fatal consequences involved in its neglect. *Hurley v. Jeffersonville, M. & I. R. Co. (Ind.)* Wils. 295, 299 (citing *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185, 186).

Ordinary care is such care as a person of ordinary prudence exercises under the circumstances, and the dangers to be appre-

hended. The greater the danger, the higher the degree of care required to constitute ordinary care, the absence of which is negligence, and which is a question of degree only. The kind of care is precisely the same. *Young v. Citizens' St. R. Co.*, 44 N. E. 927, 929, 148 Ind. 54; *Citizens' Ry. Co. v. Gifford*, 47 S. W. 1041, 19 Tex. Civ. App. 631.

If the danger be great and threatening, then a high degree of skill is requisite in order to avoid or prevent it; and, in case of great danger, great care and caution will be but ordinary care. But if the circumstances are such that but little risk or danger may be reasonably apprehended, then a much less degree of care will be ordinary care. *Brown v. Lynn*, 81 Pa. 510, 512, 72 Am. Dec. 768.

"Ordinary care" is a relative term. What is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger, and what would be ordinary care in a case of little danger would be much below this in a case of great danger. *Kelley v. Cable Co.*, 14 Pac. 633, 635, 7 Mont. 70.

The expression "ordinary care," without qualification, suggests merely the care that should be bestowed in cases of ordinary danger. It is an inappropriate expression where the danger is extraordinary, unless explained and applied to the subject. The ordinary care of an engineer on a railroad locomotive is a very high degree of care, and the skill required is a very high degree of skill. *Diamond v. Northern Pac. Ry. Co.*, 13 Pac. 367, 371, 6 Mont. 580.

The amount of diligence to be exercised must be proportioned to the necessities and exigencies of the occasion, but the standard or degree of care required of the master towards the servant is the same, however great the peril to which the servant is exposed. *Texas Midland R. R. v. Taylor (Tex.)* 44 S. W. 892.

In dangerous situations "ordinary care" means great care. The greater the danger, the greater care required, and the want of the degree of care required may amount to culpable negligence. *Farrell v. Waterbury H. R. Co.*, 21 Atl. 675, 677, 60 Conn. 239.

#### Same—Knowledge as affecting.

"Ordinary care and due diligence" is a relative term, and the question must be determined with reference to the peculiar conditions existing in all cases, and the degree of knowledge had by the party charged with such care and diligence. *Palmer v. Penobscot Lumbering Ass'n*, 88 Atl. 108, 109, 90 Me. 193.

"Ordinary care and skill" is a relative term, exacting a degree of vigilance and technical knowledge in proportion to the dan-

gerous character of the substance dealt with, and requiring that a person shall take for the safety of others whatever precautions the nature of his employment suggests. *Kinney v. Koopman*, 22 South. 593, 594, 116 Ala. 310, 37 L. R. A. 497, 67 Am. St. Rep. 119.

"Ordinary care" is a relative term. What would be ordinary care under one set of circumstances might be gross negligence under another set of circumstances. Therefore what will constitute ordinary care to avoid injury in passing from a defective and unsafe sidewalk by one ignorant of its defective and unsafe condition would not constitute ordinary care in one thus passing who had knowledge of its condition. *Town of Boswell v. Wakley*, 48 N. E. 637, 640, 149 Ind. 64. See, also, *Junction City v. Blades*, 41 Pac. 677, 680, 1 Kan. App. 85.

Ordinary care requires that a person should act not only in view of the facts of which he has actual knowledge, but in view of facts which he may learn in the exercise of ordinary diligence; ordinary care being that degree of care required by the dangers reasonably to be expected. *Davis v. Concord & M. R. R.*, 44 Atl. 388, 391, 68 N. H. 247. See, also, *Cameron v. Kenyon-Connell Commercial Co.*, 56 Pac. 358, 360, 22 Mont. 312, 44 L. R. A. 508, 74 Am. St. Rep. 602.

The term "ordinary care and prudence" expresses the degree of care and prudence which a person is bound to exercise in a given case. Therefore, to entitle one to recover for injuries sustained by reason of a defective bridge, his conduct must have been that of a prudent and careful man; and, if he had reasonable ground to apprehend that the bridge was unsafe, the driving on the bridge under such circumstances was such an act of imprudence and want of care as would preclude his recovering damages. *Folsom v. Town of Underhill*, 86 Vt. 580, 592.

#### Same—Means of prevention as affecting.

The degree of vigilance which the law exacts by the requirement of ordinary care varies with the command of means to avoid injuring others possessed by the person on whom the obligation is imposed. Under some circumstances a very high degree of vigilance is required by the requirement of ordinary care. Where the consequence of negligence will probably be a serious injury to others, and where the means of avoiding the infliction of injuries upon others are completely out of the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight. *Kelsey v. Barney*, 12 N. Y. (2 Kern.) 425.

What may be considered ordinary care in one case may under the circumstances of another amount to culpable negligence. So an act which would have been viewed with

indifference when the street cars were drawn by horses at such a low rate of speed as to be easily controlled might be gross negligence when the car is propelled by electric power at a much higher rate of speed. *Hall v. Ogden City St. Ry. Co.*, 44 Pac. 1046, 1047, 13 Utah, 243, 57 Am. St. Rep. 728.

**Same—Nature and magnitude of injury as affecting.**

The degree of care and foresight which it is necessary to use in order to constitute ordinary care must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is anticipated and to be guarded against. *St. Louis, I. M. & S. Ry. Co. v. Rice*, 11 S. W. 699, 700, 51 Ark. 467, 4 L. R. A. 173; *Central Railroad & Banking Co. v. Rylas*, 11 S. E. 499, 84 Ga. 420; *St. Louis, I. M. & S. Ry. Co. v. Barnett*, 45 S. W. 550, 551, 65 Ark. 255. See, also, *Kelsey v. Barney*, 12 N. Y. (2 Kern.) 425, 429. It will thus be seen that even the ordinary care which requires a degree of prudence and vigilance commensurate with the perils to be apprehended and the injuries to be avoided may require a high degree of care. *St. Louis, I. M. & S. Ry. Co. v. Barnett*, 45 S. W. 550, 551, 65 Ark. 255 (quoting *Central Railroad & Banking Co. v. Rylas*, 11 S. E. 499, 84 Ga. 420).

**Slight negligence distinguished.**

"Slight negligence" and "slight want of ordinary care" are not convertible terms. A man may be slightly negligent in a given case, and still be in the exercise of that ordinary care which most men would exercise under the circumstances; and, if he is guilty of slight want of ordinary care, then he did not act as most men of ordinary care would act under the same circumstances. It is only the extremely cautious man who does not commit slightly negligent acts, but the law does not defeat the damages caused by the negligence of another unless the complaining party has himself been guilty of some neglect or want of care which contributed to the injury, which men of ordinary caution would not have committed under like circumstances. *Jung v. City of Stevens Point*, 43 N. W. 513, 515, 74 Wis. 547.

**ORDINARY CATTLE.**

See "Ordinary Stock."

**ORDINARY CAUTION.**

"Ordinary caution," means such ordinary caution as may naturally and reasonably be expected to exist under the circumstances of the particular case. *Bowen v. State*, 68 Tenn. (9 Baxt.) 46, 50, 40 Am. Rep. 71.

Ordinary caution within the meaning of the rule that a coin is counterfeit if its resemblance to a genuine one is sufficient to deceive a person of ordinary caution is such caution as is usually exercised by prudent men in the particular transaction in which they are engaged. More careful observation is expected of an expert banker, who in regular hours daily receives money at his counter, than of a railroad agent, who in the hurry of business in the day and night sells tickets at his window to eager and impatient travelers. *United States v. Hopkins* (U. S.) 26 Fed. 443, 444.

The expression "ordinary prudence and caution" is but a synonym for "ordinary care." *Blythe v. Birmingham Waterworks Co.*, 11 Exch. 781.

**ORDINARY CIRCUMSTANCES.**

Where a court instructed that ordinary care is the care which reasonable men exercise under ordinary circumstances, the term "ordinary circumstances" would not convey to the minds of the jurors the necessity of comparing the conduct of the deceased under the circumstances shown by the evidence with what would be the conduct of prudent men under the same or similar circumstances, and its use was therefore erroneous. *Overman Wheel Co. v. Griffin* (U. S.) 67 Fed. 659, 662, 14 C. C. A. 609.

**ORDINARY COURSE OF BUSINESS.**

"In determining whether a given transaction is made in the ordinary and usual course of business of a party, the question is not whether such transactions are usual in the general conduct of business throughout the community, but whether they are according to the usual course of business of the particular person whose conveyance is subject to investigation." *Rison v. Knapp* (U. S.) 20 Fed. Cas. 835, 837.

The question whether a note or bill of exchange was received by the holder in the ordinary course of business is a question of fact, and is to be determined as such. It means that the security was transferred before maturity, and for value, without the transferee's knowledge of any defect in his title thereto. *National Bank of Chelsea v. Isham*, 48 Vt. 590, 592.

The phrase "ordinary course of business," as employed in Rev. Code, § 4884, declaring that an indorsee in due course is one who in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of dishonor, acquires a negotiable instrument duly indorsed to him, means according to the usages and customs of commercial transactions, and

includes a case where a note is purchased for value before maturity. *Christianson v. Farmers' Warehouse Ass'n*, 67 N. W. 300, 303, 5 N. D. 438, 32 L. R. A. 730; *First Nat. Bank v. Flath*, 86 N. W. 867, 869, 10 N. D. 281. The surrender of an antecedent debt as consideration for the purchase of a negotiable note is sufficient to constitute it in ordinary course of business. *First Nat. Bank v. Flath*, 86 N. W. 867, 869, 10 N. D. 281.

"The ordinary course of business," as the term is used in the statement that an inability to pay debts in the ordinary course of business constitutes insolvency, does not mean an ability to turn out goods or other property to pay one debt, without leaving in the debtor's hands assets to provide for other debts as they become due.—In *re Dibblee* (U. S.) 7 Fed. Cas. 651, 654.

### ORDINARY COURSE OF LAW.

A remedy by injunction is included in the expression the "ordinary course of law," in a statute which provides that mandamus will not lie where there is a plain, speedy, and adequate remedy in the ordinary course of law. *Harrington v. St. Paul & S. C. R.*, 17 Minn. 215, 226 (Gil. 188, 202).

The courts, in attempting to define the due diligence which must be exercised by the creditor against the principal debtor before he can hold the guarantor, have said that it constituted a resort to the ordinary course of the law, which, in turn, they have defined as obtaining judgment, issuing an execution, and its return unsatisfied. *Stone v. Rockefeller*, 29 Ohio St. 625; *Dewey v. W. B. Clark Invest. Co.*, 50 N. W. 1032, 48 Minn. 130, 31 Am. St. Rep. 623.

### ORDINARY COURSE OF PRACTICE.

The words "ordinary course of practice," when used in speaking of the practice of the courts, means the course which is positively commanded by the law to be pursued. *Hart v. Nixon*, 25 La. Ann. 136, 137.

### ORDINARY COURTS OF LAW.

A statute providing for the recovery of the value of lands taken for railroad purposes in "ordinary courts of law" does not mean courts only where legal, as distinguished from equitable, remedies are administered, but includes courts of equity, which, in a general sense, are courts of law. *Austin v. Rutland R. Co.* (U. S.) 17 Fed. 466, 469.

### ORDINARY CURRENT EXPENSES.

Act 1874, passed for the regulation and assessment of municipal taxes, provides (section 1) that "it shall not be lawful for the authorities of any municipal corporation in

the state to levy or collect for ordinary current expenses of such corporation, except as hereinafter provided, an ad valorem tax on the property within said corporation exceeding one-half of one per cent.," etc. Held, that while the term "ordinary current expenses" had generally been accepted to mean those annual expenses attending the administration of the city government, expended in payment of salaries, and those temporary expenditures in the way of repairs, etc., that appertain to the city, its streets, bridges, culverts, etc., such could not be held to be its meaning in the act of 1874, but all the expenses and disbursements of the city, of every kind, except for paving the streets and education, were ordinary current expenses, and were to be paid from the taxes levied for that purpose. *City of Rome v. McWilliams*, 67 Ga. 106, 114.

The term "ordinary current expenses" shall be construed to include all current expenses, excepting only expenditures for education, for paving and macadamizing streets, and for payment of principal and interest of public debt, which shall be known as "extraordinary expenses." Code Ga. 1895, § 720.

### ORDINARY DILIGENCE.

"Ordinary diligence is such diligence as men of common prudence usually exercise about their own affairs." *Chicago & A. R. Co. v. Scott*, 42 Ill. 132, 143; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 297; *Mechanics' Bank at Baltimore v. Merchants' Bank at Boston*, 47 Mass. (6 Metc.) 13, 26; *Wallace v. Lincoln Sav. Bank*, 15 S. W. 448, 454, 89 Tenn. (5 Pickle) 630, 24 Am. St. Rep. 625; *Ennis v. Eden Mills Paper Co.*, 48 Atl. 610, 613, 65 N. J. Law, 577.

"Ordinary diligence" means such diligence as men in general exert in respect to their own affairs, *Briggs v. Taylor*, 28 Vt. 180, 184; *City of Rockford v. Hildebrand*, 61 Ill. 155; and not any one man in particular, *City of Rockford v. Hildebrand*, 61 Ill. 155; *Hale v. Rawallie*, 8 Kan. 136, 139 (citing *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180, 188).

Ordinary diligence is such diligence as men of ordinary prudence exercise with reference to their own property. *Cooper v. Lee*, 21 S. W. 998, 1002, 1 Tex. Civ. App. 9.

Ordinary diligence is "that degree of diligence which an ordinarily prudent person would exercise under like circumstances." *Chicago, K. & W. R. Co. v. Fisher*, 30 Pac. 462, 467, 49 Kan. 460; *Brady v. Jefferson* (Del.) 5 Houst. 60, 79.

Ordinary diligence is that care which every prudent man exercises under the same or similar circumstances. *Richmond & D. R. Co. v. Mitchell*, 18 S. E. 290, 291, 92 Ga. 77.



It is very plain that ordinary diligence or care is that measure of care and diligence ordinarily employed in a given business. *Zell v. Dunkle*, 27 Atl. 38, 39, 156 Pa. 353.

"Ordinary diligence" means that degree of care or attention or exertion which under the actual circumstances a man of ordinary prudence and discretion would use in reference to the particular thing, were it his own property, or in doing a particular thing, were it his own concern. And where skill is required for the undertaking, "ordinary diligence" implies the possession and use of competent skill. *Swigert v. Graham*, 46 Ky. (7 B. Mon.) 661, 663.

Ordinary diligence is that degree of care which men of common prudence generally exercise in their affairs in the country and the age in which they live. *Erie Bank v. Smith* (Pa.) 3 Brewst. 9, 14, 17. These last words are quite material, quite important, in this case. Thus, what might be ordinary diligence in one country and one age may at another age and in another country be negligence—even gross negligence—as, for instance,—to give a homely illustration,—in many parts of the interior of the country, where thefts are rare, it is quite usual for people to leave their barns and even their dwelling houses unlocked at night. In cities it would be deemed a great want of ordinary care to do that. So, where bonds placed in a bank in New York City as collateral security to a loan were stolen at some time between Saturday and Monday, and there was no watchman kept in the bank at that time, and there was evidence that many banks in that city did not have a watchman over Sunday, the question whether the failure of this bank to have a watchman was a want of ordinary diligence was for the jury. *Erie Bank v. Smith* (Pa.) 3 Brewst. 9, 14, 17.

Ordinary diligence is that degree of care and prudence which a discreet and cautious person would use in his own affairs, where the whole loss or risk would be his own. *Howard County Com'rs v. Legg*, 93 Ind. 523, 47 Am. Rep. 390; *Porter County Com'rs v. Dombke*, 94 Ind. 72, 75.

Ordinary diligence is that care which every prudent man takes of his own property of a similar nature. *Civ. Code Ga.* 1895, § 2898.

Ordinary diligence is that degree of care in the preservation of a thing which a prudent father of a family would use for the safe-keeping of it if it was his own. *Halvard v. Dechelman*, 29 Mo. 459, 460, 77 Am. Dec. 585.

"Ordinary diligence" means such diligence as the mass of mankind or as men in general use in managing their own affairs. Under the statute requiring railroad companies to fence their tracks, and which makes them absolutely liable for injuries to domes-

tic animals straying thereon in case of their neglect so to do, a railroad company does not perform its duty under the statute by merely exercising ordinary diligence in keeping its fences in a safe condition, but the company is bound to exercise a high degree of diligence. *Antisdel v. Chicago & N. W. Ry. Co.*, 26 Wis. 145, 150, 7 Am. Rep. 44.

Common or ordinary diligence is that which men in general exert with respect to their own concerns. It is distinguished from high or great diligence, which is that with which prudent persons take care of their concerns, and very slight diligence, which is that with which persons of less than common prudence, or indeed of any prudence at all, take care of their own concerns. *Litchfield v. White*, 7 N. Y. (3 Seld.) 438, 442, 57 Am. Dec. 534.

In matters of administration, where the duty of performing certain functions devolves upon directors of a bank, they are justly held liable either for their nonperformance, nonfeasance, or for their lack of ordinary diligence in their attempted performance, whereby loss is incurred. By "ordinary diligence" is meant such as is exercised by other prudent and diligent officers under like circumstances. *Campbell v. Watson*, 50 Atl. 120, 126, 62 N. J. Eq. 396.

Chief Justice Gilpin, in delivering the opinion of the court in the case of *Patterson v. Philadelphia, W. & B. R. Co.* (Del.) 4 Houst. 103, said: "The term 'ordinary care and diligence,' when applied to the management of railroad engines and cars in motion, must be understood, however, to import all the care, circumspection, prudence, and discretion which the peculiar circumstances of the place or occasion require of the servants of the defendant company, and this will be increased or diminished according as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and operation of them." *Tully v. Philadelphia, W. & B. R. Co.* (Del.) 50 Atl. 95, 97, 3 Pennewill, 455.

#### ORDINARY DOMESTIC BUSINESS.

The act incorporating a turnpike company exempted from toll all persons traveling on the ordinary domestic business of family concerns. Held, that the phrase "ordinary domestic business of family concerns" meant the common and ordinary business pertaining primarily and directly to the maintenance and support of the family of the person claiming the exemption, and hence it did not extend to a case of a physician on his way to visit his patients. *Centre Turnpike Co. v. Smith*, 12 Vt. 212, 216.

#### ORDINARY EXPENDITURE.

In construing an act for the incorporation of villages passed April 20, 1870, which

provided that the expenditures of the village should be denominated "ordinary expenditures" and "extraordinary expenditures," and that ordinary expenditures should be those necessarily incurred to carry out and enforce the rules, by-laws, and ordinances which the trustees are authorized to adopt, and to give force to the powers therein conferred, except as such expenditures may be specifically enlarged or diminished or controlled by other provisions of the act, and providing that no ordinary expenditure for any specific act, object, purpose, or thing, except the lighting of streets, should exceed the sum of \$500, and providing also that the trustees should have power to raise money for an extraordinary expenditure for any village purposes by assessment and tax, by submitting a resolution stating the amount to be raised, etc., to the annual election or to a special election, it was held that the difference between the ordinary and extraordinary expenditures was not in their nature, but in their amount, and that upon a vote of the electors of a village, duly taken, bonds might be issued under such act for any expenditure for village purposes exceeding \$500 in amount. *Village of Arverne-by-the-Sea v. Shepard*, 46 N. Y. Supp. 653, 654, 20 App. Div. 12.

## ORDINARY EXPENSES.

### Of municipality.

Where the charter of a corporation authorizes the levy of a tax sufficient to defray the ordinary expenses of the corporation, such phrase meant expenditures necessary to carry into effect the ordinary powers of the corporation, and the term was used in contradistinction to "extraordinary expenses." *Intendant and Town Council of City of Livingston v. Pippin*, 81 Ala. 542, 550.

Any expense that recurs with regularity and certainty, and is necessary for the existence of the municipality, or for the health, comfort, and perhaps convenience of the inhabitants, may well be called an ordinary expense of the municipality. *Brown v. City of Corry*, 34 Atl. 854, 855, 175 Pa. 523.

The "ordinary expenses of a township," within the meaning of How. St. §§ 671, 750, authorizing the township board to vote taxes for the necessary sums to defray the ordinary township expenses, has never been very satisfactorily defined; but it may well be said that such expenses cannot include less than the necessary expenses incurred in administering the government of the township under the statutes creating it and relating thereto, in such manner as will best promote the convenience, peace, health, prosperity, and happiness of the people residing therein. The term does not include the expense of establishing lost section corners, nor the

expense of building a town hall. *Mills v. Richland Tp.*, 40 N. W. 183, 186, 72 Mich. 100.

### Of state.

The ordinary expenses of a state include the current expenses of the government, and debts to mature during the current fiscal year. *State v. Leaphart*, 11 S. C. 458, 469.

Const. art. 11, § 1, provides that the Legislature shall provide for an annual tax sufficient to defray the ordinary expenses of the state. Held, that the term "ordinary expenses" was practically defined in article 12, § 2, to be the ordinary current expenses of the executive, legislative, and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for the common schools, such section providing that the general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative, and judicial departments of the state, the current expenses of state institutions, interest on the public debt and for common schools; and that all other appropriations shall be made by separate bills, each embracing one object, etc. In *re Limitation of Taxation*, 54 N. W. 417, 419, 8 S. D. 456.

An item for the salary of a clerk in the offices of the Supreme Court prothonotary is intended to pay for part of the regular and ordinary work of such offices, and therefore is for their ordinary expenses, within the meaning of the Constitution, limiting general appropriation bills to the ordinary expenses of the executive, legislative, and judicial departments. *Commonwealth v. Gregg*, 29 Atl. 297, 298, 161 Pa. 582.

## ORDINARY FENCES.

In a statute relating to unruly cattle, that will not be restrained by ordinary fences, the term "ordinary fences" does not mean lawful fences. "Ordinary," in such a connection, means common, and the meaning of the word as there used is different from that of the word lawful as used in the statute providing for lawful fences, inasmuch as fences which are lawful when made are constantly, by settling and otherwise, becoming unlawful. There is therefore a class of common fences to which the term "ordinary," in contradistinction to "lawful," can properly apply. *Hine v. Wooding*, 37 Conn. 123, 126.

## ORDINARY FLOODS.

Ordinary floods, within the rule that a railroad company constructing an embankment is liable for failing to provide means to prevent damages by the collection of waters caused by ordinary floods, means floods, the

occurrence of which may be reasonably anticipated from the general experience of men residing in the regions where such floods happen. They are distinguished from extraordinary floods, which are floods of such unusual occurrence that they cannot be foreseen by men of ordinary experience and ordinary prudence. *Gulf, C. & S. F. R. Co. v. Pool*, 8 S. W. 535, 537, 70 Tex. 712.

### ORDINARY FORM.

An allegation in the petition in an action on notes that they were "drawn in the ordinary form" is to be understood as meaning that they were payable in dollars. *Sessions v. Peay*, 21 Ark. 100, 105.

### ORDINARY GRANT.

By an ordinary grant there is a transfer of title or estate or ownership from one to another, and the grantor, having parted with what he had, can give nothing by a second deed. *Western Electric Co. v. Sperry Electric Co.* (U. S.) 59 Fed. 295, 296, 8 C. C. A. 129.

### ORDINARY INSPECTION.

The rule that a railroad company is bound to make a "reasonable and ordinary inspection" of foreign cars received for transportation means such an inspection as the time, place, means, and opportunity, and the requirements and exigencies of commerce, will permit. *Louisville, N. A. & C. Ry. Co. v. Bates*, 45 N. E. 108, 111, 146 Ind. 564.

### ORDINARY JURISDICTION.

The jurisdiction of a court of equity is termed ordinary where a person holding the legal title of property for the use of another refuses to discharge the obligation, or forfeits his right to do so, and the court appoints another trustee. This jurisdiction is confined to the selection of the instrument to apply the property to the object. The ordinary jurisdiction is here limited to the mode. *United States v. Late Corporation Church Jesus Christ*, 31 Pac. 436, 441, 8 Utah, 310.

### ORDINARY LANGUAGE.

Code, § 149, requiring that answers that set up no denial must contain a statement of new matter constituting a defense or counterclaim. In "ordinary and concise language," without repetition, means the established and customary form when the Code was enacted. "Ordinary" means that which has been established and is customary. *Bell v. Yates* (N. Y.) 33 Barb. 627, 629.

### ORDINARY LOW WATER.

In construing an instruction that "the boundary line described in the treaty of cession from Georgia to the United States as running up the said river and along the banks thereof, was a line impressed upon the land by ordinary low water," the court said: "'Ordinary low water,' like 'low water,' is a relative term, and in the abstract, and without practical application, has no definite meaning, and furnishes no satisfactory guide by which to ascertain or determine the line in question." *Howard v. Ingersoll*, 54 U. S. (13 How.) 381, 425, 14 L. Ed. 189.

Ordinary low water of a river is not the water line in an extremely dry time. *Hamilton v. Pittock*, 27 Atl. 1079, 1080, 158 Pa. 457.

### ORDINARY MAN OR PERSON.

The use of the expression "such care as an ordinary man," or "an ordinary business man," would use, in an instruction defining the degree of diligence and care required of a railroad company to avoid liability on a charge of negligence, and in determining the question of contributory negligence, is improper. *Houston & T. C. Ry. Co. v. Smith*, 13 S. W. 972, 973, 77 Tex. 179.

The expression "ordinary persons," in common parlance, means men of ordinary care and diligence in relation to any particular thing. *City of Kinsley v. Morse*, 20 Pac. 217, 220, 40 Kan. 577.

### ORDINARY METHOD.

The fact that the usual, customary, and ordinary method of handling a locomotive was being pursued at the time a fire was set by it does not necessarily show that the prudent and careful way was being pursued, especially if the wind was blowing hard at the time, and the land adjacent to the roadway was covered with very combustible material. It might well be contended that more than ordinary care and caution was required. *Solum v. Great Northern Ry. Co.*, 65 N. W. 443, 444, 63 Minn. 233.

### ORDINARY NAVIGATION.

See "Ordinary Navigation."

Ordinary navigation is established or regular navigation. Johnson assigns to the word "ordinary" the meaning of "established, regular, common, usual." *Crenshaw v. Slate River Co.* (Va.) 6 Rand. 245, 263.

### ORDINARY NEGLECT.

By "ordinary neglect" is meant the want of that care and diligence which prudent

men usually bestow on their own concerns. *Baltimore & O. R. R. v. Rathbone*, 1 W. Va. 87, 107, 88 Am. Dec. 664.

"Ordinary neglect" is said to be such neglect as would not be suffered by men of common prudence and discretion. Where a bank receives from a customer bonds and other securities as collateral security for loans and discounts, the bank is not a gratuitous bailee, but is liable for the want of ordinary and reasonable care in the custody of such securities. *Ouderkick v. Central Nat. Bank*, 119 N. Y. 263, 271, 23 N. E. 875.

"Ordinary neglect" is understood to be the omission of care which every man of good prudence takes for his own concerns. The directors of a corporation are bound to exercise such care in regard to the corporation property. *Scott v. Depeyster* (N. Y.) 1 Edw. Ch. 513, 543.

### ORDINARY NEGLIGENCE.

Ordinary negligence is the want of such care and diligence as reasonably prudent men generally exercise. *Fordyce v. Culver*, 22 S. W. 237, 239, 2 Tex. Civ. App. 569.

Ordinary negligence is that absence or want of that degree of care which men of common prudence generally exercise in their own affairs. *Sweeney v. Merrill*, 16 Pac. 454, 38 Kan. 216, 5 Am. St. Rep. 734; *Dreher v. Town of Fitchburg*, 22 Wis. 675, 677, 99 Am. Dec. 91. It is the want of such care as the great mass or the majority of mankind observe in the transactions of human life. *Dreher v. Town of Fitchburg*, 22 Wis. 675, 677, 99 Am. Dec. 91.

Ordinary negligence is the want of that diligence which the generality of mankind use in their own concerns. *McGrath v. Hudson River R. Co.*, 19 How. Prac. 211, 220 (quoting *Jones*, Bailm. 22); *Moore v. Cass*, 10 Kan. 288, 291.

Ordinary or common negligence is the want of that degree of care which ordinarily prudent men would ordinarily exercise under like circumstances. *Union Pac. Ry. Co. v. Henry*, 14 Pac. 1, 3, 36 Kan. 565; *Chicago, K. & W. R. Co. v. Fisher*, 30 Pac. 462, 467, 49 Kan. 460.

Ordinary negligence is a disregard of those rules of conduct that a man of ordinary prudence would have followed. *Tyler v. Nelson*, 109 Mich. 37, 43, 66 N. W. 671, 673.

Ordinary negligence is the failure to exercise ordinary care, or, in other words, that degree of care which an ordinarily prudent person would exercise under like circumstances, although the party has exercised some care, and it may be only slightly less than ordinary care. *Chicago, K. & N. Ry. Co. v. Brown*, 24 Pac. 497, 499, 44 Kan. 384.

Ordinary negligence is the want of such care and diligence as reasonably prudent men generally, in regard to the subject-matter of inquiry, under similar circumstances, would use to prevent or avoid the injury complained of. *Toncray v. Dodge County*, 51 N. W. 235, 237, 33 Neb. 802.

Ordinary negligence, as used in an action for a negligent destruction of the property of another, is want of such care and diligence as reasonably prudent men generally, in regard to the subject-matter of inquiry, under such circumstances as those under consideration, would have used to prevent or avoid the injury complained of. *Toncray v. Dodge County*, 51 N. W. 235, 237, 33 Neb. 802.

Where there is a want of such care as persons of ordinary prudence observe in the performance of duty, the same has been designated by this court as "ordinary negligence"; and that includes not only mere inadvertence or inattention to duty, resulting in an injury to another, but also a want of the means or capacity to prevent such injury when the same is known to be imminent. *Lockwood v. Belle City St. Ry. Co.*, 65 N. W. 866, 871, 92 Wis. 97.

"Ordinary negligence" is the want of ordinary care or of the degree of diligence which men in general exert in respect to their own concerns. What constitutes ordinary care in respect to property depends upon the value, character, and situation of the property in question; the question in each case being what care would usually be exercised by men of ordinary prudence in respect to property of the same kind, and similarly situated. *Ward v. Milwaukee & St. P. Ry. Co.*, 29 Wis. 144, 148.

Ordinary care is the opposite of ordinary negligence. There can be negligence less than ordinary negligence. *East Tennessee, V. & G. Ry. Co. v. Bridges*, 17 S. E. 645, 647, 92 Ga. 399.

It was not improper to use the term "ordinary negligence" in an instruction that plaintiff, suing for personal injuries, must establish negligence on the part of the defendant, and that he did not contribute to the negligence by his own ordinary negligence. In 1 *Shear. & R. Neg.* § 86, the term "ordinary negligence" is treated as equivalent of "want of ordinary care," and, when used in that sense, it is not improper, although perhaps not the best means of expressing the thought intended to be conveyed. *Kerns v. Chicago, M. & St. P. Ry. Co.*, 62 N. W. 692, 693, 94 Iowa, 121.

Ordinary negligence is the absence of ordinary care. The attempt to distinguish different degrees of negligence has been much criticised, but it is said that the expression "ordinary negligence" in a charge is not mis-

leading. *Lake Shore & M. S. Ry. Co. v. Murphy*, 33 N. E. 403, 405, 50 Ohio St. 135.

Ordinary negligence consists in the want of ordinary care and diligence. *Rev. St. Okl.* 1903, § 2784; *Rev. Codes N. D.* 1899, § 5111; *Chicago, K. & W. R. Co. v. Fisher*, 30 Pac. 462, 467, 49 Kan. 460; *Union Pac. Ry. Co. v. Rollins*, 5 Kan. 167, 180; *Whiting v. Chicago, M. & St. P. Ry. Co.*, 37 N. W. 222, 224, 5 Dak. 90; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512; *Thackston v. Port Royal & W. C. Ry. Co.*, 18 S. E. 177, 178, 40 S. C. 80. Ordinary negligence is a want of ordinary care. *Chicago, K. & N. Ry. Co. v. Brown*, 24 Pac. 497, 499, 44 Kan. 384.

#### Gross and slight negligence distinguished.

"Sir Wm. Jones distinguishes between ordinary negligence, gross negligence, and slight negligence thus: 'Ordinary neglect is the omission of that care which every man of common prudence and capable of governing a family takes of his own concerns. Gross neglect is the want of that care which every man of common sense, how inattentive soever, takes of his own property. And slight neglect is the omission of that diligence which all circumspect and thoughtful persons use in securing their own goods and chattels.' And Mr. Justice Story gives, in substance, the same definition of these terms: 'Ordinary negligence may be defined to be the want of ordinary diligence; gross negligence, to be the want of slight diligence; and slight negligence, to be the want of great diligence.' *Story, Merchants*, § 17." *French v. Buffalo, N. Y. & E. R. Co.*, \*43 N. Y. (4 Keyes) 108, 113. See, also, *Litchfield v. White*, 7 N. Y. (3 Seld.) 438, 442, 57 Am. Dec. 534.

Strictly speaking, the expressions "gross negligence" and "ordinary negligence" are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to perform that little, it is called "gross negligence." If very great care is required, and he fails to come up to the mark, it is called "slight negligence." And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called "ordinary negligence." In each case the negligence, whatever epithet we give it, is failure to give and bestow the care which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply "negligence," and this seems to be the tendency of modern authority. *Briggs v. Spaulding*, 11 Sup. Ct. 924, 931, 141 U. S. 132, 35 L. Ed. 662.

In speaking of an alleged legal distinction between gross and ordinary negligence, the court observes that, strictly speaking,

these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, and stupidity which he exhibits, and therefore, by whatever name it may be called, it is under such name a failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps, to call it simply negligence. *Atchison N. R. Co. v. Washburn*, 5 Neb. 117, 120.

#### ORDINARY OBSERVATION.

"Ordinary observation," as used in the statement that the statute prohibiting the carrying of concealed weapons is violated by the carrying of such a weapon where it cannot be seen by ordinary observation, is hardly capable of an exact definition, meaning all the varying conditions under which a pistol may be carried, but it may be said that the meaning generally is that the weapon must be open to the ordinary observation of those who come in contact with the person carrying it. In the usual and ordinary associations of life, if a person with a pistol on his person approach another, or pass him on the street or public highway, or is otherwise thrown with the other in social contact, and has the pistol on his person, so that it may be seen without inspection or examination of his person for that purpose, and from ordinary observation, as persons usually observe each other, then the pistol is not concealed; but if, on the other hand, the pistol is carried on the person under such conditions that it is hidden from view and from the observation of persons coming in contact with the person carrying it, casually observing his person, there is concealment. *Driggers v. State*, 26 South. 512, 513, 123 Ala. 46.

#### ORDINARY PLACE.

The words "ordinary place," in a statute prohibiting gambling in an ordinary race field or any other public place, described a tavern. *Wortham v. Commonwealth (Va.)* 5 Rand. 669-675.

#### ORDINARY PRECAUTIONS.

The term "ordinary precautions," in the meaning of a covenant in a coal lease by which the lessor agrees to protect the lessee from damages resulting from mining, providing the lessee takes all ordinary precautions usually taken in mining and removing coal, includes the requirement that the lessee give proper support to the overlying surface. *Youghiogeny River Coal Co. v. Hopkins*, 48 Atl. 19, 20, 198 Pa. 343.

#### ORDINARY PROCEEDING.

An attachment is not an ordinary proceeding in the action, but an extraordinary

and collateral proceeding, within the meaning of a statute requiring notice of all ordinary proceedings in the action. *Schundt v. Calm*, 3 Alb. Law J. 389.

### ORDINARY PROCESS OF LAW.

The phrase "ordinary process of law," found in the statute providing that the cost of street work shall be assessed, and the bill be delivered to the contractor, who shall proceed to collect the same by ordinary process of law, does not mean ordinary personal judgment and execution, but such process as is adapted to enforce a lien or specific charge on the property specially assessed. *Neenan v. Smith*, 50 Mo. 525, 529.

### ORDINARY PRUDENCE.

"Ordinary prudence" means such care and prudence as the average prudent man would exercise under like surroundings and in the like situation. *Fassett v. Town of Roxburg*, 55 Vt. 552, 556.

The expression "ordinary prudence and caution," as used in an instruction that the degree of care required under certain circumstances is such care as men of ordinary prudence and caution would have exercised under similar circumstances, is but a synonym for "ordinary care." *Blyth v. Proprietors of Birmingham Waterworks Co.*, 11 Exch. 781.

In marine insurance it is held that a ship is a total loss when she has sustained such extensive damage that it would not be reasonably practicable to repair her. The ordinary measure of prudence which the courts have adopted is this: If the ship, when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss. The above doctrine applied to a case of fire insurance on a building, in order to determine whether or not there was a total loss thereof. *Corbett v. Spring Garden Ins. Co.*, 50 N. E. 282, 283, 155 N. Y. 389, 41 L. R. A. 318.

### ORDINARY PURCHASER.

The term "ordinary purchaser," within the rule that the test of infringement of a patent is whether ordinary purchasers would be likely to mistake the one design for the other, does not mean a dealer who is presumably informed as to the various designs, and their resemblances and differences, but is applicable to the general purchasing public who buy the article under the ordinary conditions under which such purchases are ordinarily made. *Britton v. White Mfg. Co.* (U. S.) 61 Fed. 93, 98.

### ORDINARY PURPOSES.

In a contract to furnish all gas for ordinary purposes connected with the house, "ordinary purposes" will be held to include the use of gas for gas range, fireplace, and street lamps in front of the house. *Graves v. Key City Gas Co.*, 61 N. W. 937, 938, 93 Iowa, 470.

### ORDINARY RAINFALL.

In an action against a railroad company for damages occasioned by water claimed to have been caused by the negligence of the company in failing to provide sufficient culverts, the court submitted to the jury the question whether the defendant maintained the tracks or embankments of its railway in such condition as to prevent the passage of such amount of surface water as is caused by the ordinary rainfall of this country, and said: "By the 'ordinary rainfall' and the 'ordinary flow of surface water' I mean such fall of rain as is liable to occur in the ordinary course of nature in this climate and country, and such flow of surface water as would be caused thereby." This instruction was held to be correct. *Cornish v. Chicago, B. & Q. R. Co.*, 49 Iowa, 378, 380.

Ordinary rainfalls are such as are not unprecedented and extraordinary, and hence floods and freshets which habitually occur, though at irregular and infrequent intervals, are not extraordinary or unprecedented. *Cairo, V. & C. R. Co. v. Brevoort* (U. S.) 62 Fed. 129, 133, 25 L. R. A. 527.

### ORDINARY REPAIRS.

All buildings are subject, more or less, to natural and unavoidable decay; and "ordinary repairs," when used in reference to buildings, means expenses reasonably incurred in keeping the property in good condition and order. *Abell v. Brady*, 28 Atl. 817, 820, 79 Md. 94.

The term "ordinary repairs," in the charter of a city providing that the expense of all new street work or improvements or alterations not in the nature of ordinary repairs shall be assessed and be a lien upon the property benefited, naturally suggests to the mind the idea that only such work as would be necessary to preserve the highway in its usual condition, with no material change in its grade, was intended. It does not apply to the grading of an avenue. *Brenn v. City of Troy* (N. Y.) 60 Barb. 417, 421.

The difference between work upon highways, which is spoken of as ordinary and extraordinary in Rev. St. 1881, § 5069, providing that road superintendents shall in certain months put all the roads in their

respective townships in good, ordinary repair, and then, with such other means as may be in their hands, proceed to do work denominated extraordinary, and, by judicious ditching, draining, and making embankments, and grading, construct smooth roads, etc., is more in degree than in character; and hence work upon a highway is not of an extraordinary character simply because, in doing it, drains, etc., may be constructed. *Clark Civil Tp. v. Brookshire*, 16 N. E. 132, 135, 114 Ind. 437.

### ORDINARY RISKS.

The ordinary risks of a particular business are those which are a part of the ordinary method of conducting that business, even though they may be fairly called extraordinary with reference to a different business, or a different department of the same business. If the business is essentially attended with extraordinary dangers, these are among the risks assumed. *Southern Pac. Co. v. Winton* (Tex.) 66 S. W. 447, 482, 27 Tex. Civ. App. 503 (citing *Joyce v. Worcester*, 140 Mass. 245, 4 N. E. 565); *Tucker v. Northern Terminal Co.*, 68 Pac. 426, 429, 41 Or. 82. The general rule is that risks of a service shall not be increased or caused by the employer's negligence, but risks not increased or caused by the employer's negligence are risks of service which the employé assumes. *International & G. N. R. Co. v. Cochrane* (Tex.) 71 S. W. 41, 42 (citing *Missouri, K. & T. R. Co. v. Hamilton* [Tex.] 30 S. W. 679).

### ORDINARY SERVICE.

"Ordinary service" is defined by the mechanics' lien law of New Jersey as service to be made by the sheriff of any county, in case the defendant can be found in the state, in the manner that other writs of summons are served. *Smith v. Collopy*, 55 Atl. 805, 807, 69 N. J. Law, 365.

### ORDINARY SKILL.

The ordinary skill which a person contracting to play baseball contracts to be possessed of is that degree which men engaged in that particular art usually employ, not that which belongs to a few men only, of extraordinary endowments and capacities. *Baltimore Baseball Club & Exhibition Co. v. Pickett*, 28 Atl. 279, 280, 78 Md. 375, 22 L. R. A. 690, 44 Am. St. Rep. 304 (citing *Waugh v. Shunk*, 20 Pa. 130, 133).

"Ordinary skill" means that degree which men engaged in that particular art usually employ, not that which belongs to a few men only, of extraordinary endowments and capacities. 1 Bell, Comm. 458. The degree of skill which is required rises in proportion to the value, the delicacy, and the difficulty

of the operation. The want of ordinary skill is ordinary negligence. *Waugh v. Shunk*, 20 Pa. (8 Harris) 130, 132.

### As required of physician.

The ordinary skill required of a physician and surgeon is the ordinary skill which a surgeon would, under the circumstances of the case, reasonably use in treating the case. *Boon v. Murphy*, 12 S. E. 1032, 1034, 108 N. C. 187.

Physicians and surgeons are required to use "ordinary skill and diligence"—only the average of that possessed by the profession as a body, and not by the thoroughly educated only, having regard to the improvements and the advanced state of the profession at time of the treatment. *Peck v. Hutchinson*, 55 N. W. 511, 513, 88 Iowa, 320.

"Ordinary skill," within the meaning of the rule that a physician or surgeon is only required to exercise ordinary care and skill, means such degree of skill as is commonly possessed by men engaged in the same profession. He is not accountable for a want of the highest degree of skill. And determining whether he possesses ordinary skill, regard must be had to the advanced state of the profession at the time. *Heath v. Glisan*, 3 Or. 64, 65.

### ORDINARY STAGE OF WATER.

The term "ordinary stage of water" in a stream includes its stage or level in such rises or high water as are usual, ordinary, and reasonably to be anticipated, but does not include its stage or level in such extraordinary freshets as cannot reasonably be anticipated at particular periods of the year. *Ames v. Cannon River Mfg. Co.*, 6 N. W. 787, 788, 27 Minn. 245.

A distinction is taken between the ordinary stage of water and its ordinary stage at particular periods. The former is without meaning, unless it means the average stage, for there is no ordinary stage of any stream in this country for the year around. A man may make his dam according to the ordinary, but not according to the average stage of the stream. But what is the ordinary stage depends upon the seasons and weather. The ordinary stage in ordinary rainy seasons is one thing, and in ordinary dry seasons is another. The ordinary stage in March is high; in August, low. The ordinary rise of streams is a matter which every one is expected to provide against, because with ordinary care he can calculate upon them. *McCoy v. Danley*, 20 Pa. (8 Harris) 85-91, 57 Am. Dec. 680.

### ORDINARY STOCK.

"Ordinary stock," as used in a contract requiring the defendant to cultivate and

maintain a hedge in a skillful manner until the same shall be sufficient to turn ordinary stock, means such stock as is permitted by law to run at large. *Usher v. Hiatt*, 21 Kan. 548, 550.

Stock that is ordinary in respect to fences must be such as is not extraordinarily unruly or breachy, and vice versa. *Albright v. Bruner*, 14 Ill. App. (14 Bradw.) 319, 322.

In an action to recover damages occasioned by defendant's cattle breaking into plaintiff's pasture, the plaintiff alleged that his pasture was inclosed "with a good and sufficient fence, capable of preventing the entry of all ordinary cattle, of whatever class, age, or kind." In answer to the objection that the court should have explained to the jury what was meant by "ordinary cattle," in the charge, the court said: "We think any attempted definition of this term would have had a greater tendency to confuse than enlighten an ordinary jury. At any rate, appellee should have requested a proper definition, if it desired one given, and this it failed to do in its requested special charge, in which this term was said to mean cattle not known to the owner to be diseased, vicious, or breachy. Knowledge on the part of the owner of his cow's condition or breachy nature is not necessary to take her out of the ordinary, and to put into the extraordinary, class. *Clarendon Land, Investment & Agency Co. v. McClelland* (Tex.) 31 S. W. 1088, 1089.

#### ORDINARY TIDES.

A rule that the right of the crown to the seashore is limited by the ordinary tides limits the seashore to the line reached by the average of medium high tides between the spring and neap tides in each quarter of a lunar revolution during the whole year. In one sense the highest spring tides are ordinary—that is, they occur in the natural order of things; but it is not the sense in which the word "ordinary" is used when designating the extent of the crown right to the shore. *Attorney General v. Chambers*, 27 Eng. Law & Eq. 242, 248.

#### ORDINARY USE.

A diversion of water for irrigation is not an ordinary use by a riparian owner, and so can only be exercised reasonably and with proper regard to the right of other proprietors to apply water to the same purposes. *Low v. Schaffer*, 33 Pac. 678, 680, 24 Or. 239.

The ordinary uses of the streets to which the authority of municipal corporations is limited when a general control of the streets is vested in them includes such modes and means of passage upon and over the streets as are usual in cities, and such additional

uses as the health and convenience of the city, in view of the extent of its population, may require, as the construction of sewers, the laying down of gas and water pipes, the grading and paving of streets, and the like. *Denver Circle R. Co. v. Nestor*, 15 Pac. 714, 722, 10 Colo. 403.

While one riparian proprietor cannot wholly abstract or divert a water course, and thereby deprive a lower proprietor of a quality of his property, he has a right to the reasonable and beneficial use of a running stream, but what is a reasonable use depends upon the nature of each case. So, for instance, it will not be an unreasonable use to take a quantity of water from a large running stream for agricultural or manufacturing purposes, where such taking will cause no sensible or practical diminution of the water in a stream, while the taking of the same quantity from a small running brook will amount to an unreasonable use. *Elliot v. Fitchburg R. Co.*, 64 Mass. (10 Cush.) 191, 194, 57 Am. Dec. 85.

#### ORDINARY WEAR AND TEAR.

"Ordinary wear and tear," as used in a stipulation that a lessor shall not be liable for ordinary wear and tear, includes any usual deterioration from the use of the premises during the term. *Waddell v. De Jet*, 23 South. 437, 438, 76 Miss. 104.

Under a lease by which the lessee agreed to deliver up the premises in as good condition as when received, ordinary wear and tear excepted, it is held that barking and plowing up young apple trees by cultivating a crop among them is not within the term "ordinary wear and tear." *Thompson v. Cummings*, 39 Mo. App. 537, 539.

#### ORDINARY WORK.

In construing an Alabama statute prohibiting ordinary or servile work on Sunday, it was said in *O'Donnell v. Sweeney*, 5 Ala. 467, 468, 39 Am. Dec. 336, that the term "ordinary" is equivalent to common or usual work or employment, and, beyond all doubt, embraces within its ample range the sale of a horse or any other chattel, whether the sale be public or private; whether the parties engaged in it, or either of them, were in the prosecution of their ordinary employment or not. *Tucker v. West*, 29 Ark. 386-390.

#### ORDINARY YEARLY TAXES.

The phrase "ordinary yearly taxes," as used in a lease executed in 1843, before the establishment of the Croton department under the Croton water acts, but after the passage of the act for supplying the city of New York with pure and wholesome water, providing that the lessee should pay the ordi-



nary yearly taxes, includes the annual water rent charged on the premises, according to the rates established by the Croton department. *Garner v. Hannah*, 13 N. Y. Super. Ct. (6 Duer) 262, 268.

### ORDINARILY.

"Ordinarily," as used in a statute providing that intention to kill will be punished whenever the means used are such as would ordinarily result in the commission of the crime, means according to established order; methodical; regular; customary, as the ordinary forms of law or justice; common; usual. *Shaw v. State*, 31 S. W. 361-364, 34 Tex. Cr. R. 435 (citing *Webst. Dict.*).

The word "ordinarily" means specific sums paid annually or at other state periods for the right to use a patented device, whether it is used much or little, or not at all. *Western Union Telegraph Co. v. American Bell Telephone Co.* (U. S.) 125 Fed. 342, 348, 60 O. C. A. 220.

### ORDINARILY CAUTIOUS PERSON.

The words "reasonable person" and the words "ordinarily cautious person" are used synonymously in describing the degree of care that should be exercised in instituting criminal proceedings, to avoid the charge of malicious prosecution. *Billingsley v. Maas*, 67 N. W. 49, 50, 93 Wis. 178.

### ORDINARILY PRUDENT MAN.

The expression "ordinarily prudent man," without qualification, suggests merely the care that should be bestowed in cases of ordinary danger. It is an inappropriate expression where the danger is extraordinary, unless explained and applied to the subject. *Diamond v. Northern Pac. Ry. Co.*, 13 Pac. 367, 371, 6 Mont. 580.

### ORDONNANCE.

"Ordonnance" is understood to be, in general, a compilation of prize law, as recognized among civilized nations. *Coolidge v. Inglee*, 13 Mass. 26, 43.

### ORE.

See "Iron Ore."  
Mineral distinguished, see "Mineral."

Webster defines the noun "ore" as the compound of a metal and some other substance, as oxygen, sulphur, or arsenic, called its "mineralizer," by which its properties are disguised or lost. *Marvel v. Merritt*, 6 Sup. Ct. 207, 208, 116 U. S. 11, 29 L. Ed. 550.

#### Granite.

The word "ore" has a definite signification, and designates a compound of metal

and other substances. Granite, neither in a popular nor scientific sense, is a mineral ore. *Armstrong v. Lake Champlain Granite Co.*, 42 N. E. 186, 187, 147 N. Y. 496, 49 Am. St. Rep. 683.

#### Waste from zinc mine.

Ore is a compound of metal and some other substance, but the term will not apply to waste from a zinc mine containing only about 7 per cent. of zinc ore, which could not be extracted profitably, though the waste was valuable for roads and making artificial stone. *Doster v. Friedensville Zinc Co.*, 21 Atl. 251, 252, 140 Pa. 147.

### ORE LEAVE.

"Ore leave" is a term used to designate the right to dig and take ore." *Ege v. Kille*, 84 Pa. 333, 340; *Appeal of Fulmer*, 18 Atl. 493, 494, 128 Pa. 24, 15 Am. St. Rep. 662.

### OREGON.

As Indian Country, see "Indian Country."

### ORGAN.

"An organ is defined to be an instrument or medium by which an action is performed or an object accomplished." *Commonwealth v. Mann Co.*, 24 Atl. 601, 602, 150 Pa. 64.

### ORGANIC.

When examining a body of systematic law in order to determine whether certain characteristics are substantial or merely accidental, language is used according to the subject-matter; and in such a connection the word "organic" does not import a physical, moral, or mathematical necessity, but rather a scientific fitness and congruity, having regard to inveterate usage, historical development, and the nature of legal things. *Flanigan v. Guggenheim Smelting Co.*, 44 Atl. 762, 764, 63 N. J. Law, 647.

### ORGANIC ACT.

The term "organic acts" is used to designate acts of Congress conferring powers of government upon the territories. *In re Lane*, 10 Sup. Ct. 760, 761, 135 U. S. 443, 34 L. Ed. 219.

### ORGANIC LAW.

"Organic law" is a term usually applied to constitutional law only, and it imports a high degree of authority. *City of St. Louis v. Dorr*, 46 S. W. 976, 978, 145 Mo. 466, 42 L. R. A. 686, 68 Am. St. Rep. 575.

The organic law of a territory takes the place of a Constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities, but Congress is supreme, and, for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly or by implication reserved by the prohibitions of the Constitution. *First Nat. Bank v. Yankton County*, 101 U. S. 129-133, 25 L. Ed. 1046.

The organic law is the Constitution of the United States and of this state, and is altogether written. Other written laws are denominated "statutes." *Ann. Codes & St. Or.* 1901, § 734.

## ORGANIZE.

### See "Duly Organized."

Gen. St. 1878, c. 36, § 1, providing that every school district shall be presumed to have been legally organized when it shall have exercised the franchises and privileges of the district for the term of one year, relates to the establishment or formation of the district, and not merely to the action of the voters in electing school officers. The words "establish," "create," "form" and "organize" are used interchangeably, and are practically synonymous. The word "organization" is clearly used in the sense of formation, and includes everything necessary to the creation of a district or bringing it into existence. *State v. School Dist. No. 152 of Blue Earth County*, 55 N. W. 1122, 54 Minn. 213.

"Organize" means to form with suitable organs. The word, in some of its forms, is frequently used in the constitution and laws of the state, and as so used has no doubtful or ambiguous meaning. To organize a certain territory into a municipal corporation is a very different thing from that of extending the limits of an organized city over new territory, and a statute which provides that "no city, town, or village shall be organized within this state, adjacent to or within two miles of the limits of any city of the first, second, or third class, unless such city be in a different county," does not apply to or prevent the extension of the limits of a city of the fourth class to within less than two miles of the limits of a city of the first class. *Warren v. Barber Asphalt Pav. Co.*, 115 Mo. 572, 577, 22 S. W. 490, 491.

A charitable bequest to an institution of learning to be organized at the end of a certain number of years contemplates that the institution is to be incorporated. *Dodge v. Williams*, 50 N. W. 1103, 1107, 46 Wis. 70.

The term "organized," as used in the South Dakota school law, providing for the

organization of school districts and school boards, means the same as the word "incorporated," in the South Dakota incorporation act (Laws 1890, c. 37, art. 1), providing that "any city now existing in the state under a special charter may become incorporated in the manner following." *State v. Power*, 59 N. W. 1090, 1091, 5 S. D. 627.

Organizing a county is the vesting the people of such territory with corporate rights and powers. *First Nat. Bank of Detroit v. Board of Beltrami County Com'rs*, 79 N. W. 591, 77 Minn. 43.

### Corporations.

The word "organize," as used in railroad and other charters, ordinarily signifies the choice and qualification of all necessary officers for the transaction of the business of the corporation. *New Haven & D. R. Co. v. Chapman*, 38 Conn. 56, 66.

"Organize" or "organization," as used in reference to corporations, has a well-understood meaning, which is the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow the legal entity with the capacity to transact the legitimate business for which it was created. *Waltson v. Oliver*, 30 Pac. 172, 173, 49 Kan. 107, 83 Am. St. Rep. 355; *Topeka Bridge Co. v. Cummings*, 3 Kan. 55, 77; *Hunt v. Kansas & M. Bridge Co.*, 11 Kan. 412, 439; *Aspen Water & Light Co. v. City of Aspen*, 37 Pac. 728, 730, 5 Colo. App. 12; *Nemaha Coal & Mining Co. v. Settle*, 38 Pac. 483, 484, 54 Kan. 424.

The word "organized," in Comp. St. c. 147, § 35, providing that any act of incorporation for a dividend paying corporation "shall become null, and taken to be wholly void, at the expiration of three years from and after the passage of such act, unless the grantees or corporators in the act named, . . . shall have, within said time, organized as a company under it, and entered in good faith upon the proper business of the corporation," means organized under color of a charter, with a bona fide purpose of acting under and according to the charter. *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295, 313.

"Organized," as used in a contract for the sale of corporate shares, payable "when the corporation shall be organized," should be construed to mean that the subscribers promised to become stockholders and pay their subscriptions in and to a corporation de jure, and not a mere corporation de facto; and therefore, where the corporation was never legally organized by a filing of the articles in the office of the county clerk as required, no liability on the subscription accrued. *Capps v. Hastings Prospecting Co.*,

58 N. W. 956, 957, 40 Neb. 470, 24 L. R. A. 259, 42 Am. St. Rep. 677.

Under a statute providing that, until articles of incorporation should be recorded, the corporation should transact no business except its own organization, it is held that the term "organization" means simply the process of forming and arranging into suitable disposition the parties who are to act together in, and defining the objects of, the compound body, and that this process, even when complete in all its parts, does not confer a franchise either valid or defective, but, on the contrary, it is only the act of the individuals, and something else must be done to secure the corporate franchise. *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb. 416, 421.

The term "organized," when used in reference to the organization of an incorporation, applies to the act of the officers in being appointed and taking upon themselves the burden of their offices. It is then furnished with organs endowed with capacity for the functions of life, and qualified for the exercise of its appropriate functions. This is the sense in which the word "organized" is used in statutes providing for the incorporation of companies for various purposes. *Commonwealth v. Wm. Mann Co.*, 24 Atl. 601, 602, 150 Pa. 64.

#### Insurance company.

Under Laws 1881, p. 279, requiring insurance companies, as a condition of doing business in the state, to make a certain deposit with the Michigan State Treasurer, or with certain named officers of the state where the company is organized, a British or other foreign company cannot be considered as organized in another state, where it is merely licensed to do business, so as to meet the requirements of the statute by a deposit made in such other state. *Employers' Liability Assur. Co. v. Commissioner of Insurance*, 31 N. W. 542, 543, 64 Mich. 614.

#### Railroads.

Under Act Cong. March 3, 1875, granting the right of way over public lands to any duly organized railroad company which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization, when a railroad company organized under a territorial statute requiring its route to be set out in some detail in its articles of incorporation subsequently changes its route, by filing supplemental articles, so as to cross certain public lands, it is "organized" for the purpose of building a road over such lands only from the date of the supplemental articles, and can only acquire a right of way on furnishing due proof, in the manner specified, of such organization. *Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co.* (U. S.) 52 Fed. 765, 766.

#### Schools.

"Organization" is defined as an arrangement of parties—the act of organizing, as the organization of a government, or of a railroad or other corporation—and as used in reference to the organization of a school, signifies the bringing together, the collecting, the placing in, the committing of boys or other inmates to, a school; and hence, the purpose of Gen. St. 1889, par. 6516, providing for the committing of boys under the age of 16 to a reform school by courts of record, is sufficiently expressed in its title, as "an act for the organization and management of the State Reform School." *In re Sanders*, 36 Pac. 348, 349, 53 Kan. 191, 23 L. R. A. 603.

#### ORGANIZATION.

Organization implies a recognition of order and an obedience to duly constituted authority. Thus members of a political organization will be held to be bound by the action of the convention. *In re Redmond*, 25 N. Y. Supp. 381, 384, 5 Misc. Rep. 369.

#### ORGANIZATION TAX.

A corporation organization tax is in the nature of a license fee for the right to become a corporation. *People v. Knight*, 67 N. E. 65, 66, 174 N. Y. 475, 63 L. R. A. 87.

#### ORGANIZED COUNTY.

Const. art. 11, § 1, providing that all laws changing county lines in a county already organized shall be submitted to the electors of the county, means a county which is organized in fact, and has its lawful officers, legal machinery, and means for carrying out the powers and performing the duties pertaining to it as a quasi municipal corporation. *In re Section No. 6*, 68 N. W. 323, 325, 66 Minn. 32.

#### Established county distinguished.

The distinction between organized counties and established counties recognized, under the Constitution, in the statutes of Minnesota, is that the establishing of a county is the setting apart of territory to be in future organized as political community or quasi corporation for political purposes, while the organizing is vesting the people of such territory with such corporate rights and powers. *State v. Parker*, 25 Minn. 215, 219.

#### ORGANIZED LABOR.

Organized labor is organized capital. It is capital consisting of brains and muscle. *Ames v. Union Pac. R. Co.* (U. S.) 62 Fed. 7, 14.

**ORGANIZED SCHOOL DISTRICT.**

"Organized," as used in Laws 1893, c. 216, § 1, abolishing organized school districts, implies a school district organized and specially created by legislative act, with special powers made a part of its organization, or at least special powers coeval with its organization, and not one organized by the town. School Dist. No. 1 in Gorham v. Deering, 40 Atl. 541, 542, 91 Me. 516.

**ORGANIZED VILLAGE.**

The words "organized or incorporated," in Laws 1885, c. 185, § 2, providing that "any village which has been or shall be organized or incorporated under the general statutes shall be governed according to the provisions of this chapter, and to the end that uniformity of village government and equal privileges to all may be secured," should be liberally construed, so as to include all villages governed by the provisions of the general law, without regard to how they were first incorporated or brought into being. Flynn v. Little Falls Electric & Water Co., 78 N. W. 106, 74 Minn. 180.

**ORIGINAL.**

"Original" means pertaining to the beginning or origin; the first or primitive form of a thing." Commonwealth v. Schollenberger, 27 Atl. 30, 33, 156 Pa. 201, 22 L. R. A. 155, 36 Am. St. Rep. 32; Haley v. State, 60 N. W. 962, 963, 42 Neb. 556, 47 Am. St. Rep. 718; State v. Southard, 29 S. W. 751, 60 Ark. 247.

The term "original," as used in the chapters relating to railroads and street railways, as applied to a street railway location in a city or town, means the first location granted to the company in such city or town. Rev. Laws Mass. 1902, p. 978, c. 111, § 1.

**ORIGINAL AMOUNT IN CONTROVERSY.**

Const. art. 4, § 4, provides that the appellate jurisdiction of the Supreme Court shall not extend to civil actions at law for the recovery of money, when the original amount in controversy does not exceed \$200. Held, that the word "original" is a word of plain import, meaning the amount originally in controversy or the amount sued for, and hence the appellate jurisdiction is governed by such amount, and not by that recovered. Bleeker v. Satsop R. Co., 27 Pac. 1073, 1074, 3 Wash. 77.

**ORIGINAL ATTACHMENT.**

An original attachment is a process given by statute to compel a defendant to appear. It is a continuation of a distringas—a common-law process, and a garnishment,

according to the custom of London. Under the statutes of North Carolina, carpenters' tools may be seized under an original attachment. Martindale v. Whitehead, 46 N. C. 64.

**ORIGINAL BILL.**

An original bill is one which relates to some matter not before litigated in the court by the same persons, and standing in the same interests. Longworth v. Sturges, 4 Ohio St. 690, 707; Butler v. Cunningham (N. Y.) 1 Barb. 85, 87.

A bill brought for the purpose of cross-litigation, or of suspending or reversing the same decree or order of court, or of obtaining the benefit of the former decree, is in the nature of an original bill. Longworth v. Sturges, 4 Ohio St. 690, 708.

Where a bill does not relate to some matter already litigated in the same court by the same persons, and which is not either in addition to, or a continuance of, the original suit, it is an original bill, and not an ancillary one, and, in order to confer jurisdiction on the federal court on the ground of diverse citizenship, the parties must be citizens of different states. Christmas v. Russell, 81 U. S. (14 Wall.) 69, 20 L. Ed. 762.

The terms "original bill" and "bills in the nature of an original bill" are used by the judges and text-writers in a restricted sense, and refer to the character of the plea, rather than that of the action or proceeding to which they apply. There is considerable contrariety of opinion on the question whether bills of review and bills of impeachment on the ground of fraud are or are not original bills. In Willard, Eq. Jur. 163, such bills are treated as strictly original bills, while in Story, Eq. Pl., they are classed with those bills which are for the purpose of cross-litigation, or for the purpose of securing a reversal of some decree or order of the court, or carrying it into effect, and therefore are not original bills. Smithson v. Smithson, 56 N. W. 300, 302, 37 Neb. 535, 40 Am. St. Rep. 504.

**ORIGINAL BILL IN THE NATURE OF A BILL OF REVIEW.**

Where the object of a bill is to impeach a final decree of an equity court, rendered at a former term, for alleged fraud, it is commonly called an "original bill in the nature of a bill of review." McDonald v. Pearson, 21 South. 534, 536, 114 Ala. 630.

**ORIGINAL BILL IN THE NATURE OF A SUPPLEMENTAL BILL.**

"An original bill in the nature of a supplemental bill is properly applicable when

new parties with new interests arising from events since the institution of the suit are to be brought before the court, the latter being to all intents and purposes the commencement of a new suit, which, nevertheless, may in its consequences draw to itself the advantage of the proceedings on the former bill." *Bowie v. Minter*, 2 Ala. 406, 411.

An original bill in the nature of a supplemental bill "embraces in some degree the qualities of an original bill and a supplemental bill. The foundation of a bill of this description is an event occurring after the commencement of a suit in a court of equity, which event is of such a nature that the suit cannot be continued as to all the parties by a mere supplemental bill, and therefore, in regard to those parties, it partakes of the character of an original bill. If the event determines the interest of one of several defendants, and his interest becomes vested in another by a title not derived from the former, as in the case of a determination of an estate for life and the vesting of a subsequent remainder, the remainderman must be brought in by an original bill in the nature of a supplemental bill, which, as to him, is an original bill, while as to the other defendants it is supplemental." *Butler v. Cunningham* (N. Y.) 1 Barb. 85, 87.

#### ORIGINAL CAPITAL STOCK.

The term "original capital stock," as used in Act Feb. 10, 1869, providing, in section 4, that, whenever it is ascertained that a toll road or turnpike pays a greater dividend than 10 per cent. per annum upon the original capital stock, the tolls are to be reduced until it meets 10 per cent. only upon its stock, means the amount of stock subscribed, or issued and sold, which has been actually expended for the accomplishment of the object of the road's charter; that is, the construction of the road. *Bank Lick Turnpike Co. v. Phelps*, 81 Ky. 613, 615.

#### ORIGINAL CONSTRUCTION.

"Original construction," as used with regard to railroads, has, as distinguished from "repairs," a technical meaning. It is that construction of bridges, grades, culverts, rails, ties, docks, etc., that is necessary to be done before the road can be open, or before they can be occupied or used; not such structures as are intended to replace old and worn-out counterparts. *Cleveland, C. & S. Ry. Co. v. Knickerbocker Trust Co.* (U. S.) 86 Fed. 73, 76.

Paving a street with fire-clay brick in place of a macadamized road laid some 30 years before was an "original construction," within St. § 3572, providing that an original construction of any street shall be made at the cost of the abutting owners. *City of Catlettsburg v. Self* (Ky.) 74 S. W. 1064, 1065.

#### ORIGINAL CONTRACTOR.

"Original contractor," in Code Civ. Proc. § 1187, providing that every "original contractor" claiming the benefit of the mechanic's lien must file his claim within 60 days after the completion of the work, includes a person who has contracted to paper and decorate several rooms in a dwelling house, and to furnish the labor and material therefor, and to receive what the labor and material are reasonably worth, though no set price was agreed. *La Grill v. Mallard*, 27 Pac. 294, 90 Cal. 373.

#### Materialman.

The term "original contractors," as used in the law relative to mechanics' liens, includes a person furnishing material, particularly to the owner. *J. H. Baxter Lumber Co. v. Nickell*, 60 S. W. 450, 451, 24 Tex. Civ. App. 519; *Colorado Iron Works v. Riekenberg*, 38 Pac. 651, 652, 4 Idaho, 262; *Lane & Bodley Co. v. Jones*, 79 Ala. 156, 160; *Hearne v. Chillicothe & B. R. Co.*, 53 Mo. 324, 325.

The term "original contractor," within the meaning of the mechanic's lien law, giving original contractors four months to file their lien, includes any person contracting with the owner to furnish materials for the building or improvement of premises, if there is no contractor intervening between them. *Whiteselle v. Texas Loan Agency* (Tex.) 27 S. W. 300, 312; *Matthews v. Wagonhaeuser Brewing Ass'n*, 19 S. W. 150, 151, 83 Tex. 604.

An "original contractor," within the meaning of the mechanic's lien law, means one contracting with the owner to labor or to furnish material. The term cannot be limited to those doing service by way of work, labor, or superintendence upon the building in question. *Ambrose Mfg. Co. v. Gaper*, 22 Mo. App. 397, 401.

Materialmen furnishing materials directly to an owner, to be used in the construction of a building, are not "original contractors" within the meaning of the mechanic's lien law. Should every person who furnishes materials to an owner be regarded as an original contractor, it would follow that every mechanic working on the building for the owner should be regarded as an original contractor, and this, as will be readily seen, would result in very serious complications in determining who are original contractors and who are subcontractors. *Sparks v. Butte County Gravel Min. Co.*, 55 Cal. 389, 392; *Inmen v. Henderson*, 45 Pac. 300, 301, 29 Or. 116.

#### Owner of tools.

Where the owner of certain tools rented them to the owners of a building, by whom they were used for the purpose of moving a

house from elsewhere onto the lots belonging to him, the owner of such tools was an "original contractor" within the meaning of the statute, providing that an original contractor may file a statement for lien within four months. *Burke v. Brown*, 10 Tex. Civ. App. 298, 30 S. W. 938.

### ORIGINAL COST.

In a contract whereby A. agreed to deliver stock in a mining claim to B. at its "original cost," the amount of the stock to be of the value of a certain sum, the term "original cost" was intended by the parties to mean its cost to A. *Eagan v. Clasbey*, 13 Pac. 430, 434, 5 Utah, 154.

The terms "original cost" and "present value" are not equivalent. *National Waterworks Co. v. Kansas City* (U. S.) 62 Fed. 853, 863, 10 C. C. A. 653, 27 L. R. A. 827. There are other elements beside cost of reproduction or replacement which affect present value, and, as applied to a waterworks about to be condemned, it is proper to consider what the existing system can be reproduced or replaced for, as having some tendency to show the present value. But there are two additional elements—one that it is a completed structure connected with buildings prepared for use, and the other that the company is a going concern. *Kennebec Water Dist. v. Waterville*, 54 Atl. 6, 18, 97 Me. 185, 60 L. R. A. 856.

"Original," as used in a contract of dissolution of a partnership, providing for an inventory of part of the stock at the original or wholesale cost thereof, does not mean the cost the firm paid for it. The use of the word "original" seems to mean something more, and requires a going behind the price paid by the firm to an earlier or original price. *Prima facie*, therefore, it would seem to mean the price when the goods were first, i. e., originally, bought for the purpose of being made part of the stock of the store, whether by the firm or by their predecessors in the business. This would seem to be the "original price" of the goods, considered as part of the stock to be inventoried, in reference to which the words were used in the writing. *Holloway v. Frick*, 24 Atl. 201, 202, 149 Pa. 178.

### ORIGINAL DESIGNATION OF BENEFICIARIES.

The by-laws of a mutual benefit society, whose expressed object was "to aid and assist the widows and orphans of deceased members," provided that every applicant for membership should designate in his application the person or persons to whom, in the event of his death, the benefit should be paid; also that any member might change his beneficiary by sending to the secretary a writ-

ten application, acknowledged before a notary, and surrendering his certificate; that, if such change was approved by the board of managers, the secretary should issue him a new certificate; and that no change of beneficiaries should be made in any other way. The by-laws also provided that the benefit should be paid to such person or persons as the deceased member may have designated, as the same shall appear on the books of the association, and, if no designation had been made, then to his legal heirs or devisees. A certificate of membership was issued to the deceased without his having designated any beneficiary. Subsequently he went to the office of the association and verbally designated to the secretary four of his children as beneficiaries, and requested the secretary to make or enter such designation. Thereupon the secretary, in his presence, entered or recorded, in the book of the association kept for that purpose, the names of the four children as the beneficiaries, and assured the member that this was all that was necessary to be done. This entry remained in the records of the association, without objection, until the death of the member, six years afterwards. In a controversy between the four children and the other heirs of the deceased as to who were entitled to the benefit, it was held that the act of the member was an "original designation" as distinguished from a "change" of beneficiaries. *Hanson v. Minnesota Scandinavian Relief Ass'n*, 60 N. W. 1091, 59 Minn. 123.

### ORIGINAL ENTRIES.

See "Book of Original Entries."

### ORIGINAL EVIDENCE.

Original evidence is an original writing or material object introduced in evidence. *Ann. Codes & St. Or.* 1901, § 682.

### ORIGINAL GIFT.

A gift to the issue is substitutional if the share which the issue are to take is by a prior clause expressed to be given to the parent of such issue, and a gift to the issue is an original gift when the share which the issue are to take is not by a prior clause expressed to be given to the parent of such issue. *Acken v. Osborn*, 17 Atl. 767, 769, 45 N. J. Eq. 377.

### ORIGINAL INDEBTEDNESS.

The term "original indebtedness," in a written receipt reciting the payment of certain money to apply on a contract if the balance due on such contract should be paid as therein provided, otherwise to be applied on the original indebtedness of the party mak-

ing the payment, held to refer to claims existing before the making of the receipt. *Foster v. McGraw*, 64 Pa. (14 P. F. Smith) 464, 469.

### ORIGINAL INVENTOR.

"The term 'original inventor,' in patent law, is used to designate a pioneer in the art; one who evolves the original idea, and brings it to some successful, useful, and tangible result. Such a person is, by the law of patents, entitled to a broad and liberal construction of his claims, whereas an improver is only entitled to what he claims, and nothing more." *Norton v. Jensen* (U. S.) 90 Fed. 415, 422, 83 C. C. A. 141.

### ORIGINAL JURISDICTION.

The phrase "original jurisdiction," as used in Rev. St. art. 2, c. 69, § 3, as amended, limiting the jurisdiction of the district court, and conferring upon it original jurisdiction in certain cases, means jurisdiction to entertain cases in the first instance, as distinguished from appellate jurisdiction. *Castner v. Chandler*, 2 Minn. 86, 88 (Gil. 68, 71).

Const. art. 6, § 6, declares: "The district courts shall have 'original' jurisdiction in law and equity in all civil cases where the amount in dispute exceeds \$200; in all criminal cases not otherwise provided for, and in all issues of fact joined in the probate courts their jurisdiction shall be 'unlimited.'" In considering the question whether the word "unlimited" qualifies the character of the jurisdiction fixed by the term "original," or whether it qualifies the specified limitation as to the amount in value fixed in the first paragraph of the section, the court said: "We are compelled to decide in favor of the latter proposition. The term 'original' is a general term of limitation, contradistinguished from the term 'appellate,' which latter defines the jurisdiction of the Supreme Court. If, therefore, a change in the general character of the jurisdiction was intended to take place in a certain class of cases, that change would have been designated by the use of the general term, which in all other parts is used for the purpose of conferring jurisdiction. It is also strictly in consonance with the proper use of language that where a limitation is removed, and there is an immediately prior specific limitation, the removal shall apply to the latter, and not be allowed to qualify a general term of limitation which is more remote in its position in the sentence." *Reed v. McCormick*, 4 Cal. 342, 343.

#### As exclusive.

The constitutional grant of original jurisdiction to the federal Supreme Court in all cases affecting consuls is held not to pre-

vent Congress from conferring original jurisdiction in such cases also upon the subordinate courts of the Union, the term "original" not having the force of "exclusive." *Bors v. Preston*, 4 Sup. Ct. 407, 409, 111 U. S. 252, 28 L. Ed. 419; *Pooley v. Luco* (U. S.) 76 Fed. 146, 147.

Laws 1862, c. 18, providing that the several district courts of the state shall have original jurisdiction in all cases of mandamus, does not mean that such courts shall have exclusive jurisdiction thereof. *Crowell v. Lambert*, 10 Minn. 369, 372 (Gil. 295, 298).

### ORIGINAL LOCATION.

Within the statute regulating the rights of street railways, the term "original location" is defined to mean the first location granted to the company in such city or town, so that an extension of an original location is not an original location. *City of Springfield v. Springfield St. Ry. Co.*, 64 N. E. 577, 580, 182 Mass. 41.

### ORIGINAL MACHINE.

Wherever the patent law speaks of "improvement," it is on some machine of manufacturing, and not on manual labor. Consequently, an improvement of an article manufactured by manual labor is not, strictly speaking, an "invention," but an original machine. *Evans v. Eaton* (U. S.) 8 Fed. Cas. 856, 859.

### ORIGINAL MANUSCRIPT.

By express provision of Rev. St. 1881, § 1410 (Rev. St. 1894, § 1476), the longhand manuscript of the evidence taken by a stenographer is an "original manuscript or document" incorporated in the bill of exceptions, and hence may be treated as embraced within and constituting part of it, and cannot be construed to be a mere transcription of the evidence introduced at the trial. *Zeis v. Passwater*, 41 N. E. 796, 799, 142 Ind. 375.

### ORIGINAL MEETING.

According to parliamentary law, strictly speaking, an "original meeting" and an "adjourned meeting" constitute the same meeting; but it is held that in Gen. St. 1878, c. 13, §§ 49-53, relative to meetings of the board of county commissioners, and providing that, when a petition is made for the establishment, change, or vacation of a county road, the county auditor shall lay it before the board at their next session, and after the lapse of 30 days at the next meeting of the board they shall proceed to determine the prayer of the petition, the words "session" and "meeting" are not used in any strictly technical sense, but have reference merely to a time when the board is lawfully con-

vened and in session for the transaction of business. *Burkleo v. County of Washington*, 38 Minn. 441, 442, 443, 38 N. W. 108.

### ORIGINAL NOMINATION.

Laws 1896, § 66, provides that, when no nomination shall have been originally made by a political party or by an independent body for an office, no committee of such party or independent body can nominate or substitute the name of another party or independent body for such office. By the use of the phrase "original nominations" in such section, the Legislature clearly meant the first nominations, as distinguished from those made to fill vacancies caused by death, resignation, or otherwise after the original first or primary nomination. *Gillespie v. McDonough*, 79 N. Y. Supp. 182, 185, 39 Misc. Rep. 147.

### ORIGINAL NOTICE.

"Original notice," as used in Code, § 2532, providing that the delivery of the original notice to the sheriff of the proper county with intent that it is to be served immediately is a commencement of the action, does not include a notice with the appearance day left blank, with the intention that the sheriff shall file the same as soon as convenient. *Phinney v. Donohue*, 25 N. W. 126, 127, 67 Iowa, 192.

### ORIGINAL OUTFIT.

Converting a ship from her original destination with intent to commit hostilities, or, in other words, converting a merchant ship into a vessel of war, must be deemed an "original outfit" within the meaning of Act June 5, 1794 (1 Stat. 381), § 3, providing for the punishment of any person who shall within the waters of the United States fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, any ship or vessel to be employed, in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens, or property of another foreign prince or state with whom the United States are at peace. *United States v. Guinet* (Pa.) 2 Dall. 321, 328, 26 Fed. Cas. 53, 1 L. Ed. 398.

### ORIGINAL OWNERS.

In an action by a corporation against the promoters thereof, who had induced the corporation to purchase from them oil lands by false representations that they had bought the lands for the company from original owners, and that the prices paid by the company were those paid to the original owners, and were low, when in fact the prices paid by them were about \$75,000 less than the prices represented, and the amount received by

them from the company, the court said: "The words 'original owners' in the prospectus were not terms of art, science, or trade which required the aid of experts to explain. Nobody could well mistake their meaning. They simply imported that no profits were added to the prices paid by the company for their lands on account of any intermediate party or agent between it and the precedent owners of the soil. It excluded the idea of a purchase at a speculative price." *Simons v. Vulcan Oil & Mining Co.*, 61 Pa. (11 P. F. Smith) 202, 220, 100 Am. Dec. 628.

### ORIGINAL PACKAGE.

Original package or otherwise, see "Otherwise."

The character of the article shipped as an original package is determined by the condition of the package when delivered for shipment by the importer to and received by the railway company or transporter, and not by the acts of the latter after receipt of package by it without knowledge of the former. *Tinker v. State*, 11 South. 383, 384, 96 Ala. 115.

The definition of "original package" commonly accepted and believed to be correct is that it is a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together convenient for handling and conveyance. In the case of *State v. Winters*, 44 Kan. 723, 25 Pac. 237, 10 L. R. A. 616, it is said: "The 'original package' was and is the package as it existed at the time of its transportation from one state to another. It is quite apparent that the words 'original package' have reference to the unit which the carrier receives, transports, and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step; and from that time until sold in that form, or broken and transferred, it is the subject of interstate commerce; but when sold or broken, or when it changes form, it ceases to be an article of interstate commerce, and no longer enjoys this protection. The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received; for, if the package be broken after such delivery, it by that act alone becomes a part of the common mass of property within the state, and is subject to the laws of that state passed in virtue of its police power." *McGregor v. Cone*, 73 W. 1041, 1043, 104 Iowa, 465, 39 L. R. A. 484, 65 Am. St. Rep. 522.

The term "original package" does not seem to have received, and, perhaps, is not



capable of, a precise definition that may be applied to it in all cases. The idea for which it stands is, however, definitely known. The method adopted by manufacturers and importers for packing and transportation of goods by sea or land differs with the character, bulk, and material of the merchandise itself. The general purpose is to adopt that size and form of package best adapted to the safe and convenient transportation and delivery of the particular class of goods to be moved, because the convenience of trade will be best subserved thereby. Such packages, being put up with a view to the convenience and security of transportation and handling in the regular course of trade, are the "original packages" of commerce. If we look at the meaning of the words employed, we are brought to the same conclusion. "Original" pertains to the first or primitive form of a thing; "package" means a bundle or parcel made up of several small packages bound up in a bale, package, or crate, or other form of package. An original form of package is such form or size of package as is used by shippers for the purpose of securing both convenience of handling and security in transportation of merchandise in the ordinary course of actual commerce. In this case it is specifically held that where bottles of intoxicating liquor were each inclosed in a paper wrapper or box, which was sealed with sealing wax, and a number of paper boxes, each containing a flask of such liquor, were packed in a wooden box and shipped to an agent, who sold the flasks of liquor separately, the wooden box was the "original package," and not the sealed paper box or wrapper and bottle therein contained. *Haley v. State*, 60 N. W. 962, 42 Neb. 556, 47 Am. St. Rep. 718.

The term "original package," as employed by law, admits of no precise definition applicable to all cases. Generally, it is said to be a parcel, bundle, bale, box, or case made up of or "packed" with some commodity with a view to its safety and convenient handling and transportation. It does not necessarily mean that goods shall be inclosed in a tight or sealed receptacle. It relates wholly to goods as prepared for transportation, and has no necessary reference whatever to the package originally prepared or put up by the manufacturer. Indeed, the idea of the "original package" may well be made to cover certain forms of property which do not ordinarily admit of being packed or encased in any other manner than in the car or vessel in which they are transported, such, for instance, as steel beams, threshing machines, and other bulky articles. *Cook v. Marshall County*, 93 N. W. 372, 373, 119 Iowa, 384.

The term "original package," as applied to liquors within the interstate commerce act, so as to authorize their importation into

the state, prohibiting the sale of liquors, is a term which has not received, and, perhaps, is not capable of, precise definition that may be applied to all cases. The idea for which it stands is a package of convenient form and size, best adapted to safe and convenient transportation and delivery of a particular class of goods to be moved. Such packages, put up with a view to the convenience and security of transportation and handling in the regular course of trade, are the "original packages" of Congress. *Haley v. State*, 60 N. W. 962, 963, 42 Neb. 556, 47 Am. St. Rep. 718.

"An original package is such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce. Such packages are not always made up by putting smaller packages or bundles together, but may include any form or receptacle that shall hold a fixed quantity." *Commonwealth v. Shollenberger*, 27 Atl. 30, 33, 156 Pa. 201, 22 L. R. A. 155, 36 Am. St. Rep. 32.

The term "original package," in Act Cong. May 8, 1890, providing that intoxicating liquors transported into any state, or remaining therein for sale, etc., shall be subject to the laws of such state, enacted in the exercise of its police powers, to the same extent as though such liquors had been produced in the state, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise, "had, at the time of the passage of the act, by the decisions of this court, acquired, with reference to the construction of the Constitution, a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a state by the receiver thereof, although state laws might forbid the sale of merchandise of like character not in such packages." *Rhodes v. State of Iowa*, 18 Sup. Ct. 664, 668, 170 U. S. 412, 42 L. Ed. 1088.

No importer is guarantied the right of opening original packages which he may be allowed to import, and selling the contents of such packages either in gross or piecemeal. His right extends only to sales in the original packages, and a contract for the sale of liquors in original packages, giving the purchaser 10 days in which to ascertain whether they were satisfactory or not, and, if not, to return them, as it gave the purchaser the right of breaking and examining the packages, was not a sale in original packages. *Wasserboehr v. Boulter*, 24 Atl. 808, 809, 84 Me. 165, 30 Am. St. Rep. 344.

#### As package of shipment.

In the commercial sense, the case or box or bale in which separate articles are placed

together for transportation constitutes the "original package." *Keith v. State*, 8 South. 353, 354, 91 Ala. 2, 10 L. R. A. 430.

Where whisky in bottles, sealed and labeled, which bottles were for convenience of shipment packed in barrels, the separate bottles were in "original packages;" that is, in the form in which they were put up by the shipper for sale. At least, such has been the holding of the courts in Iowa. *Collins v. Hills*, 77 Iowa, 181, 41 N. W. 571, 3 L. R. A. 110. See, also, *In re Beine*, 42 Fed. 545. It is proper to observe that this case was determined before the act of Congress relating to the laws of the several states pertaining to the regulation of traffic in intoxicating liquors. *State v. Coonan*, 48 N. W. 921, 922, 82 Iowa, 400.

Where bottles of liquor are placed in a wooden box and shipped into the state to be sold on commission, the box is the "original package." *Harrison v. State*, 10 South. 30, 31, 91 Ala. 62.

Where bottles of whisky or beer are each sealed up in a paper wrapper, and closely packed together in uncovered wooden boxes furnished by the importer, and said wooden boxes are marked to the address of the agents and shipped from one state to another, the wooden boxes, and not the bottles, constitute the "original package." *State v. Chapman*, 47 N. W. 411, 415, 1 S. D. 414, 10 L. R. A. 432.

Where bottles of whisky which are sealed up in a paper wrapper, and closely packed together in uncovered wooden boxes furnished by an express company, and marked "To be returned," are shipped from one state to another, the boxes, and not the bottles, constitute the "original packages" within the meaning of decisions of the Supreme Court upon the interstate commerce provisions of the national Constitution. *In re Harmon* (U. S.) 43 Fed. 372, 373.

An "original package," within the meaning of the interstate commerce law, is the package delivered by the importer to the carrier at a designated point in exactly the same condition in which it was shipped. In the case of liquids in bottles, if the bottles are shipped singly, each is an original package; if a number are fastened together and marked, or checked in a box, crate, or other receptacle, such box, crate, or receptacle constitutes the original package. *Guckenheimer v. Sellers* (U. S.) 81 Fed. 997, 999.

An "original package," as applied to interstate and international commerce, is a package, bundle, or aggregation of goods put up, in whatever form, covering, or receptacle, for transportation, and as a unit transported from one state or nation to another. After a sale of cigarettes they were placed by the seller on the floor of the factory in

packages conforming to the United States revenue laws. A common carrier was notified, who piled them into a basket and brought them into the state in the basket, where he delivered them to the buyer, retaining possession of the basket. Under such circumstances the basket full of packages, and not each individual package, must be deemed the original package, even though the basket was not closed during the transportation, and though the basket was owned by the carrier. *Austin v. State*, 48 S. W. 305, 308, 101 Tenn. 563, 50 L. R. A. 478, 70 Am. St. Rep. 703.

An "original package" is defined to be such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce. Where a mode of putting up a package does not meet the requirements of interstate commerce, but the requirements of an unlawful domestic retail trade, the dealer will not be protected on the ground that he is selling an original package. Pursuant to this definition, it is held that paper packages of cigarettes, each 3 inches in length and 1½ inches in width, containing 10 cigarettes, without any shipping address on such packages, when they are taken from a loose pile at the factory by an express company in a basket which it furnished, in which it carries them, and from which it empties them on the counter of the consignee in another state, do not constitute original packages of interstate commerce, but if there is any original package in the shipment it is the basket. *Austin v. State of Tennessee*, 21 Sup. Ct. 132, 137, 179 U. S. 343, 45 L. Ed. 224.

The "original package" referred to in the decisions of the Supreme Court was and is the package of the importers as it existed at the time of its transportation from one state into another. The whole subject has relation to interstate commerce, and to nothing else. Hence the words must mean the package as transported by the importer himself and his agent, either as a common carrier or a private carrier, for the purposes of commerce, and it would seem that it is for the importer to determine how large or how small the package should be, and the manner in which the package should be made up, and the materials used in making it up. *State v. Winters*, 25 Pac. 235, 237, 44 Kan. 723, 10 L. R. A. 616.

The rule established by the Supreme Court of the United States in relation to the rights of states to restrict the sale of imported liquors goes no further than that the importer may sell the articles imported in the form and shape in which they were imported without impediment from state laws, and does not apply to the sale of liquor by the bottle by one who imports such bottles

in boxes with closed tops which were broken open. *Smith v. State*, 54 Ark. 248, 15 S. W. 882.

The term "original package," as applicable to the sale of patent and proprietary medicines, means—and is so understood by all persons—the small individual package or bottle as prepared for retail, and not the large box or package in which the smaller packages may have been shipped by the manufacturer, and is so used in St. 1899, c. 85, § 2631, authorizing the sale of patent medicines in original packages. *Kentucky Board of Pharmacy v. Cassidy*, 74 S. W. 730, 732.

The case or box or bale in which separate articles are placed together for transportation constitutes the "original package," in the commercial sense. *Keith v. State*, 8 South. 353, 354, 91 Ala. 2, 10 L. R. A. 430. A separate wrapping of single bottles of medicine manufactured in another state, and inclosed in a package in which they were shipped into this state, did not constitute each bottle an original package, entitling the vendor thereof to the protection of Const. art. 1, § 8, vesting in Congress the power to regulate commerce between the states, as against Rev. St. 1889, §§ 7211, 7218, defining a "peddler," and imposing a fine for dealing as such without a license. *State v. Parsons*, 27 S. W. 1102, 1104, 124 Mo. 436, 46 Am. St. Rep. 457.

#### **Contents of package.**

A person who keeps a saloon with bar and fixtures, receives as original packages bottles of beer and whisky, and sells the same over his bar to customers, who destroy the seals or wire on the bottles, pull the corks, pour the contents into glasses on the bar, drink the same, and leave the bottles on the bar, is a seller of the contents of the original packages, and not the original packages themselves. *Hopkins v. Lewis*, 84 Iowa, 690, 51 N. W. 255, 15 L. R. A. 397.

#### **Mingling with consignee's property.**

When an importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is a duty on imports, and therefore to that extent invalid. *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 442, 6 L. Ed. 678.

#### **Package adapted for sale at retail.**

The right of one importing into a state a proper article of interstate commerce to sell it in the original package does not depend on whether the package is suitable for

the retail trade or not. The right to sell it is the same, whether to consumers or to retail dealers. A sale of a 10-pound package of oleomargarine manufactured, packed, marked, imported, and sold in the ordinary course of business is sold in the original package, and therefore an act of a state forbidding the sale of oleomargarine is void as an interference with interstate commerce, as applied to oleomargarine brought into the state and sold in the original packages. *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49.

A package devised by a nonresident manufacturer, or put up by him, adapted for sale at retail to individual consumers—such, for example, as a flask of whisky, or a tub or pail or roll of oleomargarine—and actually sold by him or his agent to the consumer for use as an article of food or drink, in violation of the laws of the state where such sales take place, is not an "original package" within the meaning of the law relating to interstate commerce. *Commonwealth v. Paul*, 33 Atl. 82, 85, 170 Pa. 284, 30 L. R. A. 396, 50 Am. St. Rep. 776.

#### **Very small packages.**

The term "original package," within the rule that the state prohibitory law is in contravention of the interstate commerce clause of the Constitution in so far as it applies to sales by the importer, outside the state, of liquor in the original packages in which it is brought into the state, is not affected by the form or size of such packages, and therefore single bottles of beer packed and sealed or nailed up in boxes made of pasteboard or wood, and shipped singly, are original packages. *In re Beine* (U. S.) 42 Fed. 545.

Where beer is put into sealed bottles and packed in boxes, and sent by a nonresident into the state, consigned to an agent, and the agent prior to August 14, 1890, merely removed the bottles from the box, furnished corkscrews and tumblers, and allowed customers to open them for themselves, the sale was in the original packages. *State v. Miller*, 86 Iowa, 638, 53 N. W. 330.

#### **Subdivisions of package.**

Goods, imported and remaining in the original boxes or cases or wrappings in which shipped are, until sold, in original packages; but goods taken from the original cases or boxes or wrappings in which shipped and received by the importers, though still remaining in the manufacturer's packages, become incorporated into the general mass of the property of the state, and subject to its tax laws. *May v. City of New Orleans*, 25 South. 959, 960, 51 La. Ann. 1064.

Where many boxes, each containing 10 cigarettes, are given absolutely loose to an express company by the manufacturer to

transport to a person in another state, each box will not be held an original package, though it does not affirmatively appear that the express company used any receptacle in which to carry them. *Cook v. Marshall County*, 93 N. W. 372, 373, 119 Iowa, 384.

#### ORIGINAL PAPERS.

"Original papers," as used in Rev. St. 1881, § 1771, providing that, on a change of venue in a criminal proceeding, the clerk shall make a transcript of the proceedings and orders of the court, and, having sealed up the same with the "original papers," shall deliver them to the sheriff, means the original indictment, or the original affidavit and information, in which the defendant is charged with a public offense. An affidavit for a change of venue is not an "original paper" within the meaning of the statute. *Bright v. State*, 90 Ind. 343, 345.

#### ORIGINAL PARTY.

"Original party to a contract or cause of action," as used in Act 1868, declaring that an original party to a contract or cause of action shall not be competent to testify, means an original party to the contract or cause of action at issue or on trial, and therefore excludes a party as a witness only when he is a party to the cause. *Wright v. Gilbert*, 51 Md. 146, 157.

#### ORIGINAL PROPERTY.

"Original and ultimate property," as used in Const. 1846, art. 1, § 2, declaring that the people of the state in their right of sovereignty are deemed to possess the "original and ultimate property" in and to all lands within the jurisdiction of the state, means that theoretical title to which the state's right of possession and enjoyment become annexed on the failure of inheritance. *People v. Rector of Trinity Church*, 22 N. Y. 44, 47.

#### ORIGINAL PROCESS.

The petition and citation in a suit constitute the original process by which the suit is commenced, and, where a statute requires that a revenue stamp be placed on the original process, it is sufficient to affix such stamp to either the petition or citation. *Appeal of Hotchkiss*, 32 Conn. 353, 355.

The process issued as notice to the plaintiff in a bill for a new trial is not "original process" within Rev. St. 739, restricting the bringing of suits by original process against a citizen of the United States save in the district where he resides or shall be found, but it is incidental, ancillary, a step in a pending cause. It is not a process

which originates a cause, but it merely prolongs one already commenced. *Oglesby v. Attrill* (U. S.) 12 Fed. 227, 230.

#### ORIGINAL PROMISE.

"Original promise," as used with relation to the statute of frauds, is a promise such that, although the effect is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own. If such a promise be made on good consideration, it is unaffected by the statute of fraud, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promisor. *Nelson v. Boyton*, 44 Mass. (3 Metc.) 396, 400, 37 Am. Dec. 148; *Patton v. Mills*, 21 Kan. 163, 169.

"The terms 'original' and 'collateral,' as applied to undertakings in connection with the statute of frauds, though not found in the statute, are often used in applying it, and, being significant and intelligible, are convenient. If the promise is made by one in his own name to pay for goods or money delivered to or services done for another, that is original; it is his own contract on good consideration, and is called 'original,' and is binding on him without consideration. But if the language is, 'Let him have money or goods, or do service for him, and I will see you paid,' or 'I promise you that he will pay,' or 'If he don't pay, I will,' this is collateral, and, though made on good consideration, is void by the statute of frauds." *Stone v. Walker*, 79 Mass. (13 Gray) 613, 615.

An original promise, though it has the effect of paying the debt of another, is a promise in which the leading object of the promisor "is to subserve or promote some interest or purpose of his own." Such a promise is not within the statute of frauds, requiring a promise to answer for the debt, default, or miscarriage of another to be in writing. *Clay v. Walton*, 9 Cal. 323, 334.

An original promise to answer for a debt or default of another is a promise where, distinct from the original liability, there is a new and superadded consideration for the promise, moving between the party promising and him to whom the promise is made. Such a promise is not within the statute of frauds, requiring a promise to answer for a debt or default or miscarriage of another to be in writing. *Elder v. Warfield* (Md.) 7 Har. & J. 391, 396.

"The terms 'original' and 'collateral' promise are used to distinguish between the cases where the direct and leading object of a promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the

debt of another, yet the leading question of the undertaker is to promote some interest or purpose of his own." Beach on Contracts, § 570. "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may have the effect of extinguishing that liability." An oral promise by the owner of a building in the process of construction to pay laboring men, for the purpose of procuring the completion of the building, is not a collateral promise to answer for the debt of a contractor within the statute of frauds, but is an original undertaking which may be enforced against the owner. *Almond v. Hart*, 61 N. Y. Supp. 849, 852, 46 App. Div. 431.

A parol promise by an attorney to pay whatever judgments might be rendered against his client is within the statute of frauds, though it be on consideration of the opposite party waiving costs in an undertaking, the attorney not being under any present duty to pay what he promised. *Scott v. Brown*, 60 N. Y. Supp. 511, 512, 29 Misc. Rep. 320.

Where the primary debt subsists and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment irrespective of the liability of the principal debtor. *White v. Rintoul*, 108 N. Y. 222, 15 N. E. 818.

#### ORIGINAL RECEPTACLE.

"Original receptacle," as used in a city ordinance providing that no merchant, retailer, trader, dealer, hawker, or peddler should sell in such city any fruit, vegetable, or nut from cups, cans, or other receptacles other than sealed dry measures sealed by the city sealer, except when such fruit, vegetable, or nut is sold in its original receptacle, means the box, can, or other receptacle in which the merchandise originally came to the hands of the dealer. *Raffetto v. Mott*, 38 Atl. 857, 60 N. J. Law, 418.

#### ORIGINAL STOCK.

Between such stock as may be authorized and required by the charter of a corporation—that is, original stock or foundation stock—and increased stock, there is a substantial difference. In the case of the issue of increased stock there is no implied understanding that the whole of the authorized issue shall be subscribed for. A sub-

scriber's contract for such stock is that he will pay the price agreed upon for the stock, and, if it is not delivered in accordance with such contract, he is liable at any time to be called upon to pay whatever balance he may owe. *Gettysburg Nat. Bank v. Brown*, 52 Atl. 975, 976, 95 Md. 367, 93 Am. St. Rep. 339.

#### ORIGINAL SUIT.

A bill filed on the equity side of the federal court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary to the original suit out of which it has arisen, and is maintainable without reference to the citizenship or residence of the parties. *Freeman v. Howe*, 65 U. S. (24 How.) 450, 460, 16 L. Ed. 749.

The substitution of a plaintiff is not an original suit, but an incident of an existing one—a step in it, and nothing more; and allowing plaintiff's intestate to become the party plaintiff without a revival in the name of the personal representative of the original plaintiff, and proceeding without additional notice against the defendant, is not an unreasonable practice. *Lockhart v. Locke*, 42 Ark. 17, 21.

#### ORIGINAL WRIT.

An "original writ" means the first process or initiatory step taken in prosecuting a suit. It issues on the application of a party. In English, this writ is the *præcipe*. After this is issued and returned, an attachment issues to take the body, then a *distingas*, and then a *capias*. *Walsh v. Haswell*, 11 Vt. 85, 88.

Under Rev. St. c. 81, § 2, providing that "all civil actions, except *scire facias* and other special writs, shall be commenced by original writs," writs of summons and attachment are "original writs" within the meaning of section 6, which provides that "every writ original, or *scire facias*, of error," etc., shall, before entry in court, be indorsed by some sufficient inhabitant of the state, when plaintiff is a nonresident; the writs of *scire facias*, error, etc., enumerated in the section, being additional to, and not limitations of, the provision requiring original writs to be so indorsed. *Pressey v. Snow*, 17 Atl. 71, 81 Me. 288.

#### ORIGINALLY.

Acts 23 Geo. II, c. 30, § 8, relating to jurisdiction of the court of requests, and providing that the commissioners shall not decide on any debt for any sum, being the balance of an account on a "demand originally

exceeding five pounds," would include a debt which originally exceeded five pounds, but had been reduced below that amount by payments from time to time before action was brought. *Elsley v. Kirby*, 9 Mees. & W. 536, 539.

Acts 6 & 7 Wm. IV, c. 122, § 22, excepts from the jurisdiction of Blackheath court of request any debt for any sum, being the balance of an account originally exceeding £5. Held, that this exception did not apply to an account containing items amounting to upwards of £5, and reduced by payments from time to time below that sum, where it appeared that at no time so much as £5 was due. *Pope v. Banyard*, 3 Mees. & W. 424, 425.

### ORIGINALLY COMMENCED.

"Originally commenced," as used in Code, § 11, providing that an appeal should not be allowed to the Court of Appeals in an "action originally commenced" in a court of a justice of the peace, should be construed to include an action commenced in the county court or Supreme Court on the discontinuance of an action in a justice's court involving the title to land. There is no distinction between cases arising in a justice's court and "actions originally commenced" in that court. *Cook v. Nellis*, 18 N. Y. 126, 127.

### ORIGINALLY GRANTED.

As used in Iowa statutes which declare that administration shall not be originally granted after the elapse of five years from the death of the decedent, the expression "originally granted" applies only to administration which is granted upon the estate for the first time. It does not apply to an administration which is merely auxiliary to one originally granted in another state. *Dolton v. Nelson* (U. S.) 7 Fed. Cas. 872.

### ORIGINALLY LIABLE.

Originally liable, as used in Pub. St. c. 155, § 23, authorizing a suit for contribution against any one or more of the "stockholders of a corporation who were originally liable" with the stockholders suing for the payment of the corporate debt, which the latter liquidated, means all stockholders who were liable for the debt before it was paid by the stockholders suing for contributions, and therefore all persons who were stockholders when the debt was contracted, and all who were stockholders when proceedings were begun to enforce the liability, are proper contributors. *Sayles v. Bates*, 5 Atl. 497, 499, 15 R. I. 342.

### ORIGINALS.

"Originals," as used in Pub. St. c. 169, § 70, making copies of documents in the

executive and other departments of the commonwealth, duly authenticated, competent evidence equally with the "originals" thereof, means the documents in the hands of the certifying officer, whatever they may be. *Commonwealth v. Corkery*, 56 N. E. 711, 712, 175 Mass. 460.

### ORIGINATING.

The word "originating," in a fire policy on a building, which provides that the policy shall not cover any loss or damage by fire originating in the building proper, does not characterize a burning resulting from the outer brick walls of the building becoming so heated from without as to set fire to the woodwork within the building. *Sohler v. Norwich Fire Ins. Co.*, 93 Mass. (11 Allen) 336, 337.

### ORNAMENT.

See "Personal Ornaments."

A will contained the following provisions: "To my niece L. I give my finger rings and so many of my books, pictures and ornaments not otherwise bequeathed specifically as she shall choose to take." Held, that the word "ornaments," as used in the will, was intended to include articles of jewelry, such as breastpins, bracelets, earrings, brooches, lockets, chains, etc., and also many articles not classified under the head of "jewelry." *In re Traylor's Estate*, 16 Pac. 774, 775, 75 Cal. 189.

"Altering, repairing, or ornamenting a building," as used in the Illinois mechanic's lien law, does not include putting a lightning rod on a house. *Drew v. Mason*, 81 Ill. 498, 499, 25 Am. Rep. 238.

A statute giving a lien for labor and materials furnished for the building, altering, repairing, or ornamenting any house or other building or appurtenance thereto, does not give a lien on a lot for curbing, grading, and paving the street in front of the same. *Smith v. Kennedy*, 89 Ill. 485.

The word "ornament," in Act May, 1807, the chief object of which was to allow a certain space contiguous to the front line of lots for purposes of utility or ornament, and to provide means by which the health and beauty of the town might be promoted, etc., and allowing, in section 1, 10 feet "for erecting porches in front of houses, for doors or cellars, for an area to allow light to apartments below the level of the ground, for a grass plat or shrubbery, or for other purposes of utility or ornament, as the inclination or taste of the proprietor may direct," is to be construed with reference to the kind of ornament specially enumerated. It would not justify the use of those spaces for purposes of ornament not fairly deducible from the words "grass plat or shrubbery." The

objects of ornament authorized by law are such only as may contribute to the convenience, comfort, or health of owners of lots, provided they do not annoy the public or mar the beauty of the city. *People v. Carpenter*, 1 Mich. (Man.) 273, 283.

#### Watch.

Laws which exempt innkeepers who have provided a safe, and posted notice of the fact in accordance with the act, from liability for money, "jewels, and ornaments" of a guest not deposited in the safe, do not include a watch. The statute applies to certain property which is particularly valuable in itself, takes but small space compared with its value for its safe-keeping, is easy of concealment and removal, and which holds out great temptation to the dishonest, and is not necessary to the comfort or convenience of the guest while in his room. *Ramaley v. Leland*, 43 N. Y. 539, 541, 3 Am. Rep. 728; *Becker v. Warner*, 35 N. Y. Supp. 739, 741, 90 Hun, 187; *Gile v. Libby* (N. Y.) 36 Barb. 70, 77.

The term "jewels or ornaments," in Laws 1897, c. 305, relieving an innkeeper from liability from loss of money, jewels, or ornaments where he furnishes a safe in the office of his hotel, posts notice, etc., and the guest neglects to deposit such articles in the safe, does not include silver table forks, and a silver soup ladle, and a gold watch, even though a state coat-of-arms is engraved on the watch, and a picture of the guest's mother is on the inside of the case. *Briggs v. Todd*, 59 N. Y. Supp. 23, 26, 28 Misc. Rep. 208.

#### ORNAMENTAL PLASTERING.

After the execution of a plastering contract, a dispute arose as to the meaning to be given its terms, the defendants contending that "ornamental plastering" had a technical trade meaning, and only included such ornamental work as is modeled and cast in the shop, and afterwards applied to the building in a dry state; that "plain plastering" means the plain surface, and such plain moldings and cornices as are put on in the form of wet plaster in the building, and is distinguishable from those cornices and moldings which are not put upon the walls until after they are made. Upon this subject there was a conflict in the testimony, and, in so far as the question was one of fact, it was held that the finding of the court below was conclusive. *Woodruff v. Klee*, 62 N. Y. Supp. 350, 351, 47 App. Div. 638.

#### ORNAMENTAL PURPOSES.

A deed of blocks of real estate to a city "for ornamental purposes and not otherwise" implies that such property is to be enjoyed by the public at large, and hence it

cannot be appropriated by the city authorities for its use in the management and conduct of city business by the erection of a city hall and jail thereon. *Church v. City of Portland*, 22 Pac. 528, 531, 18 Or. 73, 6 L. R. A. 259.

#### ORNAMENTAL STRUCTURE.

Baltimore Ordinance 1850, permitting the erection of a "portico, steps or other ornamental structure" on Mt. Vernon Place at a distance of nine feet from the building line, should be construed to include an inclosed porch built over the main entrance to a house, built of brownstone, as the house is, having two stained-glass windows and an ornamental panel in front, and another stained-glass window in the end. From its being inclosed, the doorways or arches through which visitors or inmates pass from this entranceway into the hall or building proper may remain open. Its primary use and purpose is a means of access to the building through the three doorways which are abreast of and command the hall, and this is essentially an inclosed porch or portico for that purpose. The ordinance, from using the descriptive terms "portico, steps," etc., and not mentioning "porch," did not mean to forbid the erection of porches, or use "portico" in a technical sense as distinguishing it from "porch," "plazza," "veranda," or any other equivalent mode of entrance, but in a generic sense, and in effect as synonymous. Besides, the words "or any other ornamental structure" would include a porch, if handsome, whether inclosed or uninclosed, if not implied in the word "portico." *Garret v. Janes*, 3 Atl. 597, 598, 65 Md. 260.

#### ORNAMENTAL TIMBER.

An injunction against cutting "ornamental timber" is confined to timber standing for ornament or shelter, and the description is not the same as trees "contributing to ornament." *Williams v. McNamara*, 8 Ves. 70.

#### ORNAMENTAL TREE.

Within the meaning of Laws 1853, c. 573, providing that any person who shall maliciously or wantonly destroy, injure, or deface any ornamental tree, shrub, or plant, etc., shall be deemed guilty of a misdemeanor, a shade tree is an ornamental tree. *Village of Lancaster v. Richardson* (N. Y.) 4 Lans. 136, 139.

#### ORNAMENTED GLASSWARE.

Tariff Act 1890, Act Cong. Oct. 1, 1890, par. 106, providing a tariff for "ornamental glassware," does not include hollow translucent vessels, molded from glass and etched

with fluoric acid, representing female figures, the heads separable from the body, and fitting closely on a narrow neck so as to form a stopper of a capacity of  $7\frac{1}{2}$  and  $18\frac{1}{2}$  fluid ounces respectively. Such articles are dutiable as bottles under paragraph 103. In re Smith (U. S.) 55 Fed. 476.

### ORNAMENTED PORCELAIN.

The ornamented or decorated porcelain dutiable at 50 per cent. under Rev. St. § 2504, does not apply to paintings on porcelain, which does not in itself constitute an article of chinaware, and therefore it is only dutiable under another provision of the act as "paintings not otherwise provided for." *Arthur v. Jacoby*, 103 U. S. 677, 678, 26 L. Ed. 454.

### ORNERY.

The word "ornery" has not such a place in the English language that any lexicographer has ventured to define it or give it authoritative recognition. It has much of the impress of provincialism. Its use seems to be peculiar to certain localities of people. While it is a word used to express quality or kind, it is not alone applicable to persons. It is doubtless never used to express good qualities. Its use is generally to express the opposite, and it does not in some of its uses differ from the words "common" or "mean." As applied to a woman, it is not equivalent to saying that she is a prostitute. *Wimer v. Allbaugh*, 42 N. W. 587, 588, 78 Iowa, 79, 16 Am. St. Rep. 422.

### ORPHAN.

An orphan is a fatherless child. *Poston v. Young*, 30 Ky. (7 J. J. Marsh.) 501.

An orphan is a minor or infant who has lost both of his or her parents. *Chicago Guaranty Fund Life Soc. v. Wheeler*, 79 Ill. App. 241, 244.

The term "orphans" includes children that are fatherless, within the meaning of a will devising an estate in trust to found a college for white male orphans. *Soohan v. City of Philadelphia*, 33 Pa. (9 Casey) 9, 24.

"Orphans," as used in the constitution of a mutual benefit society, defining the object of the society to be to assist the widows and orphans of deceased members and to establish a widows' and orphans' benefit fund, means children of deceased members, whether their mother is living or not. *Jackman v. Nelson*, 17 N. E. 529, 530, 147 Mass. 300.

The legal meaning of the term "orphan" is a fatherless child. 2 Toml. Law Dict. 678. The term is so used in the statute giving the probate court jurisdiction to

appoint guardians for orphans, as there is nothing in the context of the statute to show that it is employed in a broader sense, and therefore the court cannot appoint a guardian for a minor whose father is living. *Stewart v. Morrison's Ex'rs*, 38 Miss. 417, 419.

"Orphans," as used in the Constitution and by-laws of a beneficial association, designating the beneficiaries of the deceased members as widows, orphans, and other dependents of deceased members, means the "children," in the proper sense of the word, of the deceased member, and "children" means offspring. *Tepper v. Supreme Council of Royal Arcanum*, 45 Atl. 111, 115, 59 N. J. Eq. 321.

#### Adult.

The term "orphan children," in a regulation of a benevolent association providing that a certain benefit shall be paid to the lodge of which deceased was a member, for the use or benefit of his orphan children, in equal shares in case there is no widow, and, in case there is no widow, child or children, or designated person or object, the amount shall be paid to his executor or administrator, does not include adult children. *Hammerstein v. Parsons*, 29 Mo. App. 509, 513.

#### As minor.

In ordinary parlance, the child whose parents are living is not an "orphan"; but the statute which provides that "when any guardian, executor, or administrator, chargeable with the estate of any orphan or deceased person shall die so chargeable, he or her or their executor or administrator shall be compellable to pay out of his, her, or their estate so much as shall appear to be due to the estate of such orphan or deceased person before any other debt of such testator or intestate," clearly uses the word "orphan" as synonymous with "minor." A minor whose father is in life, as well as a minor whose parents are dead, is capable of acquiring an estate, and, if he have one, must have a guardian; and it would be impossible to conclude that the Legislature meant to give the protection only to minors whose parents were dead. *Ragland v. Justices of Inferior Court*, 10 Ga. 65, 70, 71.

Const. 1817, art. 5, § 4, conferring the jurisdiction of "orphans' business" on a certain court, will not be construed as using the word "orphan" as defined by the lexicographers, but the word will be construed as having been used as the equivalent of "minor," and hence the term includes both orphans' and minors' business. *Hall v. Wells*, 54 Miss. 289, 297.

An orphan is one bereft of parents; a minor is one under 21 years of age. In law



and in common parlance, the words "minor" and "orphan" do not mean the same. *Downing v. Schoenberger* (Pa.) 9 Watts, 298, 299.

The word "orphan" or "orphans," as used in the act relative to the sale of unseated lands for taxes, shall be taken and construed to mean "minor" or "minors." 2 P. & L. Dig. Laws Pa. 1894, col. 4638, § 478.

#### **Motherless illegitimate child.**

An orphan is a minor who has lost one or both of his parents. In New Jersey, however, a minor is not regarded as an orphan unless his father is dead. An illegitimate child, however, not being regarded as having any father, is held to be an orphan on the death of his mother. *Friesner v. Symonds*, 20 Atl. 257, 46 N. J. Eq. 521.

#### **Stepchild.**

"Orphans," as used in a charter of a benevolent association to assist and give pecuniary aid to the widows and "orphans of deceased members," the persons designated as "orphans of deceased members" include a stepdaughter of deceased. *Renner v. Supreme Lodge of Bohemian Slavonian Ben. Soc.*, 62 N. W. 80, 81, 89 Wis. 401.

#### **As too indefinite in devise.**

"Orphans," as used in a devise to trustees for the benefit of worthy, deserving poor widows and orphans, means children who have lost one or both of their parents, and a devise to "orphans" is not void. *Beardsley v. Selectmen of Bridgeport*, 3 Atl. 557, 559, 53 Conn. 489, 55 Am. Rep. 152.

The word "orphan" may include a minor who has lost both of his or her parents, or one who has lost only one, so that a devise to all Roman Catholic "orphans" is void for indefiniteness. *Heiss v. Murphey*, 40 Wis. 276, 291.

A gift to the "widows and orphans" of the parish of Lindfield was necessarily confined to such of those two classes who were within the scope of general benevolence, and was a good, charitable bequest. *Attorney General v. Comber*, 2 Sim. & S. 93, 94.

#### **ORPHAN ASYLUM.**

As common school, see "Common School."

An orphan asylum is a place of refuge for orphan children—a home. Children are naturally dependent, and all need a home and protection. Indigent orphans have no home unless it is supplied by charity. To afford such a home, with support and protection, orphan asylums are provided by the humane. The asylum is undoubtedly the home; but these must be maintained by individuals or institutions. A home maintain-

ed by the San Francisco Ladies' Protection and Relief Society, in which is carried on the work of caring for and educating orphans, half orphans, and abandoned children, having therein an average of 20 whole orphans, 115 half orphans, and 42 abandoned children, and from 1 to 8 destitute women, is within a bequest to orphans asylums of the city. In *re Pearsons' Estate*, 113 Cal. 577, 584, 45 Pac. 849, 850.

#### **ORPHANS' BUSINESS.**

The term "orphans' business," in a grant to the probate court of jurisdiction of "orphans' business," includes the power to allot to the members of a decedent's family the personal property of decedent, which, under Code, § 1738, they are entitled to retain free from account on the part of the executor or administrator. *Turner's Adm'r v. Whitten*, 40 Ala. 530, 532.

#### **ORPHANS' COURT.**

The orphans' courts of Pennsylvania are ordinary courts of chancery in their proceedings and decrees within the limited sphere of their jurisdiction, and a writ of error does not lie to review the proceedings of such a court. *Commonwealth v. Judges of Court of Common Pleas*, 4 Pa. (4 Barr) 301-303.

Distinct tribunals for the establishment of wills and administration of the assets of men dying either with or without wills are variously called "prerogative courts," "probate courts," "surrogate courts," and "orphans' courts." *Robinson v. Fair*, 9 Sup. Ct. 30, 35, 128 U. S. 53, 32 L. Ed. 415.

An orphans' court is a court of limited jurisdiction. If it transcend its jurisdiction, its acts will pass for nothing. *Gray v. Fox*, 1 N. J. Eq. (Saxt.) 259, 272, 22 Am. Dec. 508.

The "orphans' court" is not a court of common law, but a court partaking of the powers of a chancery and prerogative jurisdiction, instituted by law to remedy and supply the defects in the powers of the prerogative court with regard to the accountability of executors, administrators, and guardians. The authority given to the court by the act of December, 1784, is very extensive. The jurisdiction of the court is not restricted to orphans or persons under 21 years of age. A citation may issue from it as well against a surviving executor as against the executor of a deceased coexecutor for an accounting. *Wood v. Tallman's Ex'rs*, 1 N. J. Law (Coxe) 153, 155.

#### **OSCILLATE.**

"Oscillate" is defined to vibrate as a pendulum, to move backward and forward:

to swing. "Oscillatory" is defined moving alternately one way and another, as a pendulum; swinging; vibrating. To "vibrate" is defined to move or play to and fro, as a pendulum, to oscillate; to swing. So a machine for treatment of disease by producing an oscillating or vibratory motion in the limbs of the patient is infringed by a machine producing substantially the same motions in the limbs by a rotary motion in the machine. *Taylor v. Wood* (U. S.) 23 Fed. Cas. 807, 812.

## OSTENSIBLE.

Ostensible means capable of being shown; proper or intended to be shown; shown; exhibited; declared; avowed; professed; apparent—often used as opposed to real or actual. *Webst. Dict.*

### OSTENSIBLE AGENCY.

Ostensible agency exists in law where one, either intentionally or from want of ordinary care, induces another to believe that a third person is his agent, although he never in fact employed him. *Bibb v. Bancroft* (Cal.) 22 Pac. 484.

An agency is "ostensible" when the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. *Civ. Code Cal.* 1903, § 2300; *Rev. Codes N. D.* 1899, § 4308; *Civ. Code S. D.* 1903, § 1661; *First Nat. Bank v. Minneapolis & N. Elevator Co.* (N. D.) 91 N. W. 436, 438.

### OSTENSIBLE AUTHORITY.

"Ostensible authority" is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. *Civ. Code Cal.* 1903, § 2317; *Quay v. Presidio & F. R. Co.*, 22 Pac. 925, 927, 82 Cal. 1; *Civ. Code S. D.* 1903, § 1675. "There are two essential features of an authority of this character; that is, the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held. A belief founded on the agent's statements is not sufficient, for the party has no right to take the agent's word for the existence of his authority." Where it does not appear that the acts of a principal which are supposed to have been sufficient to justify a belief in an agent's authority were known to the person dealing with him, they could not have generated in his mind any belief on the subjects of the agency, and hence there was no "ostensible authority." *Harris v. San Diego Flume Co.*, 25 Pac. 758, 87 Cal. 528. This is the embodiment of a well-established principle of the common law which has been called the "foundation of

the law of agency." *Quinn v. Dresbach*, 16 Pac. 762, 763, 75 Cal. 159, 7 Am. St. Rep. 138.

"Ostensible authority" as used in *Civ. Code*, § 2369, providing that a factor has ostensible authority to deal with the property of his principal as his own in transactions with persons not having notice of the actual ownership, has a broader meaning than "ostensible authority" as used in *Civ. Code*, § 2317, defining "ostensible authority" to be such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess, for it has reference to the ostensible authority of agents in general. "The authority is as real where it is declared to be ostensible as where it is declared to be actual." *Wisp v. Hazard*, 6 Pac. 91, 92, 66 Cal. 459.

"Ostensible authority" is defined in *Comp. Laws*, §§ 8965, 3979, as such authority as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess; and an agency is "ostensible" when the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. *Reid v. Kellogg*, 67 N. W. 687, 689, 8 S. D. 596.

### OSTENSIBLE PARTNER.

Gow, in his *Treatise on Partnership*, 12, 13, says: "An actual, ostensible partner is one who not only participates in the profits and contributes to the losses, but he appears and exhibits himself to the world as having a personal connection therewith, and as forming a component member of the firm." *Mitchell v. Dall* (Md.) 2 Har. & G. 159, 171.

An "ostensible" partner is one whose name appears to the world as such. *Civ. Code Ga.* 1895, § 2628.

## OSTEOPATHY.

The practice of osteopathy consists principally in rubbing, pulling, and kneading with the hands and fingers certain portions of the body, and flexing and manipulating the limbs, of those afflicted with disease, the object of such treatment being to remove the cause or causes of trouble, and comes within the provisions of *Comp. St. art. 1, c. 55, § 17*, requiring those who engage in the practice of medicine to procure a license. *Little v. State*, 84 N. W. 248, 60 Neb. 749, 51 L. R. A. 717.

Osteopathy teaches neither therapeutics, materia medica, nor surgery. Bacteriology is also ignored by it. It depends entirely on manipulation of the body for diseases. Its theory is that a large number of ailments are due to irregular nerve action, and that by manipulation they enable nature herself to right

the evil. It administers no drugs; it uses no knife. It does not profess to cure all diseases. When a case is presented requiring surgery or medicine, the osteopath gives way to physicians. Faith cure or magnetism has no place in the system. It relies wholly upon manipulation aiding the vis medicatrix nature. The main things taught in the school are physiology, anatomy, and the treating of diseases by manipulation. The system is new, and of necessity imperfect as yet, but it is efficacious where the regular practice is ineffective. Still a school of osteopathy is not a "medical college" within the popular meaning of this term, nor within St. § 2613, authorizing the State Board of Health to issue a certificate to practice medicine to a physician who has a diploma from a reputable medical college. *Nelson v. State Board of Health*, 57 S. W. 501, 504, 108 Ky. 769, 50 L. R. A. 383.

The system of rubbing and kneading the body, commonly known as "osteopathy," is not an "agency" within the meaning of Act Feb. 27, 1896, "to regulate the practice of medicine" (92 Ohio Laws, p. 44), which forbids the prescribing of any "drug or medicine or other agency" for the treatment of disease by a person who has not obtained from the Board of Medical Registration and Examination a certificate of qualification. *State v. Liffing*, 55 N. E. 168, 61 Ohio St. 39, 46 L. R. A. 334, 76 Am. St. Rep. 358.

"Osteopathy" is defined as a method of treating diseases of the human body without the use of drugs, by means of manipulations applied to various nerve centers—chiefly those along the spine—with a view to inducing free circulation of the blood and lymph, and an equal distribution of the nerve forces. Special attention is given to the readjustment of any bones, muscles, or ligaments not in the normal position. The course of study in osteopathic colleges covers a period of four terms of five months each, and includes, in addition to the theory of clinical demonstration of osteopathy, demonstrative and descriptive anatomy, histology, chemistry, physiology, hygiene, pathology, physiological psychology, dietetics, obstetrics, and minor surgery. So that an exemption, in a statute regulating the practice of medicine, of those practicing osteopathy, seems based upon mental competency, though persons practicing by means of animal magnetism or hypnotism are excluded. *Parks v. State*, 64 N. E. 862, 869, 159 Ind. 211, 59 L. R. A. 190.

## OTHER.

See "All Other"; "Any Other"; "Every Other"; "No Other."

"Other" always implies something additional. *Ayrton v. Abbott*, 14 Adol. & E.

1, 17; *Michel v. American Cent. Ins. Co.*, 44 N. Y. Supp. 832, 835, 17 App. Div. 87.

The use of the word "other" in *Sess. Laws* 1885, c. 49, §§ 1, 2, providing that it shall be unlawful for any person, after obtaining a divorce, to marry again during the time allowed for an appeal, and that a violation of this act shall subject the party violating it to all the penalties as in other cases of bigamy, plainly implies that, notwithstanding the divorce, the former relation is regarded as still continuing. It implies that a divorced person, until his status becomes unalterably fixed, is to be considered and dealt with as if the decree of divorce had not been granted. *Eaton v. Eaton* (Neb.) 92 N. W. 995, 997.

### As all.

In a residuary bequest of "all other the rest and residue of my personal estate," after enumerating several subjects, the word "other" did not restrict the ordinary effect of the gift of residue, but it carried all the rest and residue. *Martin v. Glover*, 1 Colly. 269, 271.

"Others," as used in Pub. St. c. 195, § 2, as amended by Pub. Laws, c. 269, § 1, providing that the special courts of common pleas shall have jurisdiction of all actions brought for possession of tenements or estates let against "tenants and others" who have broken the terms and conditions of the lease or agreement under which they held, or who hold or occupy tenements or estates by wrongful entry or detainer, or as tenants at will or by sufferance, should be construed as meaning not only tenants of the plaintiff, but those who are not such tenants and those who have never been tenants of the plaintiff, as well as to those who formerly were and have ceased to be such. *Kenney v. Sweeney*, 14 R. L. 581, 582.

### As different.

"Other," as used in Const. art. 6, § 4, providing that the Supreme Court shall have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all "other writs" necessary or proper to the complete exercise of its appellate jurisdiction, is equivalent to "different from those which have been specified." "Other" does not mean the same as the word "also." Webster's definition of "other" is "different from that which has been specified"; Worcester's, "not the same; not this or these; different." *Hyatt v. Allen*, 54 Cal. 353, 354.

"Other," as used in a statute declaring that inconsistent acts should be repealed, but that it shall not be construed to limit or abridge any other or greater power possessed by the governing body of any municipality, means "different." *Mulcaby v. City of Newark*, 31 Atl. 226, 57 N. J. Law, 513.

The words "other water," as used in a contract by a water company to supply pure water for certain specified purposes, and to supply for other purposes such other water as might be needed, are not equivalent to "additional water," and are put in contrast with "pure water," which the water company was to supply for purposes that required pure water. *Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.*, 31 Atl. 484, 485, 167 Pa. 136.

Code Cr. Proc. § 444, provides that on indictment for crime, "consisting of different degrees," the jury may find defendant guilty of any inferior degree. Section 445 provides in all "other" cases defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged. One indicted for murder cannot be convicted of an assault, since the charge of murder is a charge of crime "consisting of different degrees," and the use of the word "other" in section 445 must exclude cases where the crime consists of different degrees. *People v. Connors*, 35 N. Y. Supp. 472, 474, 13 Misc. Rep. 582.

The word "other," as used in a statute relating to the taxation of logs in transit "other than through any water course in or bordering on" the state, is used to express a difference, such difference being between a transit which is, and one which is not, through any water course. *Diamond Match Co. v. Ontonagon*, 23 Sup. Ct. 266, 270, 188 U. S. 82, 47 L. Ed. 394.

#### **As ejusdem generis.**

The rule of ejusdem generis is by no means a rule of universal application, and its use is to carry out, not to defeat, the legislative intent. When it can be seen that the particular word by which the general word is followed was inserted, not to give a coloring to the general word, but for a distinct object, then, to carry out the purpose of the statute, the general word ought to govern. It is a mistake to allow the rule to pervert the construction. *State v. Broderick*, 7 Mo. App. 19, 20.

"Other" is a word of addition, and is often used in fire insurance policies to cover articles of the same kind and not particularly described by the preceding words. In a statute or in a contract where general words follow specific words, the general words are not construed to mean things of different kinds from those described by the specific words, but denote things of the same kind and for the same use. *Michel v. American Cent. Ins. Co.*, 44 N. Y. Supp. 832, 835, 17 App. Div. 87.

#### **As explanatory.**

The use of the word "other" in a question, in an application for a life policy, if

the applicant's parents, etc., have been afflicted with consumption, scrofula, insanity, epilepsy, diseases of the heart, or other hereditary disease, plainly indicates that the question in reference to the enumerated diseases is to be taken as having reference to a hereditary form only of such diseases. *Gridley v. Northwestern Mut. Life Ins. Co.* (U. S.) 11 Fed. Cas. 2, 3.

"Other equity cases," as used in Laws 1890, c. 167, providing for the bringing of an action by a wife to compel her husband to support her, section 3 of which provides that the practice in such cases shall conform as nearly as may be to the practice in divorce cases, and the court shall have power to enforce its orders as in "other equity cases," implies that a proceeding under this statute is a proceeding in equity. *Bauer v. Bauer*, 49 N. W. 418, 419, 2 N. D. 108.

"Other," as used in a statute providing that grants on entries and surveys made in the life of the late proprietor shall be made out in the same manner as is by law directed in case of other unappropriated lands, imports that the lands to which the entries in question relate are also unappropriated lands. *Alexander v. Greenup* (Va.) 1 Munf. 134, 144, 4 Am. Dec. 541.

Gen. St. 1878, c. 46, § 3, provides that the share of real property taken by a surviving husband or wife shall be subject, in proportion with the "other" real estate, to the decedent's debts. Held, that the term "other" implies that the real estate which is to share with it the burden of paying debts is also the property of the deceased, which would not include property conveyed by him or her during life. *Goodwin v. Kumm*, 45 N. W. 853, 854, 43 Minn. 403.

As used in Pub. St. c. 27, § 10, providing that city councils might appropriate a small sum for arms, for the celebration of holidays, and for other public purposes, "other" implies that the celebration of holidays is a public purpose within the meaning of the act, and indicates that purposes which are "public" only in that sense are included within its scope, although they look more obviously to increase the picturesqueness and interests of life than to the satisfaction of rudimentary wants, which alone were generally recognized as necessary. *Hubbard v. City of Taunton*, 5 N. E. 157, 140 Mass. 467.

"Other," as used in a charter of the city of St. Paul (Sp. Laws 1874, c. 1, § 3) conferring power to establish markets and "other" public buildings, shows that markets was used in a restricted sense, to designate public buildings erected and devoted to the use of receiving for sale and purchase such marketable articles for daily use and consumption as might be wanted to supply the inhabitants

of the city. *City of St. Paul v. Traeger*, 25 Minn. 248, 253, 33 Am. Rep. 462.

The phrase "other intoxicating drinks," in 28 St. 697, prohibiting the sale of any vinous, malt, or fermented liquor, or of any other intoxicating drinks whatsoever, is to be construed, not as showing that the vinous, malt, or fermented liquor must be intoxicating, but rather as showing that the sale of such liquors is prohibited, whether intoxicating or not. *United States v. Cohn*, 52 S. W. 38, 45, 2 Ind. T. 474.

#### As indefinite term.

Where an indictment charged an act to have been done by violence and other means, the words "other means," though if used alone would render the charge too indefinite, being used in connection with other words, were merely surplusage. *State v. Haney*, 19 N. C. 390, 404.

The words "goods, wares, chattels, implements, fixtures, tools, and other personal property," in a chattel mortgage so describing the mortgaged property, are insufficient in failing to identify any particular property so that it can be known as to what it is intended to apply. *Buskirk v. Cleveland* (N. Y.) 41 Barb. 610, 611.

The phrase "other weapons of like kind and description," in an indictment charging that the defendant carried concealed about his person brass knuckles or other weapons of like kind or description, which alternative statement is authorized by Code, § 3779, is sufficiently definite to authorize a conviction for carrying any firearms, a knife, instrument, or other weapon which may be proved to fall within the class prohibited—"or of like kind or description." *Bell v. State*, 8 South. 133, 89 Ala. 61.

"Other philosophical or philanthropic purposes," as used in a devise to trustees of property, to be by them applied for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropic purposes, means purposes which are not dissimilar in character from the purpose specified. *Rotch v. Emerson*, 105 Mass. 431, 433.

#### Other accidental causes.

"Accidental causes," within the meaning of Rev. St. §§ 4386-4388, forbidding interstate carriers of animals from confining them more than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented by storm or other accidental causes, does not include an accident to a train due to negligence. The meaning of the general words "other accidental causes" must be ascertained by referring to the preceding special words. The rule "*noscitur a sociis*" is clearly applicable. A storm is unavoidable

in the sense that it cannot be prevented. "Other accidental causes" must be taken to mean "other unavoidable causes." *Newport News & M. V. Co. v. United States*, 61 Fed. 488, 490, 9 C. C. A. 579.

#### Other action.

The term "other action," in a statute limiting every possessory, ancestral, mixed, or other action for any lands, tenements, or hereditaments or lease for a term of years, includes an action in the nature of a writ of right, though a writ of right is omitted from the section, and was in a former section from which the act was copied. *Ellis v. Murray*, 28 Miss. (6 Oushm.) 129, 142.

#### Other actionable injury.

Code Civ. Proc. § 3343, defines a "personal injury" as including libel, slander, criminal conversation, seduction, and malicious prosecution; also assault, battery, false imprisonment, "or other actionable injury to the person." Held, that the phrase "other actionable injury" should be construed as if it had read "other similar actionable injury," and hence did not include an action against the master to recover personal injuries sustained through the negligence of a servant, and in such case there was no right to an order of arrest under sections 1487 and 549, authorizing arrest in action for personal injuries. *Lasche v. Dearing*, 53 N. Y. Supp. 58, 59, 23 Misc. Rep. 722.

#### Other acts.

All other acts, see "All."

"Other acts," as used in a municipal charter authorizing the municipality to do certain specified acts and all "other acts" as natural persons, "must necessarily be restrained to such other acts as are authorized by its charter, or the statutes of the state applicable to the city, if any, and cannot be construed to remove all the limitations inseparable from corporate existence, and to confer upon the city authority to engage in business of a private nature, or to make its powers commensurate with those of natural persons. It is not, therefore, an express power to borrow money or to issue commercial paper." *Gause v. Clarksville* (U. S.) 10 Fed. Cas. 96, 98.

"Other acts," as used in the charter of a school board authorizing it to sue for and be sued, and to purchase, receive, and hold property, real and personal, to lease, sell, and dispose of the same, and do all "other acts" as natural persons, means other acts within the powers specifically granted, but not specified, and which are necessary to be done in connection with the execution of the enumerated powers. It does not authorize such school board to issue bonds for the erection

of a schoolhouse. *Erwin v. St. Joseph Board of Public Schools* (U. S.) 12 Fed. 680, 682.

#### Other agricultural product.

The term "other agricultural product or property," in a statute in reference to injuries to growing fruit, corn, grain, or "other agricultural product or property," real or personal, of any description whatever, cannot be construed to include products other than agricultural. *Murray v. State*, 2 S. W. 757, 762, 21 Tex. App. 620, 57 Am. Rep. 623.

#### Other alienations.

The words "other alienations," in Laws 1858, p. 236, §§ 1, 2, exempting a homestead, and providing that such exemption shall not extend to a mortgage lawfully obtained, but such mortgage or "other alienation" of such land by the owner thereof shall not be valid without the signature of the wife of the owner, applies to all alienations, and includes a deed executed by a husband alone, and therefore such deed is void. *Schermerhorn v. Mahaffie*, 8 Pac. 199, 202, 34 Kan. 108.

#### Other amounts due.

"Other amounts due," as used in warehouse receipts for whisky in barrels, providing that it should be delivered after payment of the United States internal revenue tax and all "other amounts due," means proper warehouse charges, as, for instance, the storage charges. *State Bank of City of New York v. Waterhouse*, 38 Atl. 904, 908, 70 Conn. 76, 66 Am. St. Rep. 82.

#### Other animals.

The words "other animals," as used in Rev. St. § 4386 [U. S. Comp. St. 1901, p. 2996], providing that "no railroad company within the United States whose road forms any part of a line of a road over which cattle, sheep, swine, or other animals are conveyed from one state to another," etc., shall confine the same in cars, boats, or vessels of any description for a longer period than 28 consecutive hours without unloading the same for rest, water, and feeding for a period of at least 5 consecutive hours, are sufficiently comprehensive to embrace horses and mules, though horses and mules are not named in the statute. *Chesapeake & O. Ry. Co. v. American Exch. Bank*, 23 S. E. 935, 937, 92 Va. 495, 44 L. R. A. 449; *United States v. Louisville & N. R. Co.* (U. S.) 18 Fed. 480, 481.

In the statute requiring railroad companies to fence their tracks and build cattle guards, and providing that "until fences, opening gates, and farm crossings, and cattle guards as aforesaid shall be made and maintained such corporation shall be liable in double the amount of damages which shall

be done by its agents, engines or cars to horses, cattle, mules or other animals on such road," the words "other animals" include sheep and hogs. *Henderson v. Wabash, St. L. & P. R. Co.*, 81 Mo. 605, 607, 608.

#### Other annual profits of estate.

A will provided that a legatee should receive rents, with timber felled, and "other annual profits" from a certain estate, due the testator at the time of his decease. Held, that tiles and bricks made on the estate from the soil thereof, and brick earth already prepared at the time of testator's death, passed to the legatee, the testator having given a key to the meaning of all "other annual profits" by coupling these words with the phrase "with timber felled." *Stapleton v. Stapleton*, 2 Sim. 212, 222.

#### Other articles.

"Other articles or things not prohibited by law," within the meaning of Act March 19, 1882, exempting from taxation all machinery used for the manufacture of cotton or woolen goods, yarns, or fabrics composed of these or other materials, or for the making of all kinds of machinery or implements of husbandry, or of all other things or articles not prohibited by law, by a well-known rule of statutory interpretation must be referred to the particular words which they immediately follow, and cannot include only articles or things ejusdem generis with those specifically enumerated, unless the text clearly requires that the general words shall be construed in their larger signification. The term does not include ice factories. *Greenville Ice & Coal Co. v. City of Greenville*, 10 South. 574, 575, 69 Miss. 86.

"Other article," as used in Rev. St. § 4963, providing that every person who shall insert or impress a notice of copyright, or words of the same import, in or upon any book, map, chart, musical composition, print, cut, engraving, or photograph or "other article" for which he has not obtained a copyright shall be liable to a penalty, does not mean any articles, whether copyrighted or not, but must be taken as limited to other articles which in preceding sections have been described as the proper subject of copyright, a part of which only are expressly enumerated in this section. *Rosenbach v. Dreyfuss* (U. S.) 2 Fed. 217.

In construing a statute providing that there shall be exempt from taxation and license the capital, machinery, and other property employed in the manufacture of furniture and other articles of wood, the courts say that the word "other," as qualifying articles of wood, contributes to give a restrictive sense to the words "articles of wood," and satisfies our mind that the articles of wood contemplated are such as fur-

niture and other like articles. *Carre v. City of New Orleans*, 6 South. 893, 895, 41 La. Ann. 996.

"Other articles," as used in 14 Stat. § 14, providing that there shall be excepted from the operation of this section the necessary household and kitchen furniture, and such "other articles" and necessities of such bankrupt, etc., is a very indefinite expression, and might include family pictures, watches, or clocks, and many other things of small value, but cannot be construed as including things of considerable value, when used only as things of ornament or pleasure, as gold watches or pianos, and the like. In *re Thiel* (U. S.) 23 Fed. Cas. 917, 918; In *re Williams* (U. S.) 29 Fed. Cas. 1320.

"Other articles and necessities," as used in a statute relating to the property of a bankrupt which should be taken possession of by his assignee, and providing that there should be exempt from the operation of such statute the necessary household and kitchen furniture, and such "other articles and necessities" of such bankrupt as the assignee should designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed a certain specified value, means only that description of property which is palpably of an immediate necessity to the bankrupt or his family, and has relation to things not precisely furniture or wearing apparel, but manifestly useful to the individual or his family, in a like sense. "Provisions in the house, the common implements or tools of trade by which a day's support is gained, may justly be ranked in that class," and the auction stand and flags, as things in daily use necessary to the business of the bankrupt, fairly fall within the catalogue of articles that may be exempted, but a fowling piece, pistol, fishing tackle, paintings, etc., or watch, are not necessities within the purview of the act. In *re Ludlow*, 1 N. Y. Leg. Obs. 322, 323.

Act Nov. 30, 1865, entitled "An act to amend an act entitled 'An act for the better protection of religious meetings, agricultural fairs and other lawful assemblages of the people,' approved March 3, 1859" (Acts 1865, Sp. Sess. p. 201), provided that no person not the owner of the real estate, and not carrying on his regular business at the usual place of transacting the same, shall sell or offer for sale any drinks "or other articles" within a mile of the place where such assemblage is being held. Held, that the intention of the statute was not alone to prevent the sale of drinks nearer the locus of such public assemblage, but the term "other articles" had a broad signification, and included within the prohibition the keeping of an eating house and stand by an itinerant vender, though he sold articles intended to be

drank and eaten not mentioned in the statute by name. *State v. Solomon*, 33 Ind. 450, 452.

"Other articles," as used in an assignment to a trustee for the benefit of creditors of certain specified property and other articles, is equivalent to the phrase "all other articles." *Dowdel v. Hamm* (Pa.) 2 Watts, 61, 64.

The general borough law of Pennsylvania of 1851 (Purd. Dig. 202, pl. 58) gives to all boroughs "the power to make all regulations respecting markets and market days, the hawking and peddling of market produce and other articles in the borough," etc. In construing this provision, the court said: "The peddling of 'other articles' beside market produce includes everything which may be disposed of by the method called hawking and peddling, and we cannot say that this does not include canvassing from house to house, and soliciting orders for books." *Borough of Warren v. Geer*, 11 Atl. 415, 416, 117 Pa. 207.

"Other articles of traffic," within the meaning of a statute making it a misdemeanor to expose to sale or gift any spirituous or other liquors, or any provisions, or "other articles of traffic" in certain places, is not to be restricted to articles of like nature to those enumerated, but the prohibition is against exposing to sale or gift any article of traffic, the enumeration being merely of such articles as would be most likely to be exposed and most obnoxious to the prohibition. *Riggs v. State*, 75 Tenn. (7 Lea) 475, 476.

#### Other bailee.

The meaning of the words "other bailee" in Wag. St. p. 469, § 37, making it criminal for any carrier or "other bailee" to embezzle, etc., is not limited by the rule of ejusdem generis to apply only to carriers. *State v. Broderick*, 7 Mo. App. 19, 20.

#### Other bank.

The charter of a bank provided that promissory notes made payable at the principal office of that bank or at any of its branches "or any other bank" shall be placed on the footing of foreign bills of exchange indorsed to and delivered to the charter bank. Held, that the term "other bank" meant only incorporated or legalized banks, and was not intended to include mere private institutions. *Campbell's Ex'r v. Farmers' Bank of Kentucky*, 73 Ky. (10 Bush) 152, 155.

#### Other beasts.

In *United States v. Glendon*, 1 Minn. 292 (Gil. 226), it was held that the malicious killing of a dog was not an indictable offense under a statute providing that every

person who shall willfully and maliciously kill, maim, or disfigure any horses, cattle, or "other beasts" of another person shall be punished, etc. *Patton v. State*, 19 S. E. 734, 93 Ga. 111, 24 L. R. A. 732.

#### Other beverages.

Laws 1885, p. 151, § 1, entitled "An act to protect the property of manufacturers, bottlers, and dealers in mineral waters, soda water, and other beverages from loss of syphons, bottles, and boxes," does not protect the manufacturer of a liquid preparation used as a beverage, and known as "Wild Cherry Bitters," since the words, "or other beverages," as used in the act, refer to the class known as "mineral waters" or "soda water." *State v. Dinness*, 19 S. W. 92, 93, 109 Mo. 434.

#### Other buildings.

See "Building."

"Other building," within the meaning of a statute making it burglary for any person to break or enter any shop, store, booth, tent, warehouse, or other building, means a building of like kind with those enumerated, and does not therefore embrace a chicken house. *State v. Schuchmann*, 33 S. W. 35, 36, 34 S. W. 842, 133 Mo. 111. Contra, see *Gillock v. People*, 49 N. E. 712, 713, 171 Ill. 307; *State v. Rogers*, 39 Pac. 219, 220, 54 Kan. 683, deciding that a courthouse was included.

#### Other business, trade, avocation, or profession.

"Other business," as used in Act 1872, designed to secure money due for labor and services rendered by any miner, mechanic, laborer, or clerk from any person or persons or charter company employing clerks, miners, mechanics, or laborers, either as owners, lessees, contractors, or underowners of any works, mines, manufactory, or "other business" where clerks, miners, or mechanics are employed, is not sufficiently comprehensive to embrace cutting and driving logs. The preceding words designating particular branches of business with which the idea of permanency and completeness in a certain sense is always associated control the meaning of the more general expression, "other business," used in immediate connection therewith. The other business is *eiusdem generis* with that more particularly described by the preceding words of the context, business of the same general character, and not embracing every species of employment in which the services of others may be rendered. *Appeal of Pardee*, 100 Pa. 408, 412.

Act June 13, 1883, amends Act April 9, 1872, so as to greatly enlarge the classes of employes whose wages due from any person or persons or chartered company employing clerks, miners, mechanics, or laborers, ei-

ther as owners, lessees, contractors, or under-owners of any works, mines, manufactory, or "other business," shall be a lien on the property, and entitled to a preference in payment. Held, that the words "or other business" in the act of 1883 should not be limited to business of the same general nature as those specifically enumerated, which was the construction given to the act of 1872, but the class of employers is enlarged, by necessary implication, to correspond with the classes of employes enumerated in the act, and the words "other business," in the act, include all kinds of business in which any of the classes of employes named in the act are engaged. *Sprout v. Murray*, 27 Atl. 303, 304, 156 Pa. 293.

The term "other business," in the act of April 9, 1872, as amended by the act of June 13, 1883, making the wages of employes in certain designated businesses and other business a preferred claim, does not include the business of a skating rink, as the statute makes no reference to places of amusement. *Merriam v. Mullett*, 2 Pa. Co. Ct. R. 360, 362.

"Other business, trades, avocations or professions," within the meaning of a statute conferring upon the city of St. Joseph the power of licensing, taxing, and regulating auctioneers, grocers, commission merchants, retailers, merchants, hotel and inn keepers, boarding houses, public buildings, public grounds, concerts, photographers, artists, agents, porters, runners, drummers, public lecturers, public meetings and shows, real estate agents and brokers, horse and cattle dealers, beerhouses, patent right dealers, inspectors, gaugers, stock yard and wagon yard proprietors, mercantile agents and insurance agents, banking and other corporations and institutions, street railroad cars, coaches, omnibuses, carts, drays, job wagons, ice wagons, and other vehicles, and all other business, trades, avocations, or professions whatsoever, does not include an abstracter of titles, though it may be admitted that the words are sufficiently comprehensive to embrace the avocation if they were considered as standing alone, independent of the preceding parts of the section and other provisions of the statute in *pari materia*; but it is among the well-recognized rules of construction that, when a particular enumeration of words is followed by general terms or words, the latter are to be understood as limited in their scope and application to the business and thing of the same kind and character as those specified in the preceding part. *City of St. Joseph v. Porter*, 29 Mo. App. 605-668.

The words "all other business, trades, avocations or professions," in St. Louis City Charter, authorizing the city by ordinance to license, tax, and regulate auctioneers, grocers, merchants, retailers, hotels, boarding



houses, tenement houses, office buildings, public halls, public grounds, concerts, photographers, artists, agents, porters, runners, drummers, public lecturers, public meetings and shows, real estate agents and brokers, horse and cattle dealers, beerhouses, patent right dealers, inspectors and gaugers, stockyard proprietors, examiners of titles, conveyancers, mercantile agencies, insurance companies, banking or other incorporations or institutions, street railroad cars, hackney carriages, omnibuses, carts, drays, and all other vehicles, and "all other business, trades, avocations or professions" whatever, cannot be made to include persons not of the same generic character or class as the enumerated persons, and therefore the charter does not authorize the city to license lawyers. *City of St. Louis v. Laughlin*, 49 Mo. 559, 564.

#### Other cars.

"Other cars," as used in Laws 1893, c. 220, providing that every railroad company shall be liable for injuries caused by negligence to employes engaged in operating passenger or freight or other trains, engines, or cars, will include hand cars, and not merely cars used in operating trains on the road, under the rule *ejusdem generis*. *Benson v. Chicago, St. P., M. & O. Ry. Co.*, 77 N. W. 798, 799, 75 Minn. 163, 74 Am. St. Rep. 444.

#### Other cases.

"Other cases," as used in Act 1836, § 17, giving a right of appeal in all actions, suits, controversies, etc., on cases arising under any law of the United States granting or conferring on inventors the exclusive right to their inventions when the sum in dispute is below the value of \$2,000, and in all "other cases" in which the court shall deem it reasonable to allow the same, refers to the cases described in that section and in which the matter in dispute is below \$2,000. *Wilson v. Sanford*, 51 U. S. (10 How.) 99, 101, 13 L. Ed. 344.

The words "powers usual in other cases" in How. Ann. St. c. 93, § 10, providing that, on the report of the commissioners appointed by a court of record to ascertain the damages sustained by the owners of real estate taken by railway companies, the court on motion shall confirm the same, unless, for good cause shown by either party, "said court, as to the confirmation of such report, shall have the powers usual in other cases," refers to the powers of courts in the confirmation of reports made to such court by some body or person authorized by law to make them in accordance with the known practice of the court; and since neither the practice in chancery causes with reference to the confirmation of reports made by court commissioners or other officers of the court, nor the statute provisions with relation to the re-

ports of commissioners of the court, extends further than to the mere setting aside of the reports for exceptions thereto, and does not authorize the appointment of new or different commissioners, the words "power usual in other cases" meant the power to set aside by the court, but not to appoint new commissioners. *Bachus v. Gartner*, 50 N. W. 646, 650, 89 Mich. 209.

#### Other casualty.

"Other casualty," as used in Rev. St. § 3221, abating tax on distilled spirits destroyed while in a bonded warehouse by fire or other casualty, means an accidental destruction by some cause of like character and operation as fire, such as lightnings, floods, cyclones, storms, or some uncontrollable force which ordinary foresight and prudence could not guard against nor prevent, and hence spirits lost by the warping of barrels from unusual and excessive heat, abnormal evaporation caused by such heat, or the existence of undiscoverable wormholes within the barrels, was not a loss within the meaning of the statute. *Crystal Spring Distillery Co. v. Cox* (U. S.) 49 Fed. 555, 559, 1 C. O. A. 365.

#### Other causes.

As used in Gen. Laws 1865, c. 189, § 2, authorizing the board of supervisors of M. county to remove an inspector of the house of correction for certain specified causes or "other causes" satisfactory to said board, "other causes" is to be considered as meaning "other kindred cause showing that it is improper that the incumbent should be retained in office." *State v. McGarry*, 21 Wis. 496, 498.

"Other causes," as used in a report of appraisers appointed to fix the full amount of the loss, and stating that taking into consideration the condition of the property, and making deductions for depreciations and "other causes," will be held to mean, under the maxim of *ejusdem generis*, such causes as might tend to fix the full amount of such loss, and to add them in making an award equivalent to damages sustained. *Stemmer v. Scottish Union & National Ins. Co.*, 53 Pac. 498, 501, 33 Or. 65.

The "other causes" mentioned in a statute giving a wife the privileges of a free trader whenever her husband, from drunkenness, profligacy, or "other cause," shall neglect or refuse to provide for his wife, or shall desert her, does not apply to the temporary inability of the husband to support his wife by reason of sickness. "There must be a desertion or a neglect or refusal upon the part of the husband, something that involves the willful nonperformance of a duty on his part." *Kling v. Thompson*, 87 Pa. 365, 369, 30 Am. Rep. 364.

**Other choses in action.**

As used in Rev. St. § 629, declaring that no circuit court shall have jurisdiction of any suit to recover the contents of any promissory note or "other chose in action" in favor of an assignee unless the suit might have been prosecuted in such court if no assignment had been made, the phrase "other chose in action" is broad enough to comprehend any claim, whether liquidated or not, which is the subject of assignment, and did not confine the scope of the section, therefore, to choses in action evidenced by transferable paper. *Corbin v. Black Hawk County*, 105 U. S. 659, 665, 26 L. Ed. 1138.

**Other children.**

"Other children," as used in a will providing that after the death of the decedent's wife the estate should be divided among their surviving children, the sons' shares to be given to them absolutely, and the shares of the daughters to be assigned to a trustee and the income applied to the benefit of the daughters and their husbands during life, and after their death the trust property to vest in their respective issue, if any, and, if none, to "go to my other children or their issue," should not be construed to mean all of the testator's children, but to mean those who survive the son or daughter so dying. *Lee v. Welch*, 39 N. E. 1112, 1113, 163 Mass. 312.

The words "other children," in a will in which testator devises certain of his lands to his son A. and other lands to his son C., and providing, if the sons should die, or either of them, without child or children, the real estate given to them or either of them should go to testator's other children, share and share alike, were construed to include one of the sons who died leaving a child. *Brooks v. Klipp*, 35 Atl. 658, 661, 54 N. J. Eq. 462.

**Other civil proceedings.**

"Other civil proceedings," as used in Code 1851, includes all proceedings for special relief which cannot be included within the term "civil or criminal actions," and the words are intended to represent proceedings of a special or independent character, such as contempt, injunction, mandamus, information, etc. *Kramer v. Rehman*, 9 Iowa, 114, 118.

**Other conditions.**

A bill of lading stating that the goods are to be delivered on the payment of the agreed freight "and other conditions" means that before a consignee was entitled to deliver he was bound to make a payment beyond the freight, and to make other payments specified in the charter party, such as demurrage, when demurrage is mentioned therein. *Smith v. Sleeveking*, 4 E. & B. 945, 951.

**Other contracts.**

"Other contracts," within the meaning of Code, § 2594, providing that actions on promissory notes, bonds, or other contracts, express or implied, for the payment of money, must be prosecuted in the name of the party really interested, whether he has the legal title or not, includes contracts of fire insurance. *Insurance Co. of North America v. Forchheimer*, 5 South. 870, 875, 86 Ala. 541.

**Other contrivance.**

Under Act March 25, 1886, making it a felony to set up, carry on, or conduct a keno bank, faro bank, or other machine or contrivance used in betting, it is held that the term "other machine or contrivance" must, under the rule of ejusdem generis, be limited to such as are similar in character to a faro or keno bank, and that hence the game of oontz, played with dice on a table or other surface, by betters, does not come within the meaning of the term "other machine or contrivance." *Commonwealth v. Kammerer* (Ky.) 13 S. W. 108.

**Other corporations.**

Comp. Laws 1871, c. 130, § 9, provides that, when any judgment shall be recovered against any turnpike or "other corporation" authorized to receive toll, the franchise of such corporation may be taken on execution, etc. Section 13 provides that the officer's return shall transfer to the purchaser all the privileges belonging to such corporation so far as relates to the right of demanding toll, and the officer shall deliver possession of all the toll houses and gates belonging to such corporation. Held, that the words "other corporation," as used in section 9, when read in connection with section 13, meant other corporations having tollhouses and tollgates of the same general nature and kind as turnpike and toll-road corporations, and hence did not include nor apply to telephone companies. *Ripley v. Evans*, 49 N. W. 504, 507, 87 Mich. 217.

The words "other corporations," in Acts 1877, p. 188, entitled "An act to secure the payment of wages or salaries to certain employes of railway, canal steamboat, and other corporations," and giving such employes a prior lien on the franchises, etc., of the companies, must be construed, by the maxim "noscitur a sociis," to mean corporations ejusdem generis. If we give the title the broad signification claimed for it by the appellants, and make the words "other corporations" mean corporations of every class, as well as corporations for transportation purposes, the title of the act would not express its object, and the act would be obnoxious to the constitutional requirement. *Crowther v. Fidelity Ins., Trust & Safe-Deposit Co.* (U. S.) 85 Fed. 41, 42, 29 C. C. A. 1. See, also, *Fidelity Ins. & Safe Deposit Co. v.*

**Shenandoah Iron Co. (U. S.)** 42 Fed. 372, 377. Hence the act, in attempting to give a prior lien to employés of mining and manufacturing companies, was unconstitutional as not expressing such object in the title. *Fidelity Ins. & Safety Deposit Co. v. Shenandoah Iron Co. (U. S.)* 42 Fed. 372, 377.

**Code Civ. Proc. § 1276**, providing that any religious, benevolent, literary, scientific, "or other corporation," or any corporation having or being known by the name of any benevolent or charitable society, may apply to the superior court for a change in its corporate name, is not restricted in its application to corporations of the kind especially enumerated, but applies also to corporations organized for profit. In *re La Societe Francaise d'Epargnes et de Prevoyance Mutuelle*, 123 Cal. 525, 530, 56 Pac. 458, 460.

#### **Other costs.**

The phrase "other costs," in a note for a certain sum with attorney's fees and other costs in case the holder is obliged to enforce payment at law, renders the note nonnegotiable, since it cannot be construed as simply referring to the legal costs collectible in case of an action fixed and determined by statute. Such phrase renders the amount due uncertain. *Johnson v. Schar*, 70 N. W. 838, 839, 9 S. D. 536.

#### **Other counsel.**

"Other counsel," as used in *Cr. Prac. Act*, § 354, providing that the district attorney or other counsel for the people must open the cause and offer the evidence in support of the indictment, means private counsel. *People v. Biles*, 6 Pac. 120, 121, 2 Idaho (Hasb.) 114.

#### **Other court.**

As used in *Rev. St.* p. 615, §§ 1, 5, providing that actions arising under the ordinance of a town should be brought before a justice of the peace residing within the town, or, if there were none such, then before any justice of the peace of the county or other court of competent jurisdiction, "other court" means some one already established by existing law, such as the probate court. *People v. Curley*, 5 Colo. 412, 415.

#### **Other craft.**

"Other craft," as used in 7 & 8 Geo. IV, c. 75, § 37, forbidding any person not a freeman to navigate on certain waters any wherry, lighter, or other craft, meant craft of the same kind as wherry or lighter, and would not include a steam tug, though such vessel might ordinarily be included within the term "craft." *Reg. v. Reed*, 28 Eng. Law & Eq. 133, 136.

*Rev. St.* § 4426 [U. S. Comp. St. 1901, p. 3029], declaring that the hull and boilers of

every ferry boat, canal boat, yacht, or "other small craft of like character" propelled by steam shall be inspected, should not be construed to apply to a small pleasure boat 29 feet long and 7 feet wide, without deck, propelled by a small steam engine with a cylinder of 9 inches stroke and 3½ inches diameter, run occasionally by its owners for amusement on Buffalo Bayou below Houston, Tex. *United States v. The Mollie (U. S.)* 26 Fed. Cas. 1290, 1292.

The term "boats, vessels and other craft," in *St. 7 & 8 Geo. IV, c. 75, § 57*, authorizing by-laws for the government of "boats, vessels and other craft" to be rowed or worked, includes steamboats. *Tisdell v. Combe*, 7 Adol. & E. 788, 798.

#### **Other creditors.**

In construing a clause in a composition agreement stating that, "in consideration of other creditors accepting a like percentage of their respective claims and demands against" the debtor "in full settlement and compromise thereof," the court said: "The term 'other creditors,' as here used, must be construed as meaning all other creditors." *M. A. Seed Dry-Plate Co. v. Wunderlich*, 69 Minn. 288, 72 N. W. 122, 123.

#### **Other crime.**

"Other crime," as used in *Const. art. 8, § 3*, which disfranchises all persons who shall have been convicted of treason, embezzlement, malfeasance in office, larceny, bribery, or other crime punishable by imprisonment in the penitentiary, while it applies to all felonies not specifically named, includes all grades of larceny or other offenses particularly named, whether felonies or misdemeanors. *Anderson v. State*, 72 Ala. 187, 189.

"Other crime," as used in the Constitution and laws of the United States and the statutes of Massachusetts relative to the surrender of fugitives from justice, means any offense indictable by the laws of the state demanding the surrender of the alleged criminal. In *re Brown*, 112 Mass. 409, 411, 17 Am. Rep. 114.

In construing the provision of the federal Constitution relating to the surrender of fugitives from justice by the states, the courts say that it is quite possible that the general term "other crime" in the Constitution should be limited, by the words which precede it, so as to include only crimes of a single genus—to those which may be denominated "felonies." In *re Greenough*, 31 Vt. 279, 287.

#### **Other dangerous trade or business.**

A covenant not to erect or permit upon the premises conveyed any brewery, distillery, or "other dangerous trade or business" should be construed to mean any business

which is as dangerous as the business which is prohibited by express designation. *Atlantic Dock Co. v. Leavitt* (N. Y.) 50 Barb. 135, 141.

#### Other deadly weapon.

"Other deadly weapons of like kind," as used in Code, § 1005, making it indictable for one to carry concealed about his person any pistol, bowie knife, razor, or "other deadly weapon of like kind," means weapons similar in their deadly character to those enumerated. *State v. Erwin*, 91 N. C. 545, 547.

As used in St. § 1166, providing for the punishment of any person who shall willfully and maliciously cut, strike, or stab another with a knife, sword, "or other deadly weapon," the phrase "other deadly weapon" does not refer to guns, pistols, knives, or swords, or other deadly weapons mentioned therein, but embrace any deadly weapon with which a person might be wounded, by cutting or stabbing, not therein specifically referred to. *Sprague v. Commonwealth*, 58 S. W. 430, 431.

#### Other dependents.

"Other dependents," in Rev. St. § 972, providing that beneficial associations may include in their corporate powers the privilege of providing for the relief and aid of the families, widows, orphans, or other dependents of the deceased members, or assisting such as may be sick, etc., "are inserted to include persons who, not being either members of the family of the deceased nor his widow or orphans, are yet dependent upon him in some manner." *Grand Lodge Order of Hermann-Soehne v. Elsner*, 26 Mo. App. 108, 116.

#### Other depositories of filth.

"Other depositories of filth," as used in a city charter prohibiting the construction and maintenance of sinks, cesspools, or "other depositories of filth," means such depositories as are of the same nature as sinks or cesspools, and means such as are constructed to hold the waste matter, solid and fluid, until they are emptied by natural causes (as by percolation through the soil or by evaporation of the fluid matter) or by artificial means. *Sprigg v. Town of Garrett Park*, 43 Atl. 813, 815, 89 Md. 406.

#### Other disability.

In Rev. St. § 953, as amended by Act June 5, 1900, permitting the allowance and signing of the bill of expenses by another judge thereafter holding court when the judge before whom the cause was tried is, by reason of death or sickness or other disability, unable to allow and sign the same, "other disability" means disability of like character to death or sickness, by which the trial judge is disabled from the performance of judicial functions, and not a disability arising from temporary absence from the district

or circuit. It means a physical or mental disability arising from either death, sickness, or insanity, or disorder of like character, by reason of which the judge was disabled from the performance of judicial functions. *Western Dredging & Improvement Co. v. Heldmaier* (U. S.) 111 Fed. 123, 125, 49 O. C. A. 264.

The term "other disability" was said by the court, in *Cummings v. Clark*, 15 Vt. 653, in construing the term as used in a statute giving an official board jurisdiction in case of a vacancy occurring in certain public offices from nonacceptance, death, removal, insanity, or "other disability," "to import such like disability as had been before enumerated; that is, such as wholly vacated the office and left it the same as if there had been no appointment." *Turnipseed v. Hudson*, 50 Miss. 429, 446, 19 Am. Rep. 15.

The phrase "other legal disabilities," in a limitation statute providing that if the owner of real estate shall, at the time of a judicial sale thereof, be a minor, insane, or under the legal disabilities, he shall have five years after such disability is removed in which to bring suit or action, does not embrace non-residents in the state, but, so far as it refers to absence, means out of the United States. *Smith v. Bryan*, 74 Ind. 515-518.

#### Other easement.

As used in 2 & 3 Wm. IV, c. 71, § 2, enacting that no claim which may be lawfully made at common law by custom, prescription, or grant to any way or "other easement," or to any water course or the use of any water, the words "other easement" mean any other ejusdem generis with the way—something that is to be exercised on or over the soil of the adjoining owner. *Webb v. Bird*, 10 C. B. (N. S.) 268, 286.

#### Other effects.

"Other effects," as used in a bequest after an enumeration of certain kinds of personality, applies to things of the same kind as those enumerated, and a bequest of plate, linen, household goods, and "other effects" will not include money. *Iverson v. Gassiot*, 27 Eng. Law & Eq. 483, 487; *Hotham v. Sutton*, 15 Ves. 320, 326.

Where a testatrix gave her daughter all the plate, linen, household goods, and "other effects," money excepted, it was held that the words "other effects," following articles specified in general, included such things only as were ejusdem generis, but that the exception of money showed that the words were used in their most extended sense, as otherwise the exception would have been unnecessary. *Tefft v. Tillinghast*, 7 R. I. 434, 436.

A statute providing that every person who has, knowingly and designedly, by false pretense, obtained from any person any mon-

ey, goods, or chattels, or "other effects" whatsoever, with intent to cheat or defraud any person, etc., shall be punished, etc., should be construed to embrace everything of a personal character not appropriately and strictly falling under the description of money or goods or chattels. They are equivalent to the words "or other valuable thing whatsoever." *People v. Stone* (N. Y.) 9 Wend. 182, 189.

#### Other emergency.

Where one of the rules for the regulation of a police force declared that, in case of fire, burglary, riot, or other emergency, the sergeant or patrolman who discovers the same shall immediately send information to the officer in command at the station, and immediately take such action as the case may require, held, that the phrase "other emergency" should be construed in the light of the preceding particular words, as meaning some offense of equal gravity. *People v. Bell*, 3 N. Y. Supp. 812, 813.

#### Other employés.

The phrase "other employés," as used in Pol. Code, § 1617, authorizing boards of education and trustees of school districts to employ teachers, "janitors, and other employés of the schools," and to fix and order paid their compensation, refers to persons employed in or about the several schools and school buildings in like character and capacity to those named, and does not authorize the employment of an attorney. *Denman v. Webster* (Cal.) 70 Pac. 1063, 1064.

#### Other erection or enclosure.

"Other," as used in Pen. Code, § 504, declaring that "the term 'building,' as used in this chapter, includes a railroad car, vessel, booth, tent, shop, or other erection or inclosure," is to be interpreted as including things of a similar nature to those already described by the specific words found in the statute. A stone vault in a cemetery, used for the interment of dead bodies, though wholly above ground, is not a building, within the meaning of the section of the Code defining burglary. *People v. Richards*, 108 N. Y. 137, 15 N. E. 371, 376, 2 Am. St. Rep. 373.

"Other erection," as used in a statute declaring it to be burglary to break into any railway car, vessel, booth, tent, or shop, or other erection or inclosure, would include a factory. *People v. Block*, 15 N. Y. Supp. 229, 230, 60 Hun, 583.

"Other inclosure," as used in an ordinance prohibiting licensed liquor dealers from constructing, with screens, curtains, partitions of any kind, any stall, booth, or other inclosure in any place or room in any building wherein intoxicating liquors are

sold, will be held to mean other such like inclosure; and hence it does not prohibit the use of bars, cigar counters, and telephone inclosures; and is not, therefore, an unreasonable provision. *State v. Barge*, 84 N. W. 911, 913, 82 Minn. 256, 53 L. R. A. 423.

The term "or other inclosures," as used in a city ordinance prohibiting the construction of booths or other inclosures with screens or partitions connected with the saloon, includes an inclosure of such a nature that it may be used as a lounging room, where the parties may to some extent, if not entirely, be cut off from the view of the main part of the saloon. The result is not affected in the least by the fact that no door or curtain was hung at the opening, where the partition was sufficient to conceal, in whole or in part, the persons occupying the back room. *State v. McGregor*, 92 N. W. 509, 510, 88 Minn. 74.

#### Other error.

"Other error," as used in Act 1869, § 5, providing that the board of supervisors may correct any manifest clerical or "other error" in any assessments or returns made by any town officer to such board, means one of the same or like character as that particularly mentioned—some error not technically clerical—but a mistake of the same general nature, and not any more intimately connected with or affecting the propriety or legality of the assessment or the action of the assessors; some error of form. *Hernance v. Ulster County Sup'rs*, 71 N. Y. 481, 485.

#### Other estate.

In Act 1702, for securing estates given to charitable uses, enacting that all such lands, tenements, hereditaments, "and other estates" that have been or hereafter shall be given for the maintenance of the ministry, schools, etc., should be exempt from taxation, the words "other estate" are not meaningless, but may be construed to mean money, that being an estate other than lands. *Atwater v. Inhabitants of Town of Woodbridge*, 6 Conn. 223, 227, 16 Am. Dec. 46.

#### Other evidences of indebtedness.

Rev. St. c. 83, § 16, provides that actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other "evidences of indebtedness in writing" shall be commenced within ten years next after cause of action accrued. Held, that "other evidences of indebtedness in writing" as here used refers only to evidences of indebtedness of a similar nature to those particularly enumerated, and includes only contracts whereof the parties intended to put the evidence in writing at the time they were made, and hence can have no application to verbal contracts sought to be proved by subsequent admissions in writing. *Wood*

*v. Williams*, 81 N. E. 681, 142 Ill. 269, 34 Am. St. Rep. 79.

#### Other false and fraudulent means.

The words "other false and fraudulent means" in an indictment charging one with seducing an unmarried female by persuasion and promises of marriage and other false and fraudulent means, cannot be treated as mere surplusage. These words were vital, pregnant, and full of significance. They carried a distinct and serious charge against the accused not embraced in the averment that he had employed persuasion and promises of marriage. Pen. Code, § 3087, in defining the offense, says that it may be committed either by persuasion and promises of or by other false and fraudulent means; that is, means not consisting of mere persuasion accompanied by promises of marriage. *Langston v. State*, 35 S. E. 166, 167, 109 Ga. 153.

#### Other false pretenses.

In construing statutes providing that "every person who, with intent to defraud or cheat another, shall designedly, or by color of any false token or writing, or by any other false pretense, obtain from any person any money or valuable thing, shall be punished by imprisonment," the rule that the term "other," when used in a statute, means those things only which are of a kindred nature to those which are mentioned, has no application, because this statute does not attempt to enumerate the pretenses that shall be held criminal. False tokens are mentioned, but the term is general, not particular; and the same may be said of false writings. The idea suggested to the mind by them is something cognizable to the sight or touch. "Any other false pretense" is a specification equally general, and will embrace other classes. The court held that falsely representing oneself as a storekeeper was a false pretense, within the meaning of the statute. *Higler v. People*, 44 Mich. 299, 6 N. W. 664, 665, 38 Am. Rep. 267.

#### Other fees.

"Other fees," as used in Act 1846, § 7, for restricting the sale of intoxicating liquors, and requiring the defendant in an action for a violation of the act to advance the jury fee, and all "other fees" that may arise after the appeal, means such fees as arise for the services of the clerk of the court. *Levant v. Varney*, 32 Me. 180.

#### Other felony.

The words "other felony" in Rev. St. c. 38, § 23, which declares that an assault with intent to commit murder, rape, mayhem, robbery, larceny, or other felony shall subject the offender to imprisonment in the penitentiary, is not to be construed as limiting the

act to felonies only, and thus to prevent an assault with intent to commit petty larceny from being within the statute, but it means any other felony except the particular felonies enumerated in the statute. *Kelly v. People*, 24 N. E. 56, 132 Ill. 363.

The term "or other felony," in Rev. St. § 4409, providing that any person who shall break in any building not adjoining or occupied as a dwelling house with intent to commit the crime of robbery, larceny, or other felony, shall be punished, etc., is not a limitation on what precedes, but is inserted to extend the scope of the section to other offenses not specifically named therein. The statute must be read as though instead of the words "or other felony" it had been written "or any other offense" for which the offender on conviction shall be liable by law to be punished by imprisonment in the state prison. It includes the breaking and entering with intent to commit petit larceny. *Pooler v. State*, 73 N. W. 336, 337, 97 Wis. 627; *Hall v. State*, 4 N. W. 1068, 1069, 48 Wis. 688.

#### Other final process.

The term "other final process," in Rev. St. Ind. 1881, providing that property not exceeding the value of \$600, owned by any resident householder, shall not be liable to sale on execution, or any "other final process," covers a case where a plaintiff, whose entire property does not exceed \$600, claims as exempt the demand in a suit, and enables him to defeat a judgment for a greater amount set up by defendant in the action as a set-off. *Coppage v. Gregg*, 1 Ind. App. 112, 115, 27 N. E. 570, 571, 572.

Under Chancery Act, c. 21, § 46, providing "that if there shall be no master in chancery, or commissioner to execute a decree, the same may be carried into effect by execution or other final process, according to the nature of the case," etc., the "other final process" must be understood to mean such final process as is the practice of the court of chancery to issue, which are ordinarily, besides executions, writs of attachment or sequestration, and writs of assistance, all of which must run in the name of the people of the state of Illinois. *Armsby v. People*, 20 Ill. (10 Peck) 155, 159.

The term "other final process" in a constitutional provision exempting personal property from execution sale or other final process was held to be an exemption from garnishment; the court saying that "to hold otherwise would be a too narrow interpretation of the constitutional provision, founded in humanity and benevolence, and intended to secure an unfortunate debtor the means of livelihood free from the claims of creditors." *Williamson v. Harris*, 57 Ala. 40, 42, 29 Am. Rep. 707.

**Other fixtures.**

"Other fixtures for manufacturing purposes," as used in Rev. p. 669, providing that any fixed machinery or gearing, or "other fixtures for manufacturing purposes," should be considered a building for the purposes of the mechanic's lien law, is as comprehensive as the language will admit of. Whatever appliances may be used for the accomplishment of a given purpose through the use of fixtures in a manufacturing establishment come within its meaning. *Hughes v. Lambertville Electric Light, Heat & Power Co.*, 32 Atl. 69, 53 N. J. Eq. (8 Dick.) 435.

**Other forms of indebtedness.**

Where a guaranty was given to cover open account or other forms of indebtedness, and remains in force until notice to the contrary in writing by the defendant, it was held that the phrase "other forms of indebtedness" was intended to embrace notes that might be given for goods sold after the accounts for them had become due. *Burt v. Butterworth*, 32 Atl. 167, 168, 19 R. I. 127.

**Other fresh waters in the state.**

"Other fresh waters of this state," within the meaning of Laws N. Y. 1879, c. 543, § 23, which forbids the catching of any fish except minnows by other means than by hook and line in certain waters of the state, including the American waters of the Niagara river above Niagara Falls, and in any other of the fresh waters of this state, or in the American waters of the St. Lawrence river, includes the American waters of the Niagara river below Niagara Falls. *People v. Gillette*, 11 N. Y. Supp. 461, 58 Hun, 602.

**Other future election.**

A bond of surety for a public officer during the time he continued in office in consequence of his election, or in consequence of "any annual or other future election," meant any future election other than annual, or whether annual or not; and therefore the bond covered a term to which such officer was elected by virtue of an amended statute whereby he was elected to the office during pleasure. *Borough of Berwick upon Tweed v. Oswald*, 3 El. & Bl. 653, 671.

**Other gambling device, bank, table, machine, etc.**

The term "other thing," in an ordinance providing that no person shall set up, keep, or maintain any E O, A B C, rolly-pooly, keno or faro table, faro bank, roulette, or other instrument, device, or thing, for the purpose of gaming, does not include a lottery or a policy shop, as general words in a penal statute, when following an enumeration of particulars, apply only to cases of the same nature as those expressly mentioned. *Marquis v. City of Chicago*, 27 Ill. App.

251, 253; *Moore v. Same*, 69 Ill. App. 571, 573.

Other device, within the meaning of the statute making it criminal to play at games by means of any one of certain designated gaming tables or "other device," means all devices of every kind or quality which have the capacity to be the instrument of playing games of chance upon or with, and includes playing cards. *Eubanks v. State*, 5 Mo. 450, 451.

The Code, which prescribes the punishment for playing or betting at any E O or A B C table, or at any "other table of like character," or roulette, etc., embraces any table on which visible, material, or mechanical means are employed to dispose of money or other articles of value by chance, under conditions of risk, and with the result of profit to one of the participants or loss to the other. Hence it would include a table on which are placed articles of merchandise of unequal values, the particular parcel disposed of in the given instance being determined by the revolutions of a spindle, and the stoppage of the same opposite the point where the article rests on the table, the uniform price of each turn of the spindle being 10 cents. *Mims v. The State*, 14 S. E. 712, 88 Ga. 458.

In *Brown v. State*, 40 Ga. 689, 692, the words of a penal statute, "any E O or A B C table or roulette table," or "other table of like character," were construed to embrace a table at which the game called "keno" was played, and it was held that the plain intent of the statute required such construction. *Bethune v. State*, 48 Ga. 505, 510.

In a statute providing that "whoever, with or without compensation, shall set up, carry on, or conduct, or shall aid and assist in setting up, carrying on, or conducting, a keno bank, faro bank, or other machine or contrivance used in betting, whereby money or other thing may be won or lost," the term "other machine or contrivance," under the rule of ejusdem generis, must be one similar in character with a faro or keno bank, and the playing of the game known as "craps" or "oontz," in which no machinery is used except two ordinary dice, which may be shaken up in the hand and rolled or thrown on the floor, ground, or a table, does not come within the meaning of the statute as "other machine or contrivance." *Commonwealth v. Kammerer*, 13 S. W. 108, 109, 11 Ky. Law Rep. 777, 778.

In construing Act Feb. 1, 1858, the first section of which prohibits all gambling with cards, while section 3 provides that every person who shall bid any money or other property at any "other" gaming table, bank, or device shall be punished, etc., the courts say that the word "other," as used in the

third section, by construction must refer to some gaming table, bank, or gambling device not mentioned in the preceding sections of the act, and cannot, therefore, refer to gambling with cards. *Remington v. State*, 1 Or. 281, 282.

"Other gaming table or bank," in a statute prohibiting the maintenance of certain designated gaming banks and tables, or any "other gaming table or bank" of the like kind or of any description, under any other name or denomination whatever, with or without any name therefor, includes any gaming table or bank similar to the designated tables or banks, although they have no name. The words following the phrase, "any other gaming table or bank," are mere tautology, and serve no other purpose than to evince the extreme solicitude of the Legislature to prohibit all gaming tables or banks, whether with or without a name, manifesting the intention of treating the name as wholly immaterial and unnecessary to constitute the offense. *Estes v. State*, 10 Tex. 300, 307.

"Other gambling device," as used in Rev. St. §§ 1547, 1548, prohibiting betting on a faro bank, roulette, equality, keno, or on any "other gambling device," refers only to such gambling devices as are of a kindred nature to those specifically enumerated, and would not apply to a gun and target. *State v. Bryant*, 2 S. W. 836, 837, 90 Mo. 534.

The term "other gaming table or bank or any other gambling device," in a statute making it criminal to bet on certain specified games, or on any other gaming table or bank, or any other gaming device, includes the game of rondo. *Randolph v. State*, 9 Tex. 521-523.

The words "or other device," as used in Act Md. 1797, c. 110, punishing the keeping of certain gambling devices "or other device" for a gambling purpose, includes the game called "equality." *United States v. Speeden* (U. S.) 27 Fed. Cas. 1280.

#### Other good and sufficient cause.

Under Comp. St. c. 40, § 11, authorizing the Governor to remove the superintendent of an insane asylum for malfeasance or "other good and sufficient cause," the language "other good and sufficient cause" should be held to mean causes of like nature, and affecting the competency or fitness of the person for the position he holds. *State v. Hay*, 63 N. W. 821, 823, 45 Neb. 321.

Rev. St. § 5078, providing that certain proof shall be made by the claimant testifying of his own knowledge, unless he is absent from the United States, or is prevented by "some other good cause," means some sufficient cause other than, or in addition to, mere absence from the state. In *re Jackson* (U. S.) 13 Fed. Cas. 190, 193.

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#### Other goods.

"Other goods," as used in a contract providing that a traveling salesman should receive on sales of tobacco manufactured by certain firms, and any other goods that might be agreed on by the parties, a certain compensation, mean the same class of goods, including cigars and tobacco. *Callaway v. Boroughs* (Tex.) 19 S. W. 611, 613.

#### Other governing body.

"Other governing body," as used in Laws 1897, c. 248, providing that, before any city shall be liable for damages for injuries, a claim for compensation must be presented to the council or other governing body, will be construed a body ejusdem generis, and will not mean the mayor or any other individual officer. *Doyle v. City of Duluth*, 74 N. W. 1029, 1030, 74 Minn. 157.

#### Other grain.

A charter party stipulating the rate of freight to be paid as 11 shillings per quarter of 480 pounds for India corn or other grain, referred to grain which would average 480 pounds to the quarter, and therefore excluded oats. *Warren v. Peabody*, 8 Man., G. & S. 800, 810.

#### Other great necessity.

"Other great necessity," as used in Acts 1858, § 4, providing that water companies shall furnish water, to the extent of their means, to the city and town, or city or town, in case of fire or other great necessity, free of charge, includes its use for irrigating the parks, squares, watering the streets, flushing the sewers, and in case of any other demand based on a requirement which is incidental to the discharge, by the supervisors of their duty as local legislators. The necessities thus mentioned are of a different class from those of the inhabitants as members of families. The extinguishing of fires is under the control of the city government, or of a department of the city government, in San Francisco, and is always under the direction of the local government. So is, or may be, the flushing of sewers, the sprinkling of streets, and the watering of parks. These things are certainly necessities, in the ordinary signification of the word. The word is not to be given the more narrow signification of the absolutely indispensable, for this would be to deprive it of all practical force or meaning. It is for uses of the character last mentioned—such as are incidental to the direct employment by the municipality of its governmental or police powers, as distinguished from the family uses of a portion of the inhabitants, for which the city may be called on to pay—that all water companies are required to furnish water free of charge. It is impossible further to classify these uses, or to say that one



of them is a greater necessity than another. *Spring Valley Waterworks v. San Francisco*, 52 Cal. 111-120.

#### Other house.

In a statute declaring that any person who "shall in the nighttime enter without breaking, or break and enter, either in the daytime or nighttime, any office, shop, storehouse, warehouse, banking house, or other house," with intent to commit certain specified crimes, he shall be punished, etc., the words "or other house" are sufficient to embrace a dwelling house. *State v. McDonald*, 9 W. Va. 456, 463.

The words "other house," as used in Gen. Code, § 4379, punishing the willful and malicious burning of another's barn, stable, or any other house, except the dwelling house, on a farm or plantation, not in a city, town, or village, etc., include a country church. *Watt v. State*, 61 Ga. 66, 67.

#### Other improvements.

Mansf. Dig. § 4402, recites that every mechanic, builder, artisan, workman, laborer, or other person who shall do work or labor upon, or furnish any material for, any building, erection, or other improvement on land, shall have a lien on such building, erection, or improvement, etc. Under this statute it is held that the expression "other improvement" can only be construed as referring to improvements of a character similar to those before mentioned, and not to authorize a lien for the planting and setting of a bridge. *Eastern Arkansas Hedge Fence Co. v. Tanner*, 53 S. W. 886, 887, 67 Ark. 156.

#### Other incidental expenses.

The organic act of Minnesota Territory, which pledges the general government to defray the expenses of a Legislative Assembly, the printing of the laws, and other incidental expenses, must be restricted to such expenses as were incidental to the Legislative Assembly and the printing of the laws. *United States v. Smith* (U. S.) 27 Fed. Cas. 1139, 1143.

#### Other indebtedness.

The clause in a mortgage describing an indebtedness was as follows: "And to secure any notes that may be given for renewal of said notes, or any part thereof, or for any interest thereon, and any further advances or other indebtedness due, or that may hereafter become due," etc. The said notes were not described in the mortgage. Held, that the said notes and notes given in renewal thereof were not secured by the mortgage, and that the words "or other indebtedness due, or that may hereafter become due," mean indebtedness other than future advances or indebtedness, evidenced by promissory notes. *Rowen v. Ratcliff*, 39 N. E. 860, 862, 140 Ind. 393, 49 Am. St. Rep. 203.

#### Other institutions.

Under a statute authorizing municipal corporations to collect a license tax on manufacturing and other corporations or institutions, it is held that the words "other institutions" apply only to such as are of the same nature as manufacturing institutions; the court observing that where several particulars are named, followed by a more generic term, it is considered that the more generic term intends only other things ejusdem generis, or of the like kind. *City of Joplin v. Leckie*, 78 Mo. App. 8, 12.

#### Other instrument.

The words "other instrument," as used in Pen. Code, § 476, declaring that every person who makes, passes, utters, or publishes, with intent to defraud, any note, check, or other instrument, are limited to the instruments of the class mentioned in the section, and do not include a deed. *People v. Chretien*, 70 Pac. 305, 306, 137 Cal. 450.

#### Other instrument for payment of money.

Code Civ. Proc. N. Y. § 649, subd. 2, providing that a levy on personal property capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, must be made by taking the same into actual custody, is to be interpreted as referring to instruments of similar character with bonds and promissory notes, such as are evidences of debt, and the title to which passes by delivery merely. It will not include a life insurance policy. *Kratzenstein v. Lehman*, 44 N. Y. Supp. 366, 19 Misc. Rep. 600.

"Other instruments," as used in Cr. Code, § 107, providing for the punishment of whoever shall pass or publish any fictitious bill, note, or check, purporting to be a bill, note, or check, or other instrument in writing for the payment of money or property of some individual, when in fact there shall be no such individual in existence, only includes such instruments as contain an absolute, unconditional promise or obligation to pay a sum of money or personal property. It would only include such instruments as are of the same class or kind as those mentioned. *Shirk v. People*, 11 N. E. 888, 889, 121 Ill. 61.

#### Other interest.

An insurance policy required "that the interest in property to be insured, if a leasehold interest, or other interest not absolute, shall be so represented and expressed in the policy," etc. Held, that the use of the word "other" would seem to indicate that by "interest not absolute" was meant something similar to a leasehold interest. *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 431, 3 Am. Rep. 149.

**Other intoxicating beverage.**

The term "other intoxicating beverage," is an information alleging that defendant sold wine, spirituous liquors, and other intoxicating beverages to a common drunkard, is not of the same import as the term "wine and spirituous liquors," and therefore the offense is charged in the alternative, and on that account the information is insufficient. *Smith v. State*, 19 Conn. 493-499.

**Other joint-stock company.**

"Other joint-stock company," as used in Code 1892, § 3758, providing that any bank or other joint-stock company, the capital stock of which is divided into shares, shall furnish the assessor a written statement of its stock and its market value, means all associations which have stock, and are also incorporated. *State v. Simmons*, 12 South. 477, 481, 70 Miss. 485.

**Other jurisdiction.**

Under Code Cr. Proc. art. 730, subd. 5, providing that all persons are competent to testify in criminal actions, except persons specifically mentioned, including "all persons who have been or may be convicted of felony in this state or in any other jurisdiction," the term "any other jurisdiction" does not refer simply to other jurisdictions in the same state, but to a conviction within any state of the United States. *Pitner v. State*, 5 S. W. 210, 214, 215, 23 Tex. App. 368.

**Other kind of killing.**

"Other kind of killing," within the meaning of the statute declaring that all murder which shall be perpetrated by means of poison and certain other enumerated methods of killing, or by any other kind of willful, deliberate, or premeditated killing, shall be murder in the first degree, means any other kind of killing, not any other kind of such willful, deliberate, or premeditated killings as are of the same nature as the enumerated methods of killing. *Commonwealth v. Jones* (Va.) 1 Leigh, 598, 611; *People v. Bealoba*, 17 Cal. 389, 394.

**Other laborer.**

The Nevada statute exempting from execution two oxen, two horses, or two mules, and their harness, and one cart or wagon, by the use of which a cartman, hostler, peddler, teamster, or other laborer habitually earns his living, cannot be construed to include one engaged in the business of a livery stable keeper. The word "laborer" is confined to other laborers ejusdem generis with those named. *Edgescomb v. His Creditors*, 7 Pac. 533, 534, 19 Nev. 149. In construing a like statute, it is held that the term "other laborer" means a person who labors by and with the aid of his team, and not by the aid of a pick and shovel, or the implements of other

trade or vocation. A clerk in a store at a stated salary, who had purchased a team mainly to furnish employment for his son, who was 17 years old, and by whom exclusively the team was used habitually in hauling freight for the store and for other parties, and in delivering goods from the store to customers, did not come within the words "or other laborer," within the meaning of the statute. *Brusie v. Griffith*, 34 Cal. 302, 306, 91 Am. Dec. 625. And a bankrupt whose occupation is that of a paper hanger, and who owns a horse and wagon, which he uses exclusively for the purpose of conveying his supplies, tools, etc., from his residence to the places where he has jobs of work, and without which he could not carry on his occupation at a profit, is entitled to claim such horse and wagon as exempt. *In re Hindman* (U. S.) 104 Fed. 331, 333, 43 C. C. A. 558.

"Other laborer," as used in St. 20 Geo. II, c. 19, conferring jurisdiction on justices of the peace to settle all dissensions arising between masters and mistresses, artificers, handicraftsmen, miners, clerks, keelmen, pitmen, glazemen, potters, and "other laborers employed for any certain time or in any other manner," includes laborers generally, and does not restrict the provision to those employed only in the trades enumerated. *Lowther v. Fadnor*, 18 East, 113, 124.

**Other lands.**

The words "other lands," as used in Code Civ. Proc. § 477, providing that the lands and tenements of a debtor within the county where a judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is entered, and all other lands as well as goods and chattels of the debtor shall be bound from the time they shall be seized in execution, refer not only to lands of the debtor within the county, but they have a broader application, and embrace exactly what the words imply in their ordinary signification, to wit, all other lands—all lands not falling within the other classes mentioned. *Berkley v. Lamb*, 1 N. W. 320, 325, 8 Neb. 392.

**Other lawful business.**

"Other lawful business," as used in Gen. St. 1866, c. 34, § 45, as amended by Laws 1873, c. 13, authorizing the formation of corporations for various kinds of business, specifically enumerated, or "other lawful business," means any kind of business for pecuniary profit not elsewhere provided for, and which might have been omitted from the previous particular enumeration. The phrase "or other lawful business" is not to be limited to a business of the same kind as those previously enumerated. *Brown v. Corbin*, 42 N. W. 481, 40 Minn. 508.

**Other legacies.**

The word "other," as used in a will providing that, in case the residuary estate should not amount to a certain sum, then the other legacies, except two certain ones, should abate in proportion, so that at all events a certain sum should be available for a certain purpose, should be construed in its ordinary sense, and according to its full and fair meaning, as comprehending all the other legacies, both general and specific. *Moore's Ex'r v. Moore*, 25 Atl. 403, 407, 50 N. J. Eq. (5 Dick.) 554.

**Other legal merchandise.**

A charter party provided that the charterer might load a full cargo of wool, tallow, bark, or any "other legal merchandise," the quantity of the bark, tallow, and hides not to exceed certain amounts, and the freight rate being specified for such enumerated articles, but not for other legal merchandise. It was held that, for the purpose of ascertaining what freight should be paid on "other legal merchandise," this term would be construed as applying only to goods ejusdem generis with those enumerated. *Cockburn v. Alexander*, 6 Man. G. & S. 791, 817.

**Other lien.**

"Other lien," as used in Laws 1882, c. 410, § 1813, as amended by Laws 1883, c. 276, providing that, where the claimant for a mechanic's lien is made a party defendant to any action brought to enforce any other lien, the notice of the pendency of such action must be filed by him or in his behalf, is broad enough to include a mortgage lien, and is not confined to mechanics' liens. *Danziger v. Simonson*, 22 N. E. 570, 575, 116 N. Y. 329.

**Other machine.**

Under Act March 25, 1886, making it a felony to set up, carry on, or conduct a keno bank, faro bank, or other machine or contrivance used in betting, it is held that the term "other machine or contrivance" must, under the rule of ejusdem generis, be limited to such as are similar in character to a faro or keno bank, and that hence the game of oontz, played with dice on a table or other surface by betters, does not come within the meaning of the term "other machine or contrivance." *Commonwealth v. Kammerer*, 13 S. W. 108, 11 Ky. Law Rep. 777.

**Other manifest impediment.**

Rev. St. § 1342 [U. S. Comp. St. 1901, p. 944], providing that no person shall be liable to be tried and punished by a general court-martial for any offense which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some "other manifest impediment,"

he shall not have been amenable to justice within that period, should be construed to mean only such impediments as operate to prevent the military court from exercising its jurisdiction over the offender, as, for instance, his being continuously a prisoner in the hands of the enemy, or of his being imprisoned under sentence of a civil court for crime, and the like; and hence, where a person accused of desertion has been within the jurisdiction of the court and amenable to justice for over two years, without being prosecuted, he is entitled to a discharge. *In re Davison* (U. S.) 4 Fed. 507, 509.

**Other matters.**

"Other matters," as used in a city charter requiring that copies of all resolutions and other matters shall be furnished to the mayor for consideration, means matters of a similar character to resolutions, of which there can only be ordinances. *Erwin v. City of New Jersey*, 37 Atl. 732, 733, 60 N. J. Law, 141, 64 Am. St. Rep. 584.

**Other means.**

"Other means," as used in Const. art. 8, § 4, providing that all other grants, gifts, and devises that have been or may hereafter be made to the state, and not otherwise appropriated by the terms of the grant, gift, or devise, the income arising from all the funds mentioned, together with all the rents of the unsold school lands, and such other means as the Legislature may provide, shall be exclusively applied to the support and maintenance of common schools in each school district in the state, includes any fund raised by taxation for school purposes, levied under legislative authority. Moneys raised by taxation for school purposes shall be exclusively applied to the support and maintenance of common schools in each school district in the state. *State v. Walsh*, 48 N. W. 263, 265, 31 Neb. 469.

The words "other means," in Comp. Laws, § 7557, providing that every person who shall set fire to any building mentioned in the preceding sections, or to any other material, with intent to cause any such building to be burned, or shall by any other means attempt to cause any building to be burned, shall be punished, etc., is to be construed as meaning some physical means, and the statute cannot be satisfied without some such act committed in person or through another, reaching far enough to amount to the commencement of the causation. The Legislature did not have it in mind, and did not design to denote and identify a mere invitation to burn. *McDade v. People*, 29 Mich. 50, 55.

"Other means, instrument, or device," as used in 1 Starr & C. Ann. St. p. 32, c. 38, par. 143, § 98, which provides a punishment for

every person who shall obtain, etc., any money or property by means or by use of any false or bogus checks, or by any other means, instrument, or device, commonly called the "confidence game," should not be construed to refer exclusively to the obtaining of money or property by the use of false or bogus checks, or by the use of other false or bogus commercial paper, or paper of the same specific class as checks, but should be construed in connection with the words following, and apply to all cases of swindling in which advantage is taken of the confidence reposed by the victim in the swindler, which comes within the meaning of what is commonly called a "confidence game." *Maxwell v. People*, 41 N. E. 995, 997, 158 Ill. 248.

Const. art. 9, § 2, providing that such other means as the Legislature may provide shall be appropriated to the support of schools throughout the state, should be construed to include any fund arising from annual taxation for school purposes, levied under general laws passed for that purpose. The means intended include such as might be raised by taxation, and are not limited to such as might be made continuing and permanent. *Crosby v. Lyon*, 37 Cal. 242, 245 (citing *District Tp. of City of Dubuque v. County Judge*, 13 Iowa, 250).

#### Other memoranda.

"Other memoranda," as used in St. 1870, c. 132, providing that in an action by or against an executor, administrator, or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the party may testify in relation thereto, means the memoranda made by the deceased person, and is not broad enough to include any memoranda that are used in evidence by either party. *Cary v. Herrin*, 59 Me. 361, 364.

#### Other mine.

An inclosure act recited that defendant should hold and enjoy all manorial rights to certain premises, and also to mines, minerals, and quarries, with liberty of granting to any person a way over or along the commons or waste land intended to be allotted and inclosed, and to perform any other necessary work in the leading and carrying away said mines, minerals, and quarries, and also for the leading, carrying, and conveying the coals and the "produce of any other mines and minerals" over or under any other lands whatsoever. Held, that the words "produce of any other mines and minerals" did not mean the produce of mines and minerals other than coals, but produce of mines and minerals other than the mines, minerals, and quarries before mentioned. *Bowes v. Ravensworth*, 6 J. Scott, 512, 522.

#### Other moneyed capital.

"Other moneyed capital," as used in Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], providing that the shares of national bank stock may be taxed to the owners thereof by the states at a rate not greater than is assessed upon "other moneyed capital" in the hands of individual citizens of the state, "other moneyed capital" means such capital as, in its use, comes into competition with the business of national banks. *Mechanics' Nat. Bank of Trenton v. Baker*, 48 Atl. 582, 65 N. J. Law, 549 (citing *First Nat. Bank of City of Aberdeen v. Chehalis County*, 166 U. S. 444, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Mercantile Nat. Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895).

The word "other," in such statute, requires that the words "moneyed capital" include shares in national banks. *First Nat. Bank of Wilmington v. Herbert* (U. S.) 44 Fed. 158, 159.

#### Other moneys.

The term "other moneys," in Rev. St. 1887, § 3977, providing that any officer or person collecting or receiving money, fines, forfeitures, or other moneys, and refusing to pay over the same, shall forfeit double the amount, means other moneys of similar or like character to fines or forfeitures, and therefore the section does not apply to a retiring treasurer of a school district who fails to pay over a general balance of money in his hands. *People v. Dolan*, 39 Pac. 752-754, 5 Wyo. 245.

#### Other municipal boards.

The words "other municipal boards," as used in a statute providing that no member of any board of aldermen, township committee, or other municipal board or body, shall during the time for which he is elected be eligible for any office, is not governed by the rule of ejusdem generis, and limited to legislative bodies, but the words include any municipal board invested with governmental functions, whether legislative or administrative. *State v. Board of Education of City of Bayonne*, 23 Atl. 670, 671, 54 N. J. Law (25 Vroom) 313.

#### Other necessary officers.

Const. art. 4, § 32, requiring the Legislature to provide for the election of certain state and county officers, and other necessary officers to be elected, instead of being appointed, applies only to officers similar to those previously enumerated in the section, and not to legislative officers, officers of the militia, and other officers belonging to different classes from those mentioned. *State v. Clarke*, 31 Pac. 545, 546, 21 Nev. 333, 18 L. R. A. 313, 37 Am. St. Rep. 517.

**Other necessary town charges.**

"Other necessary town charges," as used in Rev. St. 1857, c. 3, § 26, providing that the qualified voters of the town may raise such sums as are necessary for the maintenance and support of schools and the poor, for making and repairing highways and townways and bridges, for purchasing and fencing burying grounds, for purchasing or building and keeping in repair a hearse, and house therefor, for the exclusive use of its citizens, and for other necessary town charges, embraces all incidental expenses arising directly or indirectly in the due and legitimate exercise of the various powers conferred by the statute, and does not constitute a new and distinct grant of indefinite and unlimited power to raise money for any purpose whatsoever at the will and pleasure of a majority. Opinion of the Justices of the Supreme Judicial Court, 52 Me. 595, 598.

**Other necessities.**

As used in Act Cong. June 26, 1884, c. 121, § 2, 23 Stat. 54 [U. S. Comp. St. 1901, p. 3106], providing that if any seaman after his discharge shall have incurred any expense for board and other necessities at the place of his discharge before shipping again, or for transportation to the United States, such expense shall be paid out of the arrears of wages and extra wages received by the consular officer, which shall be retained for that purpose, and the balance only paid over to such seaman, though literally broad enough to cover expenses of cure in a case of the previous hurt, are equally applicable to the ordinary expenses of seamen who are uninjured and well, and has no such special claim against the ship. The words "other necessities" must be held to refer to the ordinary expenses of a well seaman, who has no special claim against the ship on account of previous injury or sickness. The Jansen v. W. L. White (U. S.) 25 Fed. 503, 505.

**Other object.**

Where a municipal charter directed that every ordinance requiring public work to be done should contain a specific appropriation for the whole of the cost of each street, part of a street, or "other object," respectively, it is not necessary that an estimate and separate appropriation for each street should be made; the words "or other object" being added so as to clearly embrace whatever may be the subject-matter of the ordinance in each particular case—whether part of a street, a whole street, or a district including a number of streets or parts. Seibert v. Cavender, 3 Mo. App. 421, 423.

**Other obligations or securities.**

The act of 1792 prescribing the order in which debts due by an intestate or testator shall be paid, after specifying certain pre-

ferred debts, continues the classification thus: then bonds or other obligations; and, lastly, open accounts. Held, that the phrase "other obligation" means a class of debts which were not open accounts, and which were not evidenced by writing under seal. Smith v. Ellington, 14 Ga. 379, 382.

As used in Rev. St. § 5430 [U. S. Comp. St. 1901, p. 3671], providing for the punishment of the offense of having in possession an instrument engraved and printed after the similitude of any "obligation or other security" issued under the authority of the United States, with intent to sell or otherwise use the same, means an executed instrument or at least one which on its face purports to be executed by somebody, and hence the possession of false or bogus bonds, bearing no signatures whatever, was not the possession of an "obligation or other security," within the meaning of the statute. United States v. Williams (U. S.) 14 Fed. 550, 552.

A bond issued by a mining company, and resembling a United States bond, but not purporting to be executed by any party whatever, is not an obligation or other security, within the meaning of the statute. United States v. Sprague (U. S.) 48 Fed. 828, 830.

**Other occupation.**

"Other occupation," as used in the constitution of a relief fund association, providing that a member permanently disabled from following his or her usual or other occupation should be entitled to a benefit, means other like occupation to his or her usual occupation. Albert v. Order of Chosen Friends (U. S.) 34 Fed. 721, 722.

**Other officers.**

"Other officer," as used in Rev. Laws, p. 357, providing that if the sheriff or other officer shall, by virtue of any writ of attachment, attach and take through ignorance any goods which shall be claimed by any person as his property, it shall be lawful for such sheriff or officer to summon and swear a jury to try the right of property, means the appropriate executive officer of the Supreme Court and the courts of common pleas; that is, the sheriff or coroner. Stryker v. Skillman, 14 N. J. Law (2 J. S. Green) 189, 191.

The phrase "other officers," as used in Const. art. 4, § 32, providing that the Legislature shall provide for the election by the people of a clerk to the Supreme Court, county clerk, county recorder, district attorneys, sheriffs, public administrators, and other officers, is used in its ordinary signification, and means that all officers necessary to the exercise of governmental functions in running the machinery of the state, other than those named, must be elected by the people

*State v. Arrington*, 4 Pac. 735, 736, 739, 18 Nev. 412.

"Other officers," as used in Const. art. 10, § 2, providing for the election or appointment of all county officers, and for the election and appointment of all city, town, and village officers, and prescribing that "all other officers shall be elected by the people or appointed as the Legislature may direct," refers to all officers who are neither county, city, town, or village officers, and includes the office of health officer in New York, he being neither a city nor county officer. In *re Whiting* (N. Y.) 1 Edm. Sel. Cas. 498, 500.

Notice of defects in sidewalks, given to a foreman of sidewalks, appointed and clothed with general power to repair throughout a large district of the city, by the executive board, who are the commissioners of highways, is notice to "a city officer having charge of highways," required by the charter to be given a reasonable time before the accident, to charge the city with liability; the charter authorizing the board to appoint a superintendent of streets, and to employ such other assistants as they see fit, and the provision for repairs by "the executive board, superintendent of streets, or other officer \* \* \* having charge of the highways," contemplating the appointment by the board of some other officer with charge of highways. *Sprague v. City of Rochester*, 53 N. E. 697, 699, 159 N. Y. 20.

"Other officer," as used in Cr. Code, § 80, providing for the punishment of embezzlement by any state, county, township, city, town, village, or other officer of any public corporation of the state, includes a university officer, he being a like officer. *Spalding v. People*, 49 N. E. 993, 995, 172 Ill. 40.

In section 71 of the revenue act of 1860, as amended, providing that when, by mistake or wrongful act of the treasurer or other officer, land has been sold contrary to the provisions of the act, the county is to save the purchaser harmless by paying him the amount of principal, etc., the words "other officer" mean other officer of the revenue. *Kelley v. Gage County* (Neb.) 93 N. W. 194, 195.

"Other officer," as used in Gen. St. tit. 12, § 103, providing that any person who shall resist or obstruct any sheriff, deputy sheriff, constable, or other officer in the execution of his office shall be punished, includes an indifferent person deputed to serve a writ of attachment. *State v. Moore*, 39 Conn. 244, 249.

#### Other operations.

"Other operations," as used in Act April 23, 1880, providing for the control of débris from mining and other operations, may include many subjects which are not expressed

in the title of an act to promote drainage; and the existence of such phrase renders it obnoxious to the constitutional provision requiring every act to embrace but one subject, which shall be expressed in its title. *People v. Parks*, 58 Cal. 624, 638.

#### Other party.

"Other party," as used in a statute providing that, where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living, cannot be construed to include the administrator of a former executor in a suit by an administrator de bonis non against the sureties of the former executor, so as to prevent his testifying as to payments made by the deceased executor during his lifetime on claims or demands against the estate. *State, to Use of Burrough, v. Farmer*, 54 Mo. 439, 447.

The words "the other party," in Pub. St. c. 214, § 33, providing that, "whenever an original party to the contract or cause of action is dead, the other party may be called as a witness by his opponent, but shall not be allowed to testify on his own offer," do not apply to a deceased partner, and prevent a defendant in an action by the surviving partner from testifying as to a conversation with such deceased. "The other party" was the partnership, and not the partner. *Clapp v. Hull*, 18 R. I. 652, 653, 29 Atl. 687.

"Other party," as used in Laws R. I. providing that, where "one of the original parties to the contract or cause of action in issue and on trial is dead, \* \* \* the other party shall not be admitted to testify in his own favor," means the other original party to the contract or cause of action. *Barnes v. Dow*, 10 Atl. 258, 263, 59 Vt. 530; *Kenyon v. Peirce*, 24 Atl. 825, 17 R. I. 794. And hence, in a suit between an executrix of one of the original parties to a contract and the heir at law of the other original party thereto, the former was a competent witness in her own behalf. *Kenyon v. Peirce*, 24 Atl. 825, 17 R. I. 794.

#### Other perils.

The term "other perils," in a marine policy on a barge and cargo against the perils of the voyage and other perils, may possibly include a loss occasioned by the vessel springing a leak and sinking at port, though, if the sinking is caused by unseaworthiness, there can be no recovery on the policy. *Gartside v. Orphans' Ben. Ins. Co.*, 62 Mo. 322, 324.

#### Other persons.

The term "other person," in a statute making it criminal for any ferryman or other person to convey any slave from Mis-

souri across the Mississippi river, unless the slave have a permit, etc., includes a steamboat captain. "It seems to me that all persons whatever who do the act are guilty of the offense. Ferry-men are mentioned because they have generally the means in constant readiness to do the act. They were therefore more prominent in the eye of the Legislature than all other persons." *Russell v. Taylor*, 4 Mo. 550, 551.

Acts 1881, No. 259, § 2, as amended by Acts 1883, No. 191, § 16, provides that every wife, child, parent, guardian, husband, or other person who may be injured thereby shall have a right of action against persons selling intoxicating liquors. "The words 'or other person' seem to have been intended by the Legislature to cover all persons injured in person or property by intoxicated persons." *Flower v. Witkovsky*, 37 N. W. 364, 368, 69 Mich. 371.

Rev. St. 1874, c. 59, § 4, providing that every gift, grant, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, made with the intent to disturb, hinder, or defraud creditors or other persons, should be void, should be construed to include the wife of the debtor. *Tyler v. Tyler*, 21 N. E. 616, 618, 126 Ill. 525, 9 Am. St. Rep. 642.

Pub. Acts 1883, No. 191, gives a right of action to the wife or other person injured by any intoxicated person, against the seller of the liquor by which such person became intoxicated. Held, that the words "or other person" are broad enough to include a widow whose husband's death resulted from intoxication. *Brockway v. Patterson*, 40 N. W. 192, 194, 72 Mich. 122, 1 L. R. A. 708.

"Other person," as used in Act Cong. March 2, 1799, § 65, providing that in all cases of insolvency, or where any estate in the hands of executors, administrators, or assignees shall be insufficient to pay all the debts due from the deceased, the debts due the United States on any bond or bonds for the payment of duties shall be first satisfied, and any executor, administrator, or assignee, or other person, who shall pay any debt due from the person or estate for whom or for which they are acting previous to the debt or debts due to the United States, shall be personally liable therefor, means "the person who might have the property or funds in charge which had vested in the executors, administrators, or assignees, and to which the right of priority attached. Besides, it sometimes happens that, instead of the nominative assignee, the person coming into possession of an insolvent's estate is called a 'trustee and garnishee,' and the phrase 'or other person' may have been intended to embrace them. In short, these words were introduced for the purpose of securing a faithful application of the funds which should

come to the hands of an executor, administrator, assignee, or other representative of an insolvent's estate, out of which the preference arises, but not for the purpose of extending such preference to other descriptions of property." *United States v. Crookshank* (N. Y.) 1 Edw. Ch. 233, 237.

The words "other persons," as used in Rev. St. 2159, providing that damages which a widow is entitled to recover for the withholding of her dower shall be a certain amount, to be estimated in an action against the heirs of the husband from the time of his death, and in actions against other persons from the time of her demanding her dower of such persons, not exceeding six years in the whole, includes the alienee of the husband, or one who has become vested with the husband's title by operation of law. *Munger v. Perkins*, 22 N. W. 511, 513, 62 Wis. 499.

The term "other person," in 2 Tayl. St. p. 1610, § 123, providing that all deeds purporting to convey real estate, which are duly executed, etc., and which purport to be made and executed by any sheriff, deputy sheriff, referee, or other person by virtue of any judgment, order, or decree, is of very general import, and not to be restrained, except by the clear context and proper subject-matter of the act, or by the express words found in it, or in some other statute in pari materia. To say that the words signify some ministerial officer of a court of general jurisdiction, legal or equitable, other than a sheriff, deputy sheriff, or referee, is to deprive them of nearly all force and effect. *Chase v. Whiting*, 30 Wis. 544-547.

"Other persons," as used in Sess. Laws 1891, c. 114, making it unlawful for laborers, workmen, mechanics, or other persons employed by the state to work more than eight hours per day, does not include an officer or employé for whom an annual salary has been specifically named and appropriated by the Legislature. *State v. Martindale*, 27 Pac. 852, 853, 47 Kan. 147. Thus a person contracting to do a certain amount of work for a certain sum of money cannot recover a greater sum for the reason that he has worked over eight hours a day in performing such work. *Billinsley v. Marshall County Com'rs*, 49 Pac. 329, 5 Kan. App. 435.

The phrase "other person," found in Code 1876, c. 6, tit. 2, pt. 3, relative to liens of mechanics and others, and giving a lien to every mechanic or other person who shall perform any work, etc., includes a timber-merchant furnishing materials for the erection of a building. *Geiger v. Hussey*, 63 Ala. 338-341.

The term "mechanic, miner, or other person," in the statute exempting from execution the necessary tools and implements of any mechanic, miner, or other person, used

for the purpose of carrying on his trade, are broad enough to include a merchant tailor who is a practical workman, and who cuts and fits garments for customers, and superintends their manufacture. In re Jones (U. S.) 13 Fed. Cas. 931.

"Other person," as used in Acts 1855, § 14, which provides that every mechanic, workman, or other person doing or performing any work toward the erection or construction of any building shall have a lien, means any one connected with the work, and hence includes a superintendent. Mulligan v. Mulligan, 18 La. Ann. 20, 22.

"Other persons," as used in Rev. St. 1858, c. 5, § 1, providing that all words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, and the words include arbitrators and executors. Melms v. Pfister, 18 N. W. 255, 256, 59 Wis. 186.

Under a statute providing that in forcible entry and detainer cases a bond shall be executed to the sheriff or other person, it is held that the other person referred to is not the defendant, but the officer to whom the writ is directed. Mitchell v. Gibson, 14 Ark. 224.

#### Same—As ejusdem generis.

Act Sept. 24, 1866, makes it a penal offense for any warehouseman, wharfinger, or other person to issue vouchers for goods, wares, etc., unless he shall have actually received them into store. Held, that the words "other person" should be construed in connection with the preceding words, and to mean those who are engaged in a like business, or who may connect the business of warehousemen or wharfinger with some other pursuit, such as shipping, grinding, or manufacturing. Bucher v. Commonwealth, 103 Pa. 528, 534, 41 Leg. Int. 288.

In a mechanics' lien statute giving a lien on buildings to laborers, mechanics, or other persons who have performed labor in the construction thereof, the words "other persons" should be construed to mean other persons of the same nature as laborers and mechanics, and are not sufficient to extend the provisions of the statute to an architect. Raeder v. Bensberg, 6 Mo. App. 445, 447.

As used in Act June 10, 1890, c. 407, § 9, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1805], providing that if any owner, importer, consignee, agent, or other person shall make or attempt to make a fraudulent entry of goods for the payment of custom duties, such goods shall be forfeited, etc., the words "other person" mean some one of the same general class as those described by the preceding words, and hence do not include a

stranger who is a mere trespasser in respect to goods. United States v. 1,150½ Pounds of Celluloid (U. S.) 82 Fed. 627, 636, 27 C. C. A. 231.

Rev. St. § 1564, prohibits the sale of liquor on Sunday by any tavern keeper or other person, etc. The words "tavern keeper" indicate very clearly the class of persons against whom the act was named, and the general words "other person" must, under the familiar rule, *nosctur a sociis*, be taken to mean a similar class of persons, and not be extended so as to include all persons. The words "tavern keeper," as used in this statute, clearly mean a person, a part, at least, of whose business it is to sell intoxicating liquors, and, applying the rule above quoted, the words "other person" must be held to mean persons whose business, either in whole or in part, is to sell such drinks. Jensen v. State, 19 N. W. 374, 375, 60 Wis. 577.

Gen. Laws 1899, p. 266, providing for the election of a public weigher, and forbidding the employment of commission merchants or other person or persons for weighing cotton or other merchandise offered for sale, means others of the same class as factors and commission merchants, and does not prohibit ginners and warehousemen from weighing cotton for their customers, or farmers from having it weighed by the purchaser or any other person. Whitfield v. Terrell Compress Co., 62 S. W. 116, 118, 26 Tex. Civ. App. 235.

In an ordinance referring to all appointments of janitors, engineers, or other persons, the words "other persons" will not include inspectors of buildings, since it will apply only to those ejusdem generis, and will not reach a higher class of officials. State v. Longfellow, 69 S. W. 596, 597, 95 Mo. App. 660.

The words "other persons," as used in Code, § 4074, relating to the conveyance of property with intent to defraud creditors, purchasers, or other persons, mean those who have or might have a claim or right to the property conveyed, which might be enforced at law or equity. Day v. Lown, 1 N. W. 786, 790, 51 Iowa, 364.

A statute prohibiting any "tradesman, artificer, or other person" from engaging in his usual occupation on Sunday does not include a coachman or farmer. Cavan v. City of Brooklyn, 5 N. Y. Supp. 758, 760.

In a statute providing that "if any judge or clerk of an election, or any other person, shall knowingly receive and place in the ballot box any ballot not legally voted by a qualified voter," he shall be punished, etc., the words "other person" apply only to persons ejusdem generis with the officers named; and an indictment thereunder which



falls to aver that defendant was a judge or clerk, or acting in a similar capacity, is invalid. *State v. Krueger*, 134 Mo. 262, 35 S. W. 804, 606.

A merchant tailor, who is a practical workman, and who cuts and fits garments for customers, and superintends their manufacture, comes within the meaning of "other person," as used in a statute exempting the tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, etc., from execution. *In re Jones* (U. S.) 13 Fed. Cas. 931.

In considering the question whether the city of Lynchburg had the power to assess a railroad corporation with a license tax under a provision of its charter authorizing the council to impose a tax on persons engaged in certain specified employments, "and upon any other persons or employment which it may deem proper, whether such person or employment is herein specially enumerated or not, and whether any tax be imposed thereon by the state or not," the term "other persons or employment" must be construed as applicable to persons and employments ejusdem generis with the enumerated classes; and the court held that the charter did not confer upon the council power to tax railroad corporations under cover of these general words. *City of Lynchburg v. Norfolk & W. R. Co.*, 80 Va. 237, 246, 249, 56 Am. Rep. 592.

In *Sandiman v. Beach*, 17 Barn. & C. 96, which was an action of assumpsit to recover the expense of hiring a post chaise to convey the plaintiff to a certain place, in which it was contended that the contract was illegal and against the statute because it was performed on the Sabbath, Lord Tenterden, C. J., in delivering the unanimous opinion of the Queen's Bench, said that, "upon looking into the statutes (8 Car. I, c. 1, and 29 Car. II, c. 7) upon which the objection is founded, we are of the opinion that this case does not come within them. By the first of these it was enacted that no carrier with any horse, nor wagonman with any wagon, nor cartman with any cart, nor wainman with any wain, nor drover with any cattle, shall, by themselves or any other, travel on the Lord's Day; and by 29 Car. II, c. 7, that no tradesman, artificer, workman, laborer, or other person or persons, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's Day. It was also contended that under the words 'other person or persons' the drivers of stagecoaches are included, but, where general words follow particular words, the rule is to construe them as applicable to persons ejusdem generis. Considering, then, that in 3 Car. I, c. 1, carriers of a certain description are mentioned and that in 29 Car. II, c. 7, drovers, horse courses,

wagoners, and travelers of other description are specifically mentioned, we think that the words 'other person or persons' cannot have been used in a sense large enough to include the owner and driver of a stagecoach." *City of St. Louis v. Laughlin*, 49 Mo. 559, 563.

In Rev. St. § 2982, exempting from execution the tools and implements, or stock in trade, of any mechanic, miner, or other person, used or kept for the purpose of carrying on his trade or business, the term "other person" should not be interpreted to mean only a person ejusdem generis—that is, an artificer of some sort—but it also includes a tradesman or merchant. The "other person" of the statute is one who, although not a mechanic, necessarily uses or keeps a stock in trade for the purpose of carrying on his business. *Wicker v. Comstock*, 9 N. W. 25, 26, 52 Wis. 315, 316.

"Other person," as used in the exemption law, providing that the tools and instruments of every mechanic, miner, or other person shall be exempted, etc., were intended to comprehend a class of citizens who earn their livelihood by the use of tools and instruments, in whole or in part. *Grimes v. Bryne*, 2 Minn. 89, 103 (Gil. 72, 85). And such is its use in a like statute in Kansas (Gen. St. c. 38). *Guptil v. McFee*, 9 Kan. 30, 34. So, also, in Rev. St. c. 134, § 31, subd. 9. *Bevitt v. Crandall*, 19 Wis. 581, 583.

"Other person," within the meaning of Gen. St. c. 60, § 32, which exempts from execution and attachment the tools, implements, working materials, books, and stock in trade of any mechanic, miner, or other person, etc., includes merchants and tradesmen; the application of the rule noscitur a sociis to limit the words "other person" to persons similar to the designated classes of mechanics and miners being contrary to the manifest purpose and intention of the act. *Martin v. Bond*, 24 Pac. 326, 327, 14 Colo. 466.

Under a statute providing that "every wife, child, parent, guardian, husband, or other person who shall be injured in person or property or means of support by reason of the intoxication of any person, or by reason of the selling, giving, or furnishing any spirituous or intoxicating liquors, that person shall have a right of action against any person who shall, by selling or giving intoxicating liquors, have caused or contributed to the intoxication of such person," one who lost money while intoxicated brought an action to recover from the one who had sold him the intoxicating liquor. The court held that he could not maintain the action. "The party intoxicated is excluded. The persons enumerated are persons who stand to him in special relation, and it is therefore to be assumed that any other person who may sue must also stand to him in some special rela-

tion, so as to be injured by his intoxication, or by the sale to him. A creditor might, perhaps, stand in that relation under some circumstances, or a contractor or servant, or the master of a vessel, or a traveler passing him in the street, and so on; but he could not stand in any such relation to himself, and therefore cannot be understood as embraced in the terms "wife, child, parent, husband, or other person." *Brooks v. Cook*, 7 N. W. 216, 217, 44 Mich. 617, 38 Am. Rep. 282.

A school-teacher is neither a laborer, clerk, servant, nurse, nor "other person," within the meaning of the statute providing that in all cases within the jurisdiction of a justice of the peace, where any action is brought by any laborer, clerk, servant, nurse, or other person for compensation claimed due for personal services performed, the plaintiff, if successful, shall be entitled to recover, as part of the costs, a judgment against the defendant for an attorney's fee. *School Dist. No. 94 v. Gautier*, 73 Pac. 954, 957, 13 Okl. 194.

#### Same—As person other than.

The words "other person," used in a statute following the enumeration of certain classes of persons, always mean persons other than those enumerated. *Warner Elevator Mfg. Co. v. Houston (Tex.)* 28 S. W. 405, 408.

The words "other person," as used in a statute providing that if any servant, etc., shall embezzle, without the assent of his employer, any money, goods, etc., belonging to any other person, he shall be punished, etc., mean any other person than the servant who is guilty of embezzlement. *State v. Porter*, 26 Mo. 201, 207; *Fleener v. State*, 23 S. W. 1, 2, 58 Ark. 98.

"Other person," as used in St. 11 & 12 Vict. c. 49, § 1, providing that no licensed victualer, or person licensed to sell beer by retail to be drunk on the premises, or not to be drunk on the premises, or other person, shall open his house for the sale of wine, spirits, or beer on Sunday before a certain hour, comprehends all the world except the persons before mentioned, viz., licensed victualer, or persons licensed to sell beer by retail. *Harris v. Jenna*, 9 O. B. (N. S.) 152, 157.

#### Other personal effects or property.

A testator bequeathed to a friend all her silver, jewelry, and other personal effects not otherwise enumerated in the will; saying, in connection with such bequest, that she had already communicated to her friend her wishes in connection with the bequest. It was held that the words "other personal effects" were employed in a restrictive sense, and embraced only effects of personal use, like jewelry and silver, and did not operate

on the residuum of testatrix's personal estate. This construction was reached by construing the will as a whole; there being a previous provision bequeathing all the rest and residue of testatrix's estate, after certain specified legacies had been paid, to a church. One of the main reasons for this conclusion seems to have been a presumption that testatrix would not have left undevise and undeclared the trusts which were to govern the use of the residuum of her estate, which was large, as she had done those relating to the silver and other personal effects bequeathed to her friend. *Welman v. Neufville*, 75 Ga. 124, 128.

A deed conveying "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever," situated on any portion of a ranch, covers simply personal property not previously mentioned, but of the same kind or nature as that specified. *Dietz v. Mission Transfer Co.*, 30 Pac. 380, 383, 95 Cal. 92.

"Other personal property," as used in Gen. St. 1878, c. 66, §§ 209, 270, providing that whoever shall carry off or destroy any wood, timber, lumber, hay, grass, or other personal property of another person, without lawful authority, shall be liable for treble damages, should be confined to things ejusdem generis with those enumerated—that is, such as are produced by and grown upon land; the statute being designed to apply only to trespasses committed by carrying off, using, or destroying the products of the soil. *Berg v. Baldwin*, 18 N. W. 821, 822, 31 Minn. 541.

In a statute making every railroad corporation liable for injuries in certain cases to furniture, personal effects, and "other personal property," etc., such phrase will be construed, in connection with the context, as used to mean property, and to mean property of the same general description as the furniture and personal effects. *Wall v. Platt*, 48 N. E. 270, 274, 169 Mass. 398.

Under Cr. St. § 165, providing that whoever shall willfully, unlawfully, and maliciously cut, shoot, maim, wound, or otherwise destroy any horse, mule, neat cattle, hog, sheep, goat, or other personal property, the goods and chattels of another, shall be guilty of a misdemeanor, the term "other personal property" includes oil in an oil tank. *State v. Switzer*, 37 S. E. 818, 819, 59 S. O. 225.

#### Other place

"Other place," as used in Act Cong. 1790, c. 9, § 3, which gives the federal courts jurisdiction of any offense committed within any fort, arsenal, dockyard, or in any other place or district of the country under the sole and exclusive jurisdiction of the United States, refers to other places of a similar character to those previously enumerated in

the same section, and to that which follows. Hence, under this provision, federal courts would not have jurisdiction of an offense committed on board a ship of war lying within the harbor of Boston. *United States v. Bevans*, 16 U. S. (3 Wheat.) 336, 390, 4 L. Ed. 404. It does not include a place ceded to the United States as a home for disabled volunteers. *In re Kelly* (U. S.) 71 Fed. 545, 550.

In construing the act of March 2, 1799, providing that no search by the officers of customs for the purpose of making seizures shall be made in any ship, vessel, dwelling house, store building or other place, unless by virtue of a magistrate's warrant, the court said that "the words 'other place,' following the words 'ship, vessel, dwelling house, and store building,' cannot mean 'other place' in the most general and extensive sense of the words. In this general sense of the words, every material object must occupy such place. If the Legislature had intended to prohibit searches for the purpose of making seizures in every case without a warrant, they would have said so in general terms, without particularly mentioning places. The words 'other place,' in this case, mean 'other like place'; that is, a place substantially the same with the place mentioned in connection with it, having in view the motive and object which induced the Legislature to prohibit an entry into those places without a warrant." It does not include a stagecoach. *Jones v. Gibson*, 1 N. H. 266, 272.

As used in Gen. Laws 1885, c. 224, as amended by Gen. Laws 1897, c. 349, forbidding the excluding of any person from barber shops, eating houses, or other places of public resort, on account of race, color, or previous condition of servitude, "other" will be read "others of such like," so that persons or things therein comprised may be read as ejusdem generis with, and not of a superior quality or different from, those specifically enumerated. *Rhone v. Loomis*, 77 N. W. 31, 32, 74 Minn. 200 (citing *Sandiman v. Breach*, 7 Barn. & C. 99, 17 Am. & Eng. Enc. Law, p. 278).

#### Other place of amusement.

"Other place of amusement," as employed in Act 1881, providing that a license for the sale of liquor should not be granted to the proprietors of any theater, circus, museum, or other place of amusement, included not only theaters, circuses, and museums, but any other place of amusement, as such phrase enlarged the meaning and extended the operation of the statute beyond the three special classes of amusement designated. *In re Hastings* (Pa.) 39 Leg. Int. 440.

#### Other place of business.

In an ordinance providing that "no person shall play on Sunday at billiards, ten-

pins, or other games of amusement, or shall on that day keep his store, shop, or other place of business open, or sell or offer to sell any goods," the words "other place of business" include a theater. *City of St. Joseph v. Elliott*, 47 Mo. App. 418, 420.

#### Other pleading.

In construing a statute providing that "when a declaration or other pleading alleges that any person made, indorsed, assigned, or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it in issue," the court said: "The words 'other pleadings' must obviously be construed to mean a plea in a common-law suit, or an answer in chancery. The word 'plea' in the clause of the section obviously is used in its comprehensive sense, and means any pleading, as a replication in law or in chancery." *Robinson v. Dix*, 18 W. Va. 528, 542.

#### Other power.

"Other power," as used in an act incorporating a street railway company, which provides that the road shall be operated with steam, horse, or other power, is not limited to animal power for the reason that steam cannot be legally used, and hence such road may use electricity. *Taggart v. Newport St. Ry. Co.*, 19 Atl. 326, 327, 16 R. I. 668, 7 L. R. A. 205; *Hudson River Telephone Co. v. Watervliet Turnpike & R. Co.*, 9 N. Y. Supp. 177, 178, 56 Hun, 67.

#### Other premises.

"Other premises," as used in Act April 27, 1855, § 8 (P. L. 369), declaring it to be lawful for every lessee for a term of years of any colliery or mining land, manufactory, or other premises, to mortgage his or her lease or term in the demised premises, are equivalent to "other lands and tenements," and are not to be restricted to leases of the same or like nature as colliery, mine, or manufacturing leases. The word "premises," as applied to realty, means land and tenements. *Appeal of Hilton*, 9 Atl. 342, 343, 116 Pa. 351.

#### Other proceedings.

As used in a power given to one to execute a release for the writer of all manner of imperfections or errors concerning a certain judgment, or concerning any writ, warrant, process, declaration, plea, entry, or other proceeding whatsoever, the words "other proceeding" must be construed to mean proceedings of the same kind, and would not include an error in the mode of enforcing the judgment subsequently. *Solomon v. Graham*, 5 El. & Bl. 309, 323.

"Other proceeding," as used in Revision, p. 401, providing certain solicitor's fees for drawing every bill, etc., and other pleading,

and drawing exceptions and other proceeding, includes affidavits. *Booraem v. North Hudson County Ry. Co.*, 14 Atl. 106, 107, 44 N. J. Eq. (17 Stew.) 70.

The term "other proceeding," in Civ. Code, § 761, subd. 2, provides that if a judgment be reversed, and the case remanded for trial or other proceedings, it shall stand for trial on such other proceedings in the court whence the appeal was taken, etc., includes cases where the court of appeals reverses the judgment and directs one of a particular character to be entered by the court below. *Lloyd v. Matthews*, 17 S. W. 795, 92 Ky. 300.

Under Pol. Code, § 3787, making a tax deed prima facie evidence of certain proceedings, and "conclusive of all other proceedings," the other proceedings referred to are acts and proceedings required to be done and had at the hands of the public officials, entrusted with the various steps leading up to the execution of a tax deed, and to something required to be done by the applicant for the deed, such as the giving of notice to redeem. *Reed v. Lyon*, 81 Pac. 619, 620, 96 Cal. 501.

#### Other process.

"Other process," as used in a deed reserving to the grantor "a supply of spring water by means of a hydraulic ram, wheel, or all other processes of forcing the water," includes the use of a windmill to force the water. *Richardson v. Clements*, 89 Pa. 503, 506, 33 Am. Rep. 784.

#### Other products.

Code, § 1593, providing that cotton, corn, rice, or other products sold by planters and commission merchants on cash sale shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, does not include turpentine and rosin. The products here meant are the products of the planters. Planters are those who plant something in the ground, or sow something therein which produces fruit or increase from this planting, and growing from the soil, such as corn, cotton, or rice. Potatoes, sugar cane, sugar, ground peas, hay, and fodder are such products as planters raise from the soil as they do cotton, corn, and rice, but timber, turpentine, wood, and things of that sort, are not products of the soil of the same sort as the three named, planted or sown and raised by planters from the soil. *Roberts v. Savannah, F. & W. Ry.*, 75 Ga. 225, 226.

#### Other projections.

"Other projections," as used in Gen. St. c. 19, § 13, authorizing cities to make such rules and regulations for the erection and maintenance of balustrades or other projections upon the roof or sides of buildings

therein as the safety of the public requires, as applied to the sides of a building, are those portions of or attachments to the sides which are near the line of a highway, or which project over, and therefore, in one sense, into, the highway, such as balconies, canopies, windows, cornices, gutters, signs, or other additions supported by the building itself, which do not obstruct the travel on the highway. They do not include doorsteps within the actual limits of a highway. such doorsteps, though connected with and a part of the building, are not necessarily supported by it, and are not, properly speaking, projections on the side of it, but are rather structures erected in and occupying a part of, the highway itself. *Cushing v. City of Boston*, 128 Mass. 330, 331, 35 Am. Rep. 383.

#### Other proper person.

"Other proper person," as used in Rev. Laws, p. 193, § 14, and page 425, § 91, allowing the landlord or other proper person to be made defendant in an action against the tenant, means any one whose title is connected to and consistent with the possession of the occupant, which existed between them prior to the commencement of the action. *Layton v. Fen*, 14 N. J. Law (2 J. S. Green) 497, 499 (citing *Fairclain v. Shamtitle*, 3 Bur. 1290; *Layton v. Shupe*, 13 N. J. Law [1 J. S. Green] 66).

#### Other property.

"Other property," as used in Sess. Laws 1881, c. 92, providing that a railroad company shall be liable for an injury done to a building or other property of any person or corporation by fire communicated by a locomotive engine, should be construed to embrace fences, growing trees, and herbage, and is not confined only to subjects ejusdem generis. *Grissell v. Housatonic R. Co.*, 9 Atl. 187, 138, 54 Conn. 447, 1 Am. St. Rep. 138.

Gen. St. 1888, § 3581 et seq., relating to the liability of railroad companies for damage by fire to buildings or other property, cannot be limited, under the rule of ejusdem generis, to embrace only property of the same kind as buildings—that is, real estate—but includes personal property as well. *Martin v. New York & N. E. R. Co.*, 25 Atl. 239, 241, 62 Conn. 331.

As used in Hart. Dig. art. 560, providing for the punishment of any person who shall willfully and maliciously kill, maim, beat, or wound any horse, cattle, goat, sheep, or swine, or shall willfully injure or destroy any other property of another, cannot be construed to include a dog. The expression "any other property" was intended to include only inanimate property, to the injury or destruction of which the terms kill, maim,

wound, etc., could not properly be applied. *State v. Marshall*, 13 Tex. 55, 58.

"Other property," as used in a statute giving the lessor a lien for rent upon any and all goods, chattels, or other property, means property in the nature of personalty, such as goods and chattels, and hence does not embrace fixtures or real chattels partaking more of the nature of personalty than realty. *First Nat. Bank v. Adam*, 28 N. E. 955, 957, 138 Ill. 483.

"Other property," as used in Act Cong. March 26, 1863, § 1, providing that whenever the exigencies of any army in the field are such as to make impressment of forage, articles of subsistence or other property absolutely necessary, then such impressment may be made, cannot be construed to include real estate and all other property, but signifies that kind of personal or perishable property answering to that kind of property actually specified in the act, and absolutely necessary for the army in the field. *White v. Ivey*, 34 Ga. 186, 199.

Rev. St. § 4423, provides that any person who shall designedly, by any false pretense or false token, obtain from any other person any money, goods, wares, merchandise, or other property, shall be punished, etc. Under this statute it is held that, though the word "property" is in many cases construed to include things in action and evidences of debt, the words "other property," in the statute quoted, must, under the rule of *noscitur a sociis*, be limited to such tangible classes of property as are therein previously enumerated—that is to say, money, goods, wares, merchandise, and other property of that description—and does not include the obtaining of board and lodging by false pretenses. *State v. Black*, 44 N. W. 635, 75 Wis. 490.

Under a law providing that if any damage shall happen to any person, or his or her team, carriage, or other property, by means of the insufficiency or want of repair of any bridge upon any public road, the person sustaining such damage shall be entitled to recover the same from the board of chosen freeholders of the county, the words "other property" can only be construed as including property of the same kinds as that mentioned; that is, personal and movable. *Livermore v. Board of Chosen Freeholders of Camden Co.*, 29 N. J. Law (5 Dutch.) 245, 247; *Brailley v. Inhabitants of Southborough*, 60 Mass. (6 Cush.) 141, 142. And it does not extend to injuries to real estate, so that the board of chosen freeholders are not liable under the act for damages to the owner of a gristmill for not repairing a bridge over a raceway, whereby the water in the dam escapes. *Livermore v. Board of Chosen Freeholders of Camden Co.*, 29 N. J. Law (5 Dutch.) 245, 247.

"Other property," within the meaning of Act May 15, 1871, providing that in all actions of replevin to recover timber, lumber, coal, or other property severed from the realty, the plaintiff shall be entitled to recover, notwithstanding the fact that the title to the land from which said property is severed may be in dispute, is to be construed, according to the rule of *ejusdem generis*, to apply only to articles which before the severance constituted a part of the freehold, the severance of which depreciates its value. The term does not include growing crops. *Renick v. Boyd* (Pa.) 1 Chest. Co. Rep. 267; *Id.*, 99 Pa. 555, 557, 44 Am. Rep. 124.

Prior to the incorporation of the California Fig Syrup Company, several parties were the proprietors of the medicine, and of the appliances connected with its manufacture and sale. One of them owed his associates a certain sum, due on the purchase price of his interest. On the creation of the corporation, they all joined in a deed of conveyance to it. The deed conveyed certain enumerated property, and then proceeded: "Also the same undivided interest in all the machinery and means used in manufacturing said medicine, in the materials used now belonging to them as such manufacturers in all such medicine now on hand or sold conditionally, and in the price of that sold or furnished and not yet paid for, in the bottles, filled and unfilled, and in the art of compounding or manufacturing said medicine, and in all the other property, labels, circulars, and other things, rights, or interests in or relating to such medicine now belonging to said first parties." And it was claimed that such indebtedness was conveyed by such deed. The court said: "If conveyed at all, it is by the words 'all the other property and other things,' but we are of opinion that these words do not include, and were not intended to include, the indebtedness, because, first, the instrument of conveyance carefully designates the particular property conveyed, and so important a matter as this indebtedness would naturally have been mentioned if the intention had been to transfer it; and, second, the rule of construction is that general expressions of the nature of those quoted, used in connection with enumerated matters and things, are limited to matters and things of the same kind. Thus the words 'all the other property and other things' refer to property of the nature of labels and circulars. The clause 'rights or interests in or relating to such medicine' probably refers to the proprietary right and matters connected therewith. Certainly it cannot be construed to include a debt due from one of the partners to the partnership." *Alt v. California Fig Syrup Co.*, 7 Pac. 174, 175, 19 Nev. 118.

"Other property," as used in Pen. Code, § 53, providing that every person who shall

falsely represent or personate another, and in such assumed character shall receive any money or other property whatever, shall be deemed guilty of larceny, does not refer to property of the same class, since the word "money" includes every kind or species of that class. *State v. White*, 41 Pac. 182, 183, 12 Wash. 417.

A will devised the "whole of my lands" to certain persons, and directed that "my other property" of every kind, not before mentioned, should be sold, etc. Held, that the words "other property" referred to other personal property, and did not include land acquired by the testator after the publication of his will, since such land was covered by the devise of the whole of his lands, *Edwards v. Warren*, 90 N. C. 604, 606.

Under Rev. Laws, § 4154, providing for the punishment of persons obtaining money or other property from another with intent to defraud, a promissory note comes within the description of "other property." *State v. Switzer*, 22 Atl. 724, 725, 63 Vt. 604, 25 Am. St. Rep. 789.

The term "other property," in Rev. St. § 949, authorizing counties to pay their subscriptions to railroad stock in moneys, lands, or other property, includes tax certificates. *Hall v. Baker*, 42 N. W. 104, 107, 74 Wis. 118.

The words "other property," in a statute providing punishment for any one obtaining goods, wares, merchandise, or other property under false pretences, should be limited to such identical classes of property as are therein previously enumerated; that is to say, money, goods, wares, merchandise, and other property of that description. Under Pen. Code, § 532, providing that any person obtaining money or property by false pretences is punishable to the same extent as for larceny, a person so obtaining land is not punishable. *People v. Cummings*, 114 Cal. 437, 441, 46 Pac. 284, 285.

Under Act 1860, providing that money or other property acquired by a married woman during coverture by her personal services shall be held by her to her sole and separate use, money due for her services is protected as hers in the same manner as if the money had been received. *Whiting v. Beckwith*, 31 Conn. 596, 597.

Pen. Code, § 4627, prohibiting all acts of willful and malicious mischief in the injuring or destroying any other public or private property, relates only to the injury or destruction of inanimate property, and does not apply to the injury or killing of animals of any kind. *Patton v. State*, 19 S. E. 734, 98 Ga. 111, 24 L. R. A. 732.

#### Other provision.

Rev. St. § 2171, providing that, when a devise or other provision is made for a wid-

ow, she must elect whether to take the provision made for her by law, or such devise or other provision, should be construed to include a direction in a will to the testator's executors to bear constantly in mind the wants of his wife, and set aside, use, and expend whatever moneys might be necessary, consistent with her condition, to provide for her comfort and physical health, and placing no limit on the sums which might be spent for such purposes. *Van Steenwyck v. Washburn*, 17 N. W. 289, 59 Wis. 483, 48 Am. Rep. 532.

#### Other publication.

An obscene private letter is not a book, pamphlet, picture, or print, and is not covered by the words "other publication" as used in Act March 3, 1865, § 16, providing that no obscene book, pamphlet, picture, print, or other publication of an indecent character, shall be admitted into the mails. *United States v. Williams* (U. S.) 3 Fed. 484, 486.

#### Other public building.

The words "other public buildings," in Nix. Dig. 829, which forbids the pulling down or removal of any dwelling house, market house, or other public building "heretofore erected, and which may encroach on any highway," are to be construed as meaning buildings similar to the designated buildings, and show that the building meant was such that the property in it, and also its possession and use, were in the public. An engine house, the property of which was not in the public, and the possession of which was exclusively in a fire company, is not a public building in such sense. *Pancoast v. Troth*, 34 N. J. Law (5 Vroom) 377, 383.

#### Other public grounds.

"Other public grounds," as used in title of Laws 1897, c. 248, being an act relating to actions against municipalities for damages to persons injured on streets and other public grounds, will not be construed, under the rule of ejusdem generis, to mean grounds of the same general kind as those previously mentioned, since such fact does not appear to be the intent of the Legislature from the general provisions of the act. *Winters v. City of Duluth*, 84 N. W. 788, 789, 82 Minn. 127.

#### Other public measures.

"Other," as used in Rev. St. 1891, c. 46, § 303, declaring that, whenever a constitutional amendment or other public measure is proposed to be voted upon by the people, the ballots should be prepared in a particular form, is not to be construed as limiting the public measures to like measures of equal breadth, affecting like territory with "constitutional amendments," for, if such a construction were adopted, only constitutional

amendments would be included, and the words "or other public measures" would be rendered meaningless. The rule that the word "other," following an enumeration of particulars, embraces enumerated particulars of like nature, unless a broader sense is obviously intended, is not applicable. *Union County v. Ussery*, 35 N. E. 618, 619, 147 Ill. 204.

#### **Other public official proceeding.**

The execution of a capital sentence upon a convict does not come within the true meaning of a statute exempting from the libel law publications which are a fair and true report of some "judicial, legislative, or other public official proceeding, or of some statement, subject, argument, or debate in the course of the same." Such enactment was only intended to embrace such transactions as resemble judicial and legislative proceedings—such as the transactions of administrative boards, in which the subjects dealt with are liable to be considered, deliberated upon, discussed, and determined—and has no reference to the speech of a convicted criminal just before his execution. *Sanford v. Bennett*, 24 N. Y. 20, 24.

#### **Other public officer.**

Rev. St. § 5344 [U. S. Comp. St. 1901, p. 3629], providing that every owner of any steamboat or vessel, inspector, or other public officer through whose fraud, connivance, etc., the life of any person is destroyed, is guilty of manslaughter, does not include a pilot. The words "other public officer" evidently mean one who had something to do with regulating or limiting the number of passengers to be taken on board—a matter over which the pilot is presumed to have had no authority. *United States v. Holtzhauer* (U. S.) 40 Fed. 76, 80.

#### **Other public purposes.**

The words "other public purposes," in the act of incorporation of a water company, providing that the corporation shall supply water to the city of New Orleans, free, for the extinguishment of fires and other public purposes, and authorizing the city to draw a sufficient quantity of water from the hydrants for extinguishing fires, for wetting, washing, watering the streets and gutters, and any other public purposes, means, in both places in which it is used in the statute, public purposes of a similar nature to the enumerated purposes. It does not include water for the use of the whole city. *Commercial Bank of New Orleans v. City of New Orleans*, 17 La. Ann. 190, 195.

#### **Other public schools.**

Rev. Laws, § 270, provides that the real and personal property belonging to colleges, academies, or other public schools, shall be

exempt from taxation. Held, that the phrase "other public schools" should not be construed as meaning those which are supported by public taxation, but those which are public in the sense that colleges and academies are. *Willard v. Pike*, 59 Vt. 202, 9 Atl. 907, 915.

#### **Other public use.**

Act Cong. July 2, 1836, provided that a certain strip of land along the river bank at the town of Burlington, Iowa, and running with the river the whole length of the town, should be reserved from sale for public use as public highways and for other public uses. Held, that the term "for other public uses," as used in such act, did not mean to limit the use to a use analogous to that of a highway, but authorized the land so reserved to be used for any public uses, which included the right to make an excavation and erect a wall and freight depot thereon for the benefit of a railroad and of the public. *Burlington Gaslight Co. v. Burlington, C. R. & N. Ry. Co.*, 59 N. W. 292, 294, 91 Iowa, 470.

#### **Other purposes.**

"The words 'other purposes' have been extensively used in titles to statutes, reciting that they are for certain specified and other purposes, to cover any and every thing, whether connected with the main questions indicated by the title or not; but the words cannot have such effect, in view of the provision of the Constitution requiring every law to relate only to one subject, to be expressed in its title." *City of St. Louis v. Tiefel*, 42 Mo. 578, 592; *Lincoln Bldg. & Sav. Ass'n v. Graham*, 7 Neb. 173, 177, 179; *Town of Fishkill v. Fishkill & B. Plankroad Co.* (N. Y.) 22 Barb. 634, 642; *Pitkin County Com'rs v. Aspen Mining & Smelting Co.*, 32 Pac. 717, 718, 3 Colo. App. 223. Nothing which the act could not embrace without them can be brought in by their aid. *Pitkin County Com'rs v. Aspen Mining & Smelting Co.*, 32 Pac. 717, 718, 3 Colo. App. 223; *State v. Arnold*, 38 N. E. 820, 821, 140 Ind. 628.

"Other purposes," as used in Gen. St. 1889, § 7084, authorizing township trustees to levy a tax for township, road, and other purposes, means such sums as are necessary to meet the ordinary expenses of the year, such as the payment of such municipal officers as it is necessary to employ, the support and defense of such actions as they may be parties to, and the expenses they incur in performing such duties as the law imposes, and hence would authorize the levy of a tax for township bridge purposes. *Kansas City, Ft. S. & G. R. Co. v. Scammon*, 25 Pac. 858, 859, 45 Kan. 481.

"Other purposes," as used in Rev. St. § 5388 [U. S. Comp. St. 1901, p. 3649], pro-

viding for the punishment of every person who unlawfully cuts or wantonly destroys any timber standing on the land of the United States, which in pursuance of law may be reserved or purchased for military or other purposes, must be construed as extending only to purposes ejusdem generis with military purposes; that is, governmental or public purposes. A military purpose is a public purpose. *United States v. Garretson* (U. S.) 42 Fed. 22, 23.

"Other purposes," as used in a deed of land on which a meeting house was to be erected, in which seats were to be provided free of charge for the students of a certain academy, the trustees of which academy to have the use of such meeting house for public exhibitions and other purposes at all times, while sufficiently broad to include any purpose to which the building could be lawfully put, should be construed in a restricted sense, and not to include any purpose that would interfere or be inconsistent with the use of the house by parishioners and students for public religious worship. *Trustees of Phillips Exeter Academy v. New Parish in Exeter*, 36 Atl. 548, 549, 68 N. H. 10.

The words "other purposes," mentioned in the charter of a water company authorized to take water from a stream by purchase or otherwise, to supply a town with water for the extinguishment of fires, and for domestic, sanitary, and other purposes, must be "construed to refer to purposes ejusdem generis with the purposes specifically mentioned, and to mean other like purposes, or other like public purposes. They give the company no right to take more water than is ordinarily needed for the purposes enumerated in order to supply power to manufacturers, though this latter supply might be necessary to protect the town in case of a general conflagration." *In re Barre Water Co.*, 20 Atl. 109, 62 Vt. 27, 9 L. R. A. 195.

In a law exempting from local taxation or other purposes all the real and personal property of a charitable corporation, "so long as it or its income is used for the purposes for which it was incorporated," the other purposes referred to are evidently local purposes, such as assessments, etc., and could never have been intended to extend to taxation by the state. *In re Vanderbilt*, 2 Con. Sur. (N. Y.) 319, 326, 10 N. Y. Supp. 239.

The words "or other," as used in a provision of a will authorizing the executor to distribute a certain sum "for such religious, charitable, educational, or other purposes" as they may deem advisable, cannot be construed as intended to be read "other such," or "other like," or "other of the same kind," for such a construction would make them mere surplusage, and deprive the clause of meaning, for there are other charitable pur-

poses than those which are educational or religious, such as the care of the poor, the sick, etc. Therefore, when the testator adds the words "or other," the clause clearly expresses the intent of the testator to permit the trustees to devote the fund, if they choose to do so, to purposes other than those which are educational or religious or charitable. *Hyde's Ex'rs v. Hyde*, 53 Atl. 593, 594, 64 N. J. Eq. 6.

The phrase "other purpose intended for mutual profit or benefit," in Rev. St. art. 568, providing that a corporation may be created for purposes enumerated, and any other purpose not otherwise specially provided for, authorizes the creation of a corporation for buying, selling, and dealing in real estate, live stock, bonds, securities, and other properties of all kinds on its own account and for commission. *National Bank of Jefferson v. Texas Investment Co.*, 12 S. W. 101, 103, 74 Tex. 421.

The words "other purposes," in a city charter authorizing the assembly to order the construction of sewers when the board of public improvements shall recommend it as necessary "for sanitary or other purposes," do not mean "other like purposes pertaining to the health, or designed to secure the health of the city's inhabitants," as there may be other purposes besides sanitary purposes which make the construction of a sewer necessary. *Eyerman v. Blaksley*, 78 Mo. 145, 151.

#### Other question.

As used in Acts 1893, § 14, providing that, whenever the approval of a constitutional amendment or other question is submitted to the vote of the people, such question shall be printed upon the ballots, etc., the words "other question" mean matter on which the electors are to express their will, other than the election of officers. The clause has reference to the nature of the subject before the people, not to the particular body of electors who are to decide it; and the words "other question" are used in contradistinction to the choice of candidates for office, which is the main subject of the act. They include all questions, whether state or local, which are submitted by referendum to the direct vote and decision of the electors either of the state at large or of a particular locality. *Evans v. Willistown Tp.*, 32 Atl. 87, 88, 168 Pa. 578.

#### Other railroads.

"Other railroads held by the state," as used in Const. art. 7, § 13, par. 1, providing that the proceeds of a sale of the Western & Atlantic, Macon & Brunswick, "or other railroads held by the state," should be applied to the discharge of the existing bonded debt, applies to railroads which might be acquired after the adoption of the Constitu-



tion by the state, as the consequence of the indorsement of the bonds of these railroad companies, for in no other way, unless at a tax sale or other sale under a claim in favor of the state, could the state ever acquire railroad property, the direct acquisition of such property being prohibited by the Constitution. *Park v. Candler*, 39 S. E. 89, 93, 113 Ga. 647.

#### **Other reasonable cause.**

"Other reasonable cause," as used in St. 1762, providing that new trials may be granted for mispleading, newly-discovered evidence, want of notice, or a reasonable opportunity to appear and defend, or "other reasonable cause," means a cause of the same general nature as those enumerated. The causes enumerated being results of mistakes or accidents, any other cause, to come within the description of "other reasonable cause," must also be the result of mistake or accident. *Brown v. Congdon*, 50 Conn. 302, 309.

#### **Remedy.**

"Other remedy," as used in the statement that mandamus will not lie if the relator has any other remedy, means a remedy equally as convenient, beneficial, and effective as mandamus. *State v. Wilson*, 28 South. 482, 487, 123 Ala. 259, 45 L. R. A. 772.

The term "other remedy," when used to denote a remedy which will prevent the issuing of a writ of certiorari or other special writ or proceeding, must be construed to mean a remedy which, like a writ of error or appeal, will set aside and annul the void proceedings of which the petitioner complains. *State v. Rose*, 58 N. W. 514, 519, 4 N. D. 319.

#### **Other remedial writs.**

Under the Constitution, investing the Supreme Court with appellate jurisdiction, and authorizing it to issue "other remedial writs," it is held that this phrase embraces only such writs other than those specifically enumerated as may be properly used in the exercise of appellate powers, or of the power of control over inferior or other courts expressly granted by the Constitution. *State v. Ashley*, 1 Ark. (1 Pike) 279.

The term "other remedial writs," in the constitutional clause giving to the Supreme Court a superintending control over all the inferior courts of law and equity, with power to issue writs of error and supersedeas, certiorari and habeas corpus, mandamus and quo warranto, and other remedial writs, means only such other writs as may be proper, needful, and appropriate to carry out the general objects of the grant, leaving to the courts to say when and in what shape their interposition for the preservation of

life, liberty, or property is necessary. *Ex parte Woods*, 3 Ark. (3 Pike) 532, 538.

The term "other remedial writs," in a constitutional provision that "the Supreme Court shall have power to issue writs of error and supersedeas, certiorari and habeas corpus, mandamus and quo warranto, and other remedial writs, and to hear and determine the same," embraces only such other writs as may be properly used in the exercise of appellate powers, or the power of control over inferior or other courts, expressly granted by the Constitution, and does not include the power to issue writs of injunction to stay proceedings at law. *Ex parte Jones*, 2 Ark. (2 Pike) 93, 97.

#### **Other rock.**

"Other rock," as contained in an instruction requiring the claimant for mineral land to show by a preponderance of evidence that such mineral consists of veins of quartz or other rock in place, means any combination of rock broken up, mixed with minerals and other things, and does not mean merely hard rock or quartz rock. *Stevens v. Williams* (U. S.) 23 Fed. Cas. 40, 42.

#### **Other sharp or dangerous weapon.**

The words "other sharp or dangerous weapon," as used in Laws 1854, c. 74, providing for the punishment of any person who, with intent to do bodily harm, and without justifiable or excusable cause, shall hereafter commit any assault on the person of another with any knife, dirk, dagger, or other sharp or dangerous weapon, mean a weapon of the same character as a knife, dirk, or dagger; that is, naturally producing the same or similar results as those produced by the instruments mentioned. *People v. Cavanagh* (N. Y.) 62 How. Prac. 187, 193.

#### **Other state or government.**

"Other," as used in Code Proc. § 227, defining a foreign corporation to be a corporation created by or under the laws of any other state, government, or county, means any other state or government than that of New York. *Cooke v. State Nat. Bank of Boston* (N. Y.) 50 Barb. 339, 341.

#### **Other street railway.**

Act Mo. March 26, 1887, § 2, relating to the granting of street railway franchises, declares that before granting any franchise for constructing and operating any elevated, underground, or other street railway on, over, or under any street, etc., the city authorities shall designate the route, etc. It was held that the words "other street railway" are not repugnant to any other words in the sentence, but apply to a surface road; the court remarking that, even construing the phrase "other street railways" according to the rule

of ejusdem generis, surface street railways were included. The genus is street railway. The kinds or species of street railways are elevated, underground, and surface, and the act clearly included them all. *Ruckert v. Grand Ave. Ry. Co.*, 63 S. W. 814, 818, 163 Mo. 260.

#### Other structure.

The words "other structure," as used in Acts Mich. 1885, p. 293, § 1, giving one who builds any house, building, machinery, wharf, or other structure a lien thereon and on the lot or piece of land not exceeding one quarter section, following, as they do, specific words, do not include a railroad. *Pennsylvania Steel Co. v. J. E. Potts Salt & Lumber Co.* (U. S.) 63 Fed. 11, 15, 11 C. C. A. 11.

"Other structures," as used in Acts 1872, c. 669, providing that all the provisions of the laws relating to mechanics' liens should apply to wharves, piers, bulkheads, and bridges, and materials furnished therefor, and labor performed in constructing such wharves, piers, bulkheads, and bridges, and other structures connected therewith, covers something not strictly included in the terms before used. It means all structures on or connected with the pier, and necessary for its use, and includes sheds built on the piers, which were quite essential to their use, and, in a broad sense, were really a part of them. *Collins v. Drew*, 67 N. Y. 149, 151.

#### Other sufficient cause.

Code Civ. Proc. § 2481, authorizing the surrogate to open and vacate decrees for fraud, newly discovered evidence, clerical error, or other sufficient cause, will be interpreted as meaning causes of like nature with the others specifically named. In *re Tilden's Ex'rs*, 98 N. Y. 434, 442; In *re Hawley*, 100 N. Y. 206, 3 N. E. 68; In *re Monteith's Estate*, 58 N. Y. Supp. 379, 27 Misc. Rep. 163; In *re Soule*, 25 N. Y. Supp. 270, 272, 72 Hun, 594.

#### Other thing.

"Other thing," as used in St. 1862, c. 168, § 1, providing that whoever prints, publishes, sells, or distributes any book, pamphlet, ballad, printed paper, or other thing containing obscene, indecent, or impure language, etc., shall be punished, etc., must be construed to mean "or other thing of like kind." The maxim *noscitur a sociis* applies. *Commonwealth v. De Jardin*, 126 Mass. 46, 47, 30 Am. Rep. 652.

Act Feb. 18, 1867, § 1, authorizing the giving of a lien for an advance of money for the purchase of supplies, farming utensils, working stock, or "other things necessary for the cultivation of a farm," means all other things in addition to the specified articles which constitute the common and usual outfit to make the crop. "The exact

articles included therein must depend upon the usage and custom of agricultural pursuits, taking into account the system of agriculture as we have it. What might be necessary on large plantations would be very extravagant for the cultivation of a few acres." *Herman v. Perkins*, 52 Miss. 813, 816.

The words "other things," in a will, held represented by the sign, "etc.," and to cover articles of the same nature as those specified in the clause. *Tefft v. Tillinghast*, 7 R. I. 434, 436.

#### Other thing of value.

The words "other thing of value," in a statute making it a misdemeanor to obtain by means of any forged instrument, etc., any money, goods, or property, or other thing of value, do not modify the words "money, goods, and property," but are only used to enlarge the class of personal things which the statute makes penal to retain by false pretenses; and therefore, in an indictment for obtaining property in violation of the statute, it is not necessary to allege the value thereof. *State v. Gillespie*, 80 N. C. 396, 397.

#### Other tort.

The term "other tort resulting in personal injury," in Gen. St. 1894, § 5338, subsec. 1, as amended by Laws 1895, c. 30, providing that actions of libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury must be brought within two years, includes an action for malicious prosecution. *Bryant v. American Surety Co.*, 71 N. W. 826, 69 Minn. 30.

#### Other unforeseen cause.

A charter party required the charterer to load a full cargo of guano, and also that he should be discharged from liability in the event of the vessel being lost, or of any other unforeseen cause preventing the completion of the charter party. It was held that the phrase "other unforeseen cause" did not refer to any unforeseen cause which might prevent the loading of a cargo, such as the failure to find sufficient guano to make a load. *Hills v. Sughrue*, 15 Mees. & W. 253, 261.

#### Other unlawful game.

"Other unlawful game," as used in 1 Ky. St. Law, 760, 761, providing for the punishment of any owner, tenant, or other superintendent of a house who permits or suffers games at faro, or any other unlawful game or games whatever at which money or any other thing is won or lost in such house, should be construed to include the game of poker, at which money is won and lost. Any game at which money or other thing is lost and won is an unlawful game, within the meaning of the statute. *Vicaro v. Commonwealth*, 35 Ky. (5 Dana) 504, 505.

**Other valuable minerals.**

"Other valuable minerals," as used in a conveyance of all the coal, iron ore, fire clay, and other valuable minerals in, on, or under the particular lands, does not include petroleum oil and natural gas. *Detlor v. Holland*, 49 N. E. 690, 692, 57 Ohio St. 492, 40 L. R. A. 268.

**Other valuable thing.**

Money or other valuable thing, within the meaning of a statute imposing a penalty for running a ferry for money or other valuable thing without obtaining a license, does not include a supposed benefit to one who runs a free ferry as an inducement to trade at his store, if there is no agreement to trade at his store with the parties ferried, and no money paid by them prior to the time that they are so ferried. *Shinn v. Cotton*, 12 S. W. 157, 52 Ark. 90.

**Other vessels.**

Laws 1862, c. 482, authorized the seizure of seagoing or ocean-bound vessels, or any other vessel, for the collection of demands and debts. Held, that the words "other vessels" should be construed to include canal boats. Where the Legislature, in its enactments, distinguished between seagoing and other vessels, the latter clause should be received in its largest sense, and be held to include all craft used in navigating the waters or canals of the state. *Crawford v. Collins* (N. Y.) 30 How. Prac. 398, 400.

"The words boats, barges, or other vessels, in an act of Parliament, have been held not to include ships, as ships or vessels are not ejusdem generis with boards and barges." In re Barre Water Co., 20 Atl. 109, 110, 62 Vt. 27, 9 L. R. A. 195 (quoting *Lyndon v. Standbridge*, 2 Hurl. & N. 45).

The term "boats and other vessels," in a statute giving a lien upon boats and other vessels for construction, repairs, and supplies, applies exclusively to vessels intended for navigation, and does not include a floating wharf, constructed for receiving, storing, and forwarding merchandise. *Olmsted v. McNall* (Ind.) 7 Blackf. 387, 388.

**Other waters.**

"Other waters," as used in Code, § 2546, providing that a warden may take from any of the public waters of the state, at any time and in any manner, any fish, for the purpose of propagating or restocking other waters, is restricted to the kind previously mentioned; that is, public waters. *State v. Sears*, 87 N. W. 735, 115 Iowa, 28.

**Other writing.**

"Other writing," as used in the statute relating to the crime of forgery, and providing, after naming certain specific writings or

instruments which might be the subject of forgery, "or any other writing of any person or persons whatsoever to prevent equity and justice," includes an order, though the same was not specifically mentioned. *State v. Cooper* (Conn.) 5 Day, 250, 254.

"Other writing for the payment of money," as used in Code, § 3285, dispensing with an inquiry of damages in an action on any bond or other writing for the payment of money, means other writing like a bond, for the payment of a sum ascertained and certain. It does not include a policy of fire insurance containing a provision that, if there is other insurance on the property, the loss shall be adjusted among the several insurers. *Commercial Union Assur. Co. v. Everhardt's Adm'r*, 14 S. E. 836, 837, 88 Va. 952.

Under section 1, Act April 15, 1866 (14 Stat. 12), now section 5418, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3666], which provides a penalty for the forging of any bid, proposal, guaranty, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States, the words "other writing" include an owner's oath required to be taken before making an entry of goods at the customhouse, and an import entry and importer's bond. *United States v. Lawrence* (U. S.) 26 Fed. Cas. 878.

**OTHER INSURANCE.**

"Other insurance," as contained in an insurance policy providing that the policy should be void if there should, without the consent of the company indorsed thereon, be "other insurance, valid or otherwise," on the property insured, meant insurance in addition to that effected by the policy itself, or which was allowable under its terms; and consequently it would not have been rendered void by the existence of another insurance policy covering the same property if this state of things was permissible under any language constituting a portion of the policy, or by virtue of the company's consent indorsed thereon. *Georgia Home Ins. Co. v. Campbell*, 29 S. E. 148, 149, 102 Ga. 106.

An insurance policy providing that if the insured shall thereafter make other insurance on the property without the consent of the company written thereon, etc., then the policy shall be void, means other valid insurance, and the making of a void policy does not create a forfeiture of the first policy. "A contract of insurance is a contract of indemnity, and if there be no indemnity by its terms, and the contract is void, then there is no insurance, though there may be a policy of insurance in form; and, there being no insurance in reality, such void policy is not included in the words 'make other insurance.'" *Jersey City Ins. Co. v. Nicol*, 35 N. J. Eq. (8 Stew.) 291, 299, 40 Am. St. Rep. 625;

Dahlberg v. St. Louis Mut. Fire & Marine Ins. Co., 6 Mo. App. 121; Cassity v. New Orleans Ins. Ass'n, 3 South. 138, 139, 65 Miss. 49; Allison v. Phoenix Ins. Co. (U. S.) 1 Fed. Cas. 530, 532.

The words "other insurance," in a fire policy conditioned to be void if other insurance is obtained without the written consent of the insurer, "do not mean a void policy, which obviously offers no insurance at all, nor do they mean a policy which may, at the option of the underwriter, be canceled, for that is, at best, but conditional insurance. They mean a binding, available insurance, only, upon which the insured can rely for protection in case of loss, and which he can enforce by law, and which cannot be repudiated with impunity at the arbitrary election of the insurer. The condition prohibits a second valid insurance without the consent of the insurer, and not a mere futile attempt to procure conditional insurance. A second policy which by its own terms is void for any cause is not an insurance at all, and this is equally true whether the invalidity is apparent on the face of the policy itself, or is made to appear by evidence allunde the policy." Sweeting v. Mutual Fire Ins. Co., 34 Atl. 826-827, 83 Md. 63, 32 L. R. A. 570.

An insurance policy stipulated that the defendant company, in case there was other insurance, should not be liable for a greater proportion of any loss sustained than the sum covered by its policy should bear to the whole amount of the insurance. Plaintiff violated a condition in a policy taken out in another company to the effect that it should be null and void in case other insurance was effected without the consent of the insurer. Held, that the words "other insurance," in defendant's policy, should be construed to include the policy taken out in the other company, since it was only voidable at the option of the company. Saville v. Aetna Ins. Co., 20 Pac. 646, 650, 8 Mont. 419, 3 L. R. A. 542.

An insurance policy providing that the assured shall not be entitled to recover any greater proportion of the loss or damage than the amount insured bears to the whole sum insured on the property, "without reference to the solvency or the liability of other insurers," does not mean other valid insurance, and the sum insured by a policy which was invalidated by the taking of a subsequent policy was to be deducted from the amount specified in such later policy. Cassity v. New Orleans Ins. Ass'n, 3 South. 138, 139, 65 Miss. 49.

#### Insurance by third person.

Where a fire policy procured by the owner provided that it should be void if now or hereafter there be other insurance on any property hereby insured, the fact that a mortgagee subsequently procured insurance on his interest did not render the policy void,

the interest thus insured being distinct from the owner's interest, so that the insurance of that interest did not constitute other insurance, within the meaning of the policy. Home Ins. Co. v. Koob, 68 S. W. 453, 454, 113 Ky. 360, 58 L. R. A. 58; Carpenter v. Continental Ins. Co., 28 N. W. 749, 61 Mich. 635; Niagara Fire Ins. Co. v. Scammon, 32 N. E. 914, 915, 144 Ill. 490, 19 L. R. A. 114; Titus v. Glens Falls Ins. Co., 81 N. Y. 410, 415.

The term "other insurance," in a fire policy providing that, in case of any other insurance upon the property insured, the assured shall be entitled to recover no greater proportion of the loss sustained than the sum thereby insured should bear to the whole amount insured thereon, does not include insurance on the property effected by a mortgagee upon his interest as such. Adams v. Greenwich Ins. Co. (N. Y.) 9 Hun, 45, 48; Niagara Fire Ins. Co. v. Scammon, 28 N. E. 919, 922, 144 Ill. 490, 19 L. R. A. 114; Traders' Ins. Co. v. Pacuad, 37 N. E. 460, 462, 150 Ill. 245, 41 Am. St. Rep. 355.

"Other insurance," as used in an insurance policy providing for a pro rata distribution of the loss if the assured "shall have already any other insurance" on the property, covers not only insurances made by the assured in his own name, but any others which he had either in the name of another, or by assignment for his benefit. But a policy will not be deemed void where it was effected by the purchaser of premises, who insured without notice of a policy effected by his vendor, and which was not assigned to him. Aetna Fire Ins. Co. v. Tyler (N. Y.) 16 Wend. 385, 400, 30 Am. Dec. 90.

Where it appears that insurance was taken upon a joint interest in property, further insurance on the interest or title of one of the joint owners did not vitiate the policy under a clause providing that, if any other insurance shall be made upon the said property without the company's consent, the policy should be void. Pitney v. Glens Falls Ins. Co. (N. Y.) 61 Barb. 335, 342.

"Other insurance," within the meaning of a fire policy taken out by a mortgagee for the protection of his interest, but jointly in his name and that of the mortgagor, without the knowledge of the mortgagor, which policy provides that it "shall be void if there is or shall be any other insurance on the property insured," does not include a prior policy taken out by the mortgagor upon his interest in the property, as the mortgagor and mortgagee have separate insurable interests therein. Westchester Fire Ins. Co. v. Foster, 90 Ill. 121, 124.

#### Prior or subsequent insurance.

A condition in an insurance policy that every person insuring must give notice of any

"other insurance" effected applies to subsequent as well as to prior insurance. *Warwick v. Monmouth County Mut. Fire Ins. Co.*, 44 N. J. Law (15 Vroom) 83, 43 Am. Rep. 343, 28 Alb. Law J. 44.

A prohibition in a policy against other insurance refers to subsequent insurance, and the validity of a policy was not affected by prior insurance, though unknown to the underwriter. *Mussey v. Atlas Mut. Ins. Co.*, 14 N. Y. 79, 82.

The taking of a policy of insurance in renewal of prior insurance mentioned in the application for a policy was not within the terms of a provision in the latter policy requiring notice in case of taking other insurance. *Brown v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 385, 391.

#### OTHER THAN.

A creditor's action to set aside a conveyance in fraud of creditors is within the six-year limitation of Code Civ. Proc. § 382, as an equitable action to procure a judgment "other than for money." *Weaver v. Haviland*, 37 N. E. 641, 142 N. Y. 534, 40 Am. St. Rep. 631.

The use of the words "other than," in an indictment charging that defendant was a married man having a lawful wife other than said A., cannot be construed to mean that A. was also his wife, especially where another sentence stated that said defendant and A. were not then and there married to each other. *Lyman v. People*, 64 N. E. 974, 975, 198 Ill. 544.

#### As contrary to.

"Other than" is not a reasonable substitute for "contrary to" or "at variance with," and hence as used in an instruction that if a witness has made statements out of court "other than" those made in his testimony, etc., is erroneous. *Elrod v. Ashton*, 85 N. W. 599, 600, 14 S. D. 350.

#### As creating an exception.

Plaintiff devised land by indenture, excepting all timber, trees, etc., "other than such bushes and thorns as shall be necessary for the repair of fences," and the lessee covenanted to keep the fences in repair during the term, finding all materials, except that the lessor should find rough wood for such repairs, if growing on the premises. Held, that the provisions as to bushes and thorns was not an exception out of an exception, but that all trees, bushes, and thorns were excepted, whether part of the fence or not, or whether necessary for repairs or not. *Jenney v. Brook*, 6 Q. B. 323, 338.

The words "other than," in a constitutional provision that private property shall

not be taken or applied for public use unless just compensation be made therefor, nor shall private property be taken for private use, or for the benefit of corporations "other than" municipal, without the consent of the owner, operates to except municipal corporations from the operation of the section. *Ex parte Selma & G. R. Co.*, 45 Ala. 696, 732, 6 Am. Rep. 722.

#### OTHER THINGS BEING EQUAL.

The court, in instructing the jury, with reference to the testimony of men of great scientific attainments, "that, 'other things being equal,' the greater number would carry the greater weight," meant all things being equal in respect to such witnesses. *Spensley v. Lancashire Ins. Co.*, 22 N. W. 740, 745, 62 Wis. 443.

#### OTHERS.

"Others," as used in a bill of exceptions in reference to the plaintiffs in error, did not serve to designate any person, and those not specifically mentioned will not be considered parties to the appeal. *Farr v. Farr*, 38 S. E. 962, 113 Ga. 577.

"Others," as used in the articles of association of a corporation, providing that the officers should continue in office until the next annual meeting and until "others" are elected in their stead, does not necessarily mean different persons. *Welch v. Seymour*, 28 Conn. 387, 390 (citing *Commissioners of Public Accounts v. Greenwood* [S. C.] 1 Desaus. 450, 452; *United States v. Kirkpatrick*, 22 U. S. [9 Wheat.] 720, 6 L. Ed. 199).

"Others," as used in Act March 21, 1871, providing that the commissioners appointed to assess damages for opening streets shall meet on ten days' notice given by or to any of the persons so applying for a review of the assessment to each of the "others," or to his, her, or their attorney or agent, extends to all who are interested in the application for a new assessment, and not merely to those other persons who make application for commissioners to review the assessment. *Copeland v. Village of Passaic*, 36 N. J. Law (7 Vroom) 382, 386.

Where a testator having eight children, besides grandchildren by a deceased daughter, divided the residue of his estate into nine parts, and gave two parts absolutely to two sons, and the other seven parts in trust for the other children and grandchildren, and the will provided that, if any of the beneficiaries of the trust died without issue, his or her portion should be equally divided among the others, the word "others" should be construed not to refer merely to the beneficiaries of the trust, the next preceding antecedent, but to include all those

beneficially entitled under the residuary clause, including the two sons who were given their portions absolutely. *Niles v. Almy*, 36 N. E. 582, 161 Mass. 29.

The word "others," in a statutory definition of "murder" as including homicide perpetrated by an act imminently dangerous to others, must be held to mean any person or persons other than the one committing it, and does not imply that the act shall be dangerous to several. *Hogan v. State*, 36 Wis. 226, 247.

The word "others," in a statute giving a lien to mechanics, tradesmen, or others for labor or materials, "is a general one, immediately following the enumeration of particular cases—'mechanics' and 'tradesmen'—and is therefore applicable to other persons in the same category or calling. The statute should not be construed to include every person who furnishes material or performs labor on a vessel, because if that was the intention of the Legislature, it was very easy to have said so." *The City of Salem (U. S.)* 31 Fed. 616, 618, 2 L. R. A. 380.

The term "mechanics and others," in 4 Stat. 659, entitled "An act to secure mechanics and others payment for labor done and materials furnished in the erections of building in the District of Columbia," does not include a master builder, undertaker, or contractor who undertakes by contract with the owner to erect the building, or some part or portion thereof, on certain terms. The persons enumerated in this section are plainly those mechanics or tradesmen whose personal labor or property have been incorporated into the building, and not the agents, supervisors, undertakers, or contractors who employed them. *Winder v. Caldwell*, 55 U. S. (14 How.) 434, 444, 14 L. Ed. 487.

Where an insurance company agreed to "become insurer to a warehouseman for the benefit of himself and others" having tobacco stored and to be stored in his warehouse, on said stock of tobacco," etc., it was held that the words "for the benefit of himself and others" expressed an insurance of the tobacco of other persons which should be stored in the warehouse of the insured, and not merely of the insured's interest therein. *Strohn v. Hartford Fire Ins. Co.*, 33 Wis. 648, 655.

## OTHERWISE.

### See "Not Otherwise."

The words "or otherwise," in law, when used as a general phrase following an enumeration of particulars, are commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the classes before mentioned. *Cent. Dict.* The phrase "or otherwise," when following an

enumeration, should receive an ejusdem generis interpretation. In *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. (7 C. E. Green) 130, 400, the chancellor said that the radical meaning of the word "otherwise" is "different from that to which it relates." *People v. Feltner*, 75 N. Y. Supp. 738, 739, 71 App. Div. 479.

One of the usual meanings of "otherwise" is "contrarily." *Contra Costa Water Co. v. Breed*, 73 Pac. 189, 193, 139 Cal. 432.

"Otherwise" is defined by the Standard Dictionary as meaning "in a different manner; in another way; differently in other respects"; by Webster, "in a different manner; in other respects"; and by the Century Dictionary, "in a different manner or way; differently in other respects." *Thomson v. City of Highland Park*, 58 N. E. 328, 329, 187 Ill. 265.

The allegation of specific personal injuries, followed by the allegation that plaintiff was "otherwise greatly hurt and wounded," does not authorize proof of injuries other than those specifically alleged. *Chesapeake & N. Ry. v. Hanmer (Ky.)* 66 S. W. 375, 376.

The word "otherwise," in Act April 26, 1891, entitled "An act to regulate the sale of intoxicating liquors in original packages, or otherwise," shows that the object of the act was to regulate the sale of intoxicating liquors in any manner, whether in original packages or not. Webster defines the word "otherwise" as meaning "in a different manner; in any other way; differently; contrarily." The words "or otherwise," as used in the title of an act, have a more definite and a different meaning from the words "or other purposes," as those words are generally used in the title to legislative enactments. The latter words, when thus used, are laid out of consideration, and are not regarded as amounting to anything, but it is not so with the words "or otherwise." *Lynch v. Murphy*, 24 S. W. 774, 775, 119 Mo. 163.

"Otherwise," as used in Rev. St. § 811, denouncing punishment against whoever shall be found guilty of attempting to rob from the person by cutting or tearing the clothes, or thrusting the hand into the pockets, or "otherwise," is intended to include all similar acts to those specified, resorted to in an attempt to rob. *State v. West*, 30 South. 848, 106 La. 274.

Under a statute prohibiting the obstructing or incumbering highways by fences, buildings, structures, or "otherwise," that term includes incumbering by a felled tree. *Nagle v. Brown*, 37 Ohio St. 7, 10.

The term "otherwise," in a statute providing that it shall be lawful for the United

Companies to consolidate their respective capital stocks, or to consolidate with any railroad or canal company in this state, "or otherwise," with which they are or may be identified in interest, is not an adverb of place, and is an inappropriate word to express the meaning of their rule, and cannot be given such meaning, and therefore the act does not authorize a lease to be made to a formed corporation. *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. (9 C. E. Green) 455, 475.

Under a statute entitling a wife injured in person or property or means of support, or "otherwise," by the sale of intoxicating liquors to her husband, to recover from the person selling the same, she may recover for injuries to her feelings. *Radley v. Selder*, 99 Mich. 431, 58 N. W. 366.

#### Otherwise acquired.

"Otherwise acquired," as used in a statute of descent in connection with lands inherited from parents, means lands descended from neither parent. *Hoover v. Gregory*, 18 Tenn. (10 Yerg.) 444, 451; *Roberts v. Jackson*, 12 Tenn. (4 Yerg.) 308, 323.

#### Otherwise appropriated.

The term "otherwise appropriated," in Act May 15, 1856, granting land to a state to aid in the construction of a railroad, and providing that, if any of the land shall have been sold or "otherwise appropriated," other sections may be taken, includes lands withdrawn from sale at the time of the passage of the act, and excludes lands granted to the state of Iowa by the act of September 28, 1850, known as the "Swamp Land Grant." *Burlington & M. R. R. Co. v. Fremont County*, 76 U. S. (9 Wall.) 89, 94, 19 L. Ed. 563.

"Otherwise appropriated," as used in Act March 20, 1863, appropriating land in aid of the construction of the Mineral Range Railroad, and declaring that there should be withheld from sale not exceeding 1,280 acres of the swamp lands in the Upper Peninsula "not otherwise appropriated," meant an appropriation by the Legislature for some purpose similar to that intended by the statute—a disposition of the lands in some way by which the state is to part with the title—and it did not mean lands which had been set aside or withdrawn from the course of sale as mineral lands had been in some instances. *Houghton County v. Commissioners of State Land Office*, 23 Mich. 270, 278.

#### Otherwise controlled.

The phrase, "or otherwise controlled by him," in Rev. St. § 2734, requiring every person of full age and sound mind to list for taxation "all moneys invested, loaned, or

otherwise controlled by him, as agent or attorney, or on account of any other person or persons," must be construed to mean in a manner similar to the loaning and investing of money. *Myers v. Seabarger*, 45 Ohio St. 232, 234, 236, 12 N. E. 796, 798.

#### Otherwise defective or invalid.

In 19 Stat. U. S. 267, commonly called the "Booth Act," providing that where indemnity school selections have been made and certified to the state, and said selections shall fall by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, "or are otherwise defective or invalid," the same are hereby confirmed, the use of the words "or are otherwise defective or invalid" shows that the intention of Congress in enacting the law was to cover any and all defects in indemnity school selections. *Daniels v. Gualala Mill Co.*, 19 Pac. 519, 520, 77 Cal. 300.

#### Otherwise disabled.

Rev. St. § 1512, provides that when any person not a resident nor having a legal settlement in a town, shall become sick, lame, or "otherwise disabled," and shall not have money or property to pay his board, attendance, and medical aid, the supervisors shall provide such assistance as they may deem just and necessary, and if he shall die they shall give him a decent burial. Held, that the term "otherwise disabled," as used in such section, meant bodily or mental disability to procure a livelihood, and included a case of a woman who was so disabled by reason of mental infirmity as to be practically an imbecile. *McCaffrey v. Town of Shields*, 12 N. W. 54, 57, 54 Wis. 645.

#### Otherwise dispose of.

"Otherwise disposed of," as used in Pen. Code, art. 773, making it a penal offense to remove out of the state any personal property on which accused has given any written lien, to sell such property, or to "otherwise dispose" of such property with intent to defraud the lienholder, "does not include a removal or sale, but does include any other method of placing the property beyond the reach of the holder of the lien with such intent." *Robberson v. State*, 3 Tex. App. 502, 503.

The statute authorizing a mining corporation, on the vote of two-thirds of its stockholders and directors, to "sell, lease, mortgage, or otherwise dispose of" its property or any part thereof, does not authorize the corporation to give or transfer all its property to a corporation organized in another state in exchange for stock in such other corporation to be given to the stockholders of the mining corporation. The words "or otherwise dispose of," in so far

as they may seem sufficiently significant to require their application to powers other than those specifically named, may be satisfied by reference to the right to assign for the benefit of creditors, to hypothecate or pledge, or possibly even the right to remove or destroy the mills, smelters, concentrators, or reduction works, rather than by allowing them, by mere implication, to create or recognize a power radically different from those particularly specified. *Forrester v. Boston & M. Consol. Copper & Silver Min. Co.*, 55 Pac. 229, 235, 236, 21 Mont. 544.

The words "otherwise disposed of," as used in Act Cong. March 6, 1820 (3 Stat. 547), granting to the state of Missouri for the use of schools the sixteenth section of every township in the state which had not been sold or "otherwise disposed of," signifies some disposition of the property equally efficient with a sale, which necessarily signifies a legal sale by competent authority, which is a disposition final and irrevocable of the land, and equally incompatible with any right in the state, present or potential. The expression "otherwise disposed of" does not include the case of an imperfect title, claimed to be derived from the Spanish government, which had been rejected by the board of commissioners. *Ham v. Missouri*, 59 U. S. (18 How.) 126, 133, 15 L. Ed. 334.

The expression "otherwise dispose of," as used in Acts 1871-72, p. 71, § 1, providing that no person, after having executed a mortgage deed to personal property, shall be permitted to sell or "otherwise dispose of" the same with intent to defraud the mortgagee, means a disposing of the property in the nature of a sale, and not in any other manner, and is included in and in effect the same as the selling mentioned in the title of the act, which was entitled "An act to make penal the selling of personal property mortgaged as security for a debt." *Conley v. State*, 11 S. E. 659, 661, 85 Ga. 348.

In a statute prohibiting the selling, giving, or otherwise disposing of intoxicating liquors without a license, the words "or otherwise disposing of," in the absence of any expression of a larger legislative intention, must be construed to refer to a disposition of the same class as a sale or gift. *Roberson v. State*, 14 South. 554, 555, 100 Ala. 87.

#### Otherwise disqualified.

Laws 1870, p. 171, § 2 (Cr. Code, § 56), provides that in all cases in which it shall be made to appear that a fair and impartial trial cannot be had in the county where the suit is pending, as where the judge is interested, or has been of counsel in the case, or is related to either of the parties, or is "otherwise disqualified" to sit, the court, on application of either party, may change the

place of trial. Held, that the words "otherwise disqualified" meant prejudice, and that the section required a change of venue on a showing of prejudice being made. *Appeal of Peyton*, 12 Kan. 398, 407.

#### Otherwise improve.

"Otherwise," as used in an ordinance providing for the grading, draining, paving, and "otherwise" improving of a certain street, is a broad and comprehensive word, sufficient to make the phrase "otherwise improving" include almost any improvement of the street. *Thomson v. City of Highland Park*, 58 N. E. 328, 329, 187 Ill. 265.

Laws 1872, c. 100, § 54, providing that a city council shall have power to open, widen, or "otherwise improve" any street, avenue, lane, or alley, etc., provided that the damages sustained by the citizens of the city or the owners of the property therein shall be ascertained as prescribed, refers only to such improvements as are like those mentioned, namely, to open, widen, and extend, or are necessarily incident thereto and which partake of the same character, for under the rules of construction the words "or otherwise improve" must be limited by the preceding language of the section. *Methodist Episcopal Church v. City of Wyandotte*, 3 Pac. 527, 530, 31 Kan. 721.

"Otherwise improving highways," as used in a statute authorizing a county board to expend certain moneys in making gutters, graveling, ditching, or "otherwise improving highways," should be construed to mean making other improvements of a similar character to the designated improvements, and hence does not authorize the building of a bridge at an extraordinary expense. *State v. Wood Co.*, 40 N. W. 381, 385, 72 Wis. 629.

The words "otherwise improving," as used in Act 1891, § 10, giving the right of appeal from ordinances "otherwise improving" a street or alley, will not embrace the vacating of a street. The word "vacating" is not suggestive of improving, but of abandoning, abolishing, or destroying, and the words "otherwise improving" could not within any reasonable interpretation give the right of appeal for vacating. *Daughters of American Revolution v. Schenley*, 54 Atl. 366, 370, 204 Pa. 572.

#### Otherwise occupied.

"Otherwise occupied," as used in a lease of a certain factory building, including the passageway from the street to the end and front of such building, and the yard room around the same not "otherwise occupied," has reference to the usual and customary occupation thereof. *Meredith Mechanic Ass'n v. American Twist Drill Co.*, 20 Atl. 330, 331, 66 N. H. 267.



**Otherwise produced.**

"Otherwise produced," as used in Laws 1887, c. 377, § 2, as amended by Laws 1888, c. 181, making it unlawful for any person or corporation to use, without the owner's consent, the bottles, boxes, etc., of another with the owner's name or other marks or devices branded, stamped, engraved, blown, impressed, or "otherwise produced" upon such bottles, etc., relates to the same means of engraving upon the bottles, etc., as the other preceding words indicate naturally something that is developed out of the surface of the bottle by engraving, etching, or blowing, or other like means whereby an ineradicable impression is produced. *People v. Elfenbein*, 20 N. Y. Supp. 364, 365, 65 Hun, 434.

**Otherwise provided.**

"Otherwise provided," as used in Gen. St. § 1618, providing that every person charged with an offense shall be tried in the county wherein the offense was committed, except when "otherwise provided," means when otherwise provided by statute. *State v. Meehan*, 25 Atl. 476, 62 Conn. 128.

"Otherwise provided," as used in Const. art. 13, providing that the Constitution shall be in force from January 1, 1895, except as herein or "otherwise provided," should not be construed to mean otherwise provided in express terms, but to mean that any language used in or any proper and necessary construction of the instrument which shows an intention that the particular provision shall take effect at some time other than January 1, 1895. *In re Board of Rapid Transit Railroad Com'rs*, 41 N. E. 575, 578, 147 N. Y. 260.

**Otherwise secured.**

The term "otherwise secured," in Supreme Court rule 29, requiring supersedeas bonds, conditioned that the writ of error or appeal shall be prosecuted to effect, to be, where the judgment or decree is for the recovery of money not "otherwise secured," for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on appeal, means secured otherwise than by mere force of judgment. A judgment is not "otherwise secured" within the meaning of the rule when the court has not, by reason of a lien on property secured to plaintiff otherwise than by the judgment, or by reason of actual custody of property liable to satisfy the claim asserted, the means of making the claim of the plaintiff by subjecting specific property. *Fuller v. Aylesworth* (U. S.) 75 Fed. 604, 701, 21 C. C. A. 505.

**Otherwise used.**

As used in Gen. St. 1878, c. 81, § 5, providing that all public schoolhouses, academies, colleges, universities, and seminaries

of learning, with the books and furniture therein necessary for their proper occupancy, use, and enjoyment, and "not leased or otherwise used with a view to profit," shall be exempt from taxation, means other uses of the property than the appropriation and operation of the same for the legitimate purposes of an institution of learning. The words do not relate to revenues derived from the use of the seminary property for the legitimate purposes of an institution of learning. *Ramsey County v. Stryker Seminary*, 53 N. W. 1133, 1134, 52 Minn. 144.

"Otherwise used and practiced," as used in the Constitution, providing for a right of trial by jury except in those cases in which it had been "otherwise used and practiced," includes the practice of assessing damages occasioned by the laying out of highways by the court or by a committee, and where such custom was in practice before the Constitution was adopted it comes within the exception. *Backus v. Lebanon*, 11 N. H. 19, 27, 35 Am. Dec. 466.

**Accident or otherwise.**

A provision in a lease, under which the lessor was to furnish steam power to the lessee, that, on failure to furnish such power "through accident or otherwise," the liability of the lessor should be limited to a certain recovery, is broad enough to include wear and tear, breakage from inherent defects, or even simple negligence or the torts of others, but does not limit the lessor's liability for damages to the lessee's business arising from the breaking by the lessor of the connections by which the steam power was conveyed, committed in a willful trespass for the purpose of requiring the lessee to surrender possession. *West Chicago St. R. Co. v. Morrison, Adams & Allen Co.*, 43 N. E. 393, 399, 160 Ill. 288.

**Accidentally or otherwise.**

As used in the clause of an insurance policy declaring that the insurance does not cover injuries or death resulting from poison or anything accidentally or otherwise taken, "otherwise" is read in connection with the preceding word "accidentally," and means an injury of a kindred character, and would cover an intentional taking as well as an accidental taking. *Lowenstein v. Fidelity & Casualty Co. of New York* (U. S.) 88 Fed. 474, 477.

**Agent or otherwise.**

Under a statute providing that, "if any person or persons except taverners, by agent or 'otherwise' shall keep any house for the sale of wines and spirituous liquors to be drank thereat," he shall be punished, etc., defendant, who was indicted, charged that "he, not being a taverner, did keep a certain house, store, and shop for the purpose

of selling wines and spirituous liquors," claimed that no offense was alleged, because it was not averred that he kept the house, store, and shop by his agent, and that if he kept it himself personally, and not by his agent, there was no violation of the law. It was insisted that the word "otherwise," so used in the penal statute, had no meaning, and is to be rejected in its construction. In considering this objection, the court said: "No man can read this statute without learning from its entire perusal that the controlling purpose of the Legislature was to suppress tippling houses, under whatever pretense or name established, and thus prevent the facilities to intemperate and ruinous dram drinking. To reject the word 'otherwise' from the law, and thus to legalize the evil which it was the object of the statute to prevent, if perpetrated in person and not by agent, would be not only absurd, but it would involve a judicial repeal of an important part of the law itself. This word was not incautiously introduced into the statute; it was necessary to give full expression to the intent of the Legislature." *Rawson v. State*, 19 Conn. 292, 299.

#### **As alleged or otherwise.**

"Otherwise," as used in an answer alleging that defendant was not indebted to the plaintiff as alleged in the complaint "or otherwise," should be construed as a denial that the defendant was in any manner indebted to the plaintiff on account of the subject-matter of the complaint, whether in the precise form as stated or not. *King v. De Coursey*, 9 Pac. 31, 32, 8 Colo. 463.

#### **Assignment or otherwise.**

The words "or otherwise," in Code Civ. Proc. § 829, providing that an interested party or person shall not be examined as a witness in his own behalf, or in behalf of the party succeeding to his title or interest, against a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or "otherwise," concerning a personal transaction or communication with deceased, embraces and covers all means and manner of succession or devolution, in addition to that by assignment. Thus an executor of an estate appointed after the death of a prior executor is a person deriving his title or interest through a deceased person, and entitled to the protection of the statute. *Carpenter v. Romer & Tremper Steamboat Co.*, 63 N. Y. Supp. 274, 278, 48 App. Div. 363.

#### **Barred by statute of limitations or otherwise.**

A provision in a will that all debts and dues enforced against testator's estate in consequence of certain transactions, "whether barred by the statute of limitations or otherwise," are to be adjusted, may mean whether barred by the statute of limitations

or barred otherwise, and it may mean whether barred or otherwise—that is, whether barred or not by the statute of limitations. *Bosworth v. Smith*, 9 R. I. 67, 75.

#### **Caption or otherwise.**

"Otherwise," as used in Const. art. 2, § 17, requiring that all acts which repeal, revive, or amend former laws shall recite, in their caption or "otherwise," the title or substance of the law repealed, revived, or amended, refers to the body of the repealing, reviving, or amending act. *State v. Yardley*, 32 S. W. 481, 483, 95 Tenn. (11 Pickle) 546, 34 L. R. A. 656; *Shelton v. State*, 32 S. W. 967, 968, 96 Tenn. (12 Pickle) 521; *State v. Runnels*, 21 S. W. 665, 666, 92 Tenn. (8 Pickle) 320; *Ransome v. State*, 20 S. W. 310, 91 Tenn. (7 Pickle) 716.

The term "otherwise," as used in a constitutional provision that the title or substance of the act to be amended must appear in the amending act, either in its caption "or otherwise," can only mean the preamble or body of the act, as contradistinguished from the title or caption. *Memphis St. R. Co. v. State*, 75 S. W. 730, 732, 110 Tenn. 598.

#### **Collusion or otherwise.**

"Otherwise," as used in the mechanic's lien law, rendering the owner liable to subcontractors for money "paid in advance by collusion or otherwise," relates to the subject of the special word "collusion," and means a payment made collusively or by some fraudulent or collusive practice, and does not include a payment made in good faith and with no intention of defrauding the estate. *Foeller v. Voight*, 5 Ohio Dec. 2.

"Otherwise," as used in Act Cong. March 3, 1863, § 8 (12 Stat. 739), providing for the punishment of any person who shall by exhibition of any false sample, or by means of any false representation or device, or by collusion with any officer of the revenue, or "otherwise," knowingly effect or aid in effecting any entry of any goods, wares, or merchandise at less than the true weight or measure thereof, means by any other fraudulent means whatsoever. If the fraudulent entry were effected by any other means than by false sample, false representation or device, or collusion with an officer of the revenue, such fraudulent means would be included in the word "otherwise." *United States v. Bettilini* (U. S.) 24 Fed. Cas. 1135, 1136.

The word "otherwise," as used in Laws 1892, p. 620, c. 301, § 1, authorizing an action by a taxpayer against county supervisors for injury consisting in auditing any illegal claim by "collusion or otherwise," does not mean any audit, but an audit due to some sinister or improper motive, and in violation of the public trust. *Wallace v. Jones*, 82 N. Y. Supp. 449, 451, 83 App. Div. 152.

**Composition, real or otherwise.**

The word "otherwise," in 13 Eliz. c. 10, § 1, providing that all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes by composition, real or otherwise, shall be sustained and be deemed good and valid in law, "cannot surely be construed to introduce an entirely new ground of exemption wholly unknown to the law, but the only legitimate meaning of the words must be that exemption on any legal ground shall be sustained and deemed good and valid, and indefeasible upon evidence of nonpayment for a certain length of time, instead of the length of time formerly required." *Felloses v. Clay*, 4 Q. B. 311, 340.

**Contiguous property or otherwise.**

"Otherwise," as used in Const. 1870, art. 9, § 9, providing that the General Assembly may vest cities, towns, and villages with power to make local improvements by special assessments or by special taxation of contiguous property or "otherwise," is to be construed as meaning "or otherwise assessing the costs of the improvement against the property actually or presumptively benefited thereby." *Wilson v. Board of Trustees of Sanitary Dist of Chicago*, 27 N. E. 203, 208, 133 Ill. 443.

**Death, absence from state, or otherwise.**

Under Const. art. 49, providing that whenever the chair of the Governor shall become vacant by reason of his death, absence from the state, or "otherwise," the president of the senate shall during such vacancy have and exercise all the powers and authorities with which the Governor is vested, the Governor's physical disability is included in the word "otherwise," as equivalent for the provisional purpose of this article, to his death or absence from the state. *Attorney General v. Taggart*, 29 Atl. 1027, 1029, 66 N. H. 362, 25 L. R. A. 613.

"Otherwise," as used in Comp. St. 1897, c. 1280, § 184, relating to vacancies in the office of police judge by death, resignation, or "otherwise," the word "otherwise," in connection with the special words there employed, should probably be restricted to other causes of similar character, and the special terms refer only to causes which end prematurely the term of an actual incumbent; but section 75 makes refusal to qualify create a vacancy, and hence the word "otherwise" will be held to include the vacancies by reason of ineligibility. *State v. Moores*, 78 N. W. 529, 531, 58 Neb. 285.

**Descent, devise, or otherwise.**

The term "otherwise," in a statute declaring that all property belonging to a married woman as her sole and separate property, or which she owns at her marriage, or

acquired in good faith from any person, other than her husband, by descent, devise, or otherwise, shall be her sole and separate property, includes the purchased property. *Carpenter v. Mitchell*, 54 Ill. 126, 131.

**Divided or otherwise.**

The term "divided or otherwise," as used in Internal Revenue Act 1864, § 117, requiring stockholders in companies mentioned in the section to return as income all gains and profits in them to which they should be entitled, whether the same were "divided or otherwise," embraces not only dividends declared, but profits not divided and invested partly in real estate, machinery, and raw materials, and partly applied to the payment of debts incurred in previous years. Annual gains and profits, whether divided or not, are property. *Brainard v. Hubbard*, 79 U. S. (12 Wall.) 1, 18, 20 L. Ed. 272.

**Expiration of term of office or otherwise.**

"Otherwise," as used in Act March 16, 1866, providing for the filling of vacancies in the office of poor directors, whether such vacancy occurred by the expiration of the term of office or "otherwise," which is a supplement to Act April 9, 1862, providing for appointment to fill vacancies caused by death, resignation, or otherwise, is broad enough to cover vacancies by death or resignation. It also covers vacancies by removal of the incumbent from the district, and by failure of a director-elect to assume the duties of his office. *Commonwealth v. Dickert*, 45 Atl. 1058, 1061, 195 Pa. 234.

**Fees, clerk hire, or otherwise.**

The words "or otherwise," as used in Act April 13, 1865, providing that any county auditor who shall make, order, or pay any other or further allowances to a county treasurer, either as fees or for clerk hire, "or otherwise," than is specially provided by law, shall be liable in an action on his bond, etc., comprehend every case of getting money out of the treasury other than that which the laws have provided should be the legitimate one. *State v. Kelly*, 32 Ohio St. 421, 429.

**Felonious or otherwise.**

The use of the words "felonious or otherwise," in a life policy exempting the insurer from liability for a death caused by the act of assured, "felonious or otherwise," has the same effect as the words "sane or insane," and precludes a recovery if insured dies by his own hand, even though insane at the time of the act. *Riley v. Hartford Life & Annuity Ins. Co.* (U. S.) 25 Fed. 315, 316.

**Gift, grant, purchase, devise, or otherwise.**

Sp. Laws 1885, c. 3, authorized a corporation to establish and maintain in the city

of Minneapolis public libraries and reading rooms, galleries of art, and museums for the use and benefit of the inhabitants of the city, and for these purposes the corporation were given power to take real and personal property "by gift, grant, purchase, devise, bequest, or otherwise." Held, that the words "or otherwise" were not meaningless, but were added to express an intention to authorize the taking of property in any mode other than those specified in the statute, which authorized it to take and hold property not only as owner but as bailee. *Smith v. Library Board of City of Minneapolis*, 59 N. W. 979, 980, 58 Minn. 108, 25 L. R. A. 280.

#### **In this state or otherwise.**

"Otherwise," as used in Act 1870, providing that it shall be lawful for certain companies to consolidate their respective capital stocks, or to consolidate with any other railroad or canal company or companies in this state or "otherwise" with which they are or may be identified in interest, or whose works shall form, with their own, connected or continuous lines, means companies different from or other than companies in this state. The radical meaning of the word "otherwise," which is always a relative word, different from that to which it relates, and the phrase to which it relates in this case, both from location and the sense, is clearly the words "in this state." The word "otherwise" is an inapt word to designate companies out of the state by being placed in opposition to the words "in this state." It is inapt because its proper use is to express difference of means or manner, and not of place. *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. (7 C. E. Green) 130, 398.

#### **In trust or otherwise.**

Where a loan and trust company's charter (chapter 835, Laws 1870) authorized it to grant, bargain, sell, buy, or receive all kinds of property, or to hold the same in trust or otherwise, the phrase "or otherwise" was not intended to confer banking powers, but to embrace the holding of property differently or otherwise than as a trust. *New York State Loan & Trust Co. v. Helmer*, 77 N. Y. 64, 67.

#### **Mode of proving claims or otherwise.**

"Otherwise," as used in Gen. St. c. 44, art. 2, § 3, permitting any number of creditors to unite in a petition against a debtor and his transferee, and providing that the action and proceedings as to the mode of proving claims "or otherwise" shall be conducted as actions for the settlement of the estates of deceased persons are required to be conducted, etc., include mode of distribution. *Marbury v. Kentucky Union Land Co.* (U. S.) 62 Fed. 335, 354, 10 C. C. A. 393.

#### **Negligence or otherwise.**

Where an employé of an express company had notice of the contract between the railroad company and the express company, creating an obligation on the part of the express company to pay for injuries or death of its employés, his release of the express company from any liability by reason of its negligence or "otherwise" will be construed to include such liability as might arise from the railroad company's negligence. *Pittsburgh, C., C. & St. L. Ry. Co. v. Mahoney*, 48 N. E. 917, 920, 148 Ind. 196, 40 L. R. A. 101, 62 Am. St. Rep. 503.

#### **Nonsuit, default, or otherwise.**

The word "otherwise," in Act 1845, c. 172, providing that whenever it shall happen in the trial of any cause in the district court, that any one or more questions of law arise, it shall be lawful for the judge, with the consent of the parties, to draw up a report of the case, presenting the legal points for decision, and containing such stipulations as the parties may make, relative to the disposition of the case by nonsuit, default, or "otherwise," must necessarily have reference to a disposition of the cause equivalent to what would be effected by a nonsuit or default. *Loring v. Proctor*, 28 Me. (13 Shep.) 18, 27.

#### **Original package or otherwise.**

The words "or otherwise," as used in the title of Act April 20, 1891, entitled "An act to regulate the sale of intoxicating liquors in original packages 'or otherwise,'" show that the object of the act was to regulate the sale of intoxicating liquors in any manner, whether in original packages or not, and have a very different meaning from the words "or other purposes," as those words are generally used in the titles to legislative enactments. *Lynch v. Murphy*, 24 S. W. 774, 775, 119 Mo. 163.

#### **Owner or otherwise.**

"Otherwise" is an extremely broad word in its meaning, and, where used in connection with "owner or otherwise," is intended to signify something more than the members of the class owners, and in a lottery statute means any person who opens or establishes a lottery in any capacity, whether as agent, employé, or other representative of the owner. *State v. Dennison*, 82 N. W. 383, 384, 60 Neb. 157.

#### **Person killed or otherwise.**

"Otherwise," as used in Pen. Code, § 183, subd. 3, declaring that the killing of a human being, without a design to effect death, by a person engaged in the commission of or in an attempt to commit a felony either upon or affecting the person killed or "otherwise," is murder in the first degree, cannot be con-

strued to mean "another." It was held that the killing while engaged in the commission of any felony, whether affecting any person or property only, was murder in the first degree. *People v. Greenwall*, 22 N. E. 180, 115 N. Y. 520.

"Otherwise," as used in Pen. Code, § 183, defining "homicide" by a person engaged in the commission of, or in the attempt to commit, a felony, either upon or affecting the person killed or "otherwise," relates to felonies against any person than the one killed, as well as to those against property. *People v. Miles*, 38 N. E. 456, 458, 143 N. Y. 383.

#### **Purchaser, incumbrancer, or otherwise.**

"Otherwise," as used in a bill for the foreclosure of a mortgage, alleging that the mortgagor's wife, he being dead, claimed some interest in the premises as subsequent purchaser or incumbrancer or "otherwise," means in some other like capacity, and does not embrace a claim of dower. *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502, 520, 61 Am. Dec. 706.

#### **Purposes of road or otherwise.**

In construing the statute providing that railroad companies shall be taxed "upon all the real property by them as aforesaid occupied, used or owned for the purposes of their road or otherwise," reference must be had to the object and purpose of the act, and to the artificial character and limited capacity of the persons to be affected by it. In contemplation of the Legislature, the property to be occupied, used, or owned by these persons for the purposes of the road or otherwise is only such as may be necessary or convenient for their legitimate purposes to accomplish the end which the Legislature had in view at the time of the enactment of the charter. *Delaware, L. & W. R. Co. v. Fuller*, 40 N. J. Law (11 Vroom) 328, 330.

#### **Rents, accounts, bonds, mortgages, or otherwise.**

The words "or otherwise," as used in a power of attorney authorizing the grantee to collect and receive all sums of money now due or hereafter to become due to the grantor, whether from rents, accounts, bonds and mortgages, "or otherwise," are limited in their meaning by the words "rents, accounts, bonds, and mortgages," preceding them, and refer to debts and liabilities of a similar character, and cannot reasonably be held to extend to the collection of moneys already received and deposited in a solvent institution, subject to the immediate disposition of the owner. *Sims v. United States Trust Co.*, 9 N. E. 605, 606, 103 N. Y. 472.

In a bond conditioned that the obligors should pay to a bank any sum or sums of money which a certain person owed or thereafter might become indebted to the

bank upon bond, bill, note, draft, check, account, or otherwise, "otherwise" covers only conveyances or forms of debt of the same class as may accidentally have been omitted. *Donley v. Bank*, 40 Ohio St. 47, 60.

#### **Sample, card, or otherwise.**

In a statute imposing an occupation tax on persons engaged in "selling goods by sample, card, or otherwise," the word "otherwise" should be understood as intended to mean by other like means, for, if it be taken literally, it would include any and every person engaged in selling goods. It is most obvious that this part of the sentence had no reference to merchants, as, if it had, it would have fixed their tax at a uniform rate. It is equally obvious that it related to sellers, and not to buyers and sellers of goods. *Galveston County v. Gorham*, 49 Tex. 279, 290.

#### **Sickness or otherwise.**

Under a contract of hire of two slaves for the term of one year for a gross sum, conditioned that the owned should "deduct or account for the time lost by sickness or otherwise," the term "otherwise" must be understood to refer to time lost by the death of the slaves, or by their disability to render services, arising from any cause unmixed with the fault of the parties to the contract. Such clause did not give the owner a right to take one or both of them before the year was up. *Nesbitt v. Drew*, 17 Ala. 379, 384.

#### **Stocks or otherwise.**

A will gave the executor power to sell a portion of the estate, "and to invest the proceeds of the sale, and the cash and choses in action, in bank stock or otherwise." Among the assets were two notes made by parties who were perfectly solvent, and these parties were permitted to renew their notes. The makers of the notes continued solvent until the close of the War of the Rebellion, when they failed. In considering the question of the liability of the executor for the amounts represented by such notes, the court construed such clause in the will as committing the general management of the estate to the discretion of the executor, and, where he had acted in good faith, held that he was not liable. *Pope v. Mathews*, 18 S. C. 444, 453, 456.

A clause in a will read: "And whereas during my lifetime I have made or may hereafter make advances in money, stocks, or otherwise to my son, or to the husbands of either of my daughters, and it is my express intention that the shares of all my said children shall be equalized, I hereby direct that such advances respectively shall be deducted from the share to be paid to the trustees of my said son or to either of my said daughters, whose husbands shall be indebted to me." In construing this clause, the court said: "The advances made and to be made were

not limited to money. "Stocks or otherwise" is the phrase used, which last word would cover anything of value of which he would make advances. It might be real estate, evidences of debt, or money due to him, or any other kind of personal property. To advance or make advances of such kind of property, if voluntary on his part, and without solicitation by the sons-in-law, would not of itself convert that which was advanced into debts. Such advances would rather stand as gifts, to be accounted for or not, as the donor should direct, in such manner as should be specified by him." *Appeal of Whelen*, 70 Pa. (20 P. F. Smith) 410, 429.

#### **Wagon, boat, or otherwise.**

Act July 6, 1812, § 2, providing that if any citizen of the United States, or person inhabiting the same, shall transport or attempt to transport over land or otherwise, in any wagon, cart, sleigh, boat, "or otherwise," naval or military stores, arms or munitions of war, or any articles of provision, from the United States to Canada, etc., the wagon, cart, sleigh, boat, or other thing by which the said articles are transported, together with the articles themselves, shall be forfeited, and the person privy to the same shall forfeit a certain sum and be guilty of a misdemeanor, should be construed to mean to carry or convey the forbidden articles in a wagon, or in some other vehicle, by whatever name it might be distinguished. "Or otherwise" should be construed to mean the thing by which the articles are transported, distinguishing between the thing which transports and the thing which is transported. *United States v. Sheldon*, 15 U. S. (2 Wheat.) 119, 120, 4 L. Ed. 199.

#### **Waylaying or otherwise.**

The word "otherwise," in Laws 1887, c. 32, making an assault committed in a secret manner by waylaying "or otherwise" an offense, is not to be interpreted by supplying after it the words "ejusdem generis," and thus is not limited to assaults of a similar nature to that of waylaying, but is to be construed as meaning otherwise in any secret manner. *State v. Shade*, 20 S. E. 537, 115 N. C. 757.

### **OTTER BANKS.**

The localities where sea otters are found, along the Alaskan coast from Cook's Inlet to the Semedi Islands are called "otter banks" by the hunters, and are designated as "otter killing grounds" in Treasury Department circular of April 21, 1879. *The Alexander* (U. S.) 60 Fed. 914, 919.

### **OTTOMAN CAHVEY.**

"Ottoman cahvey" is a substance the ingredients of which are known only to the

manufacturer, but which contains a certain proportion of coffee, and is used to mix with pure coffee in the proportion of about one-half of each, which mixture produces a substitute for coffee, so that authority to purchase it is not implied from authority to purchase tea, coffee, rice, and molasses. *Ottoman Cahvey Co. v. City of Philadelphia* (Pa.) 4 Atl. 745, 746.

### **OUGHT.**

"Ought," as used in Bill of Rights, § 30, providing that all property subject to taxation "ought" to be taxed in proportion to its value, is used in its mandatory, and not its directory, sense, and prohibits, therefore, taxation in any other mode. *Life Ass'n of America v. St. Louis County Assessors*, 49 Mo. 512, 519.

"Ought," as used in an instruction in a prosecution for murder that the jury "ought" to consider the circumstances of the case from the standpoint of defendant as it appeared at the time of the killing, will be understood to have been used in a mandatory sense, and to mean "must." *Jackson v. State*, 22 S. W. 831, 839, 32 Tex. Cr. R. 192.

#### **As morally bound.**

In an instruction in a prosecution for murder providing that, if the jury believed from all the evidence that the defendant has knowingly sworn falsely in regard to any material point in this case, they "ought" to disregard his testimony on all material points, excepting so far as he is corroborated by other evidence in the case, the word "ought" means, in its ordinary sense, to be held or bound in duty or moral obligation. *Other v. People*, 76 Ill. 149, 152.

#### **As equivalent to would.**

"Ought," is often used as the equivalent of "would," and hence its use in the question for a special verdict in place of "would" was not prejudicial. *Curran v. A. H. Stange Co.*, 74 N. W. 377, 381, 98 Wis. 598.

### **OUNCE OF GOLD.**

Where a note sued on bound the payor to pay "an ounce of gold," the fact that gold entered in the composition of money did not authorize the presumption that the note was payable in money, so that it would be negotiable, and such clause rendered the contract, instead of a promissory note, a simple contract for the delivery of merchandise. *Roberts v. Smith*, 4 Atl. 709, 710, 58 Vt. 492, 56 Am. Rep. 567.

### **OUR.**

The words "her children," "our children," and "my children," used by a testator

in making devises or bequests to his wife and his children, mean substantially the same, and constitute no ground for any distinction or a different construction of the gift than the usual acceptance of the term "children." *Vaughan v. Vaughan's Ex'x*, 33 S. E. 603, 605, 97 Va. 322.

"Our child," as used in a will devising all testator's property to his wife, and providing that the testator leaves the disposition of such estate to the wife in the manner she thinks proper and well with reference to our children, etc., is to be construed to be a sufficient designation of the child of testator. *Beck v. Metz*, 25 Mo. 70, 72.

What is said as to risks on property where "our" company have risks is not necessarily or probably understood to refer to a company of which the writer is an officer. The expression would naturally be regarded as having reference to an insurance company located in the village in which the writer resides. *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. (4 Kern.) 85, 92.

The word "our," as used in a description in a contract for the sale of land in which the premises are described as "our" farm in L.'s reserve, R. county, and consisting of 83 acres, more or less, indicates that the farm referred to was the farm owned by the vendors in the contract, and will be so construed, so as not to render the written contract void for uncertainty, for the description can be made certain by such construction and by other evidence. *Guyer v. Warren*, 51 N. E. 580, 583, 175 Ill. 328.

In construing a letter in which the writer stated that he had purchased certain property, and that he candidly believes that "we will be able to realize from our half of it, \$15,000," it was said that "the employment of the pronoun 'we' and the pronominal adjective 'our' is referred to as a recognition by the writer that the person addressed was interested with him in the property, counsel arguing that these words being in the plural form could not possibly refer to any but the writer of the letter and the plaintiff to whom it was written." But the inference deduced by counsel is not by any means necessary or exclusive. In the first place, the assumption that the writer would not have used the words "we" and "our," in the connection in which they are employed, unless some one was interested with him in the stock spoken of, has but the barest probability to rest upon. Although incorrect, it is not infrequently the case that the plural pronoun is used for the first person singular, and so with the pronominal adjective "our." *Mitchell v. O'Neale*, 4 Nev. 504, 517.

The expression "our property," as used in a letter by a daughter to her father, she being a married woman, in which she said,

"In case of anything happening us, I wish you to take charge of our property," may or may not refer to the estate of both herself and her husband. It may refer to only her own possessions, and have been a mode of expression common to her in speaking of these possessions with her father, to whom this testamentary letter is addressed. But even if it relates to the property of herself and her husband, when in the next sentence she speaks of the disposition which the law would make of her estate, the slip in the change of the pronoun in a familiar letter like this would not be at all strange, and it would be giving too much weight to a mere verbal criticism if it were allowed to force a conclusion that in the words she referred to other property than that belonging to her. *Cowley v. Knapp*, 42 N. J. Law (13 Vroom) 297, 301.

#### OUR A/C.

"Our a/" and "our a/c," when used in mercantile accounts, mean "our account," and do not designate that the shippers of goods have taken them on their individual account, but on joint account. *Ogden v. Astor*, 6 N. Y. Super. Ct. (4 Sandf.) 311, 338.

#### OUSTER.

See "Presumption of Ouster."

An ouster is the wrongful dispossession or exclusion from real property of a party entitled to the possession thereof. *Winterburn v. Chambers*, 27 Pac. 658, 659, 91 Cal. 170; *Bath v. Valdez*, 11 Pac. 724, 726, 70 Cal. 350. Like all other wrongful acts, it includes a question of intent. It may be committed by one tenant in common against his or her cotenant, and may be proved by any acts which show an actual intent to exclude the cotenant permanently from his rights. *Newell v. Woodruff*, 30 Conn. 492, 497.

An ouster is an actual deprivation of the possession of a part of the land, or what is equivalent; a title which is capable of being used to deprive grantee of his possession of a portion of the land. *McMullin v. Wooley* (N. Y.) 2 Lans. 394, 396.

Ouster is the actual turning out or keeping excluded a party entitled to the possession of any real property and in trying to prevent plaintiff from obtaining effective possession of the land. *Childs v. Kansas City, St. J. & C. B. R. Co.*, 23 S. W. 373, 378, 117 Mo. 414.

"An entry by one man on the land of another is an ouster of the lawful possession, arising from a title or not, according to the intention with which it is done. If made under claim and color of right, it is an ouster; otherwise it is a mere trespass. In legal language the intention guides the entry and fixes

its character." *Ewing v. Burnet*, 86 U. S. (11 Pet.) 41, 52, 9 L. Ed. 624; *Probst v. Presbyterian Church*, 129 U. S. 182, 191, 9 Sup. Ct. 263, 265, 32 L. Ed. 642; *Copeland v. Murphey*, 42 Tenn. (2 Cold.) 64, 70; *Hacker v. Horlemus*, 41 N. W. 965, 967, 74 Wis. 21.

To constitute an ouster of him who was seised, the disseisor must have the actual, exclusive occupation of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession. *Schwallback v. Chicago, M. & St. P. Ry. Co.*, 84 N. W. 128, 131, 69 Wis. 292, 2 Am. St. Rep. 740; *McCourt v. Eckstein*, 22 Wis. 153, 157, 94 Am. Dec. 594.

To constitute an ouster physical expulsion is not necessary, but the compulsory surrender of a part of an estate by reason of a judgment in ejectment is sufficient. *Mason v. Kellogg*, 38 Mich. 132, 143.

Where there is a conveyance with a covenant of warranty, and there is in fact a superior title, which is asserted by offering the premises for sale at public auction, and the grantee under the subsequent conveyance yields to the superior title and purchases it, this assertion of title and purchase is a sufficient ouster to sustain an action on the covenant of warranty; as is also a sheriff's sale under a paramount incumbrance whereby a covenant for quiet enjoyment is broken. *Brown v. Dickerson*, 12 Pa. (2 Jones) 372, 374.

#### By landlord.

In the law of landlord and tenant, in order to constitute an ouster of the tenant by the entry of the landlord, the ouster must be *animo clamandi*, and for the purpose of taking possession; and these are evidenced by the acts and declarations of the party. *Holl v. Brown*, 14 Conn. 255, 270.

#### By tenant in common.

An ouster of one co-tenant by another is produced by acts of the same character as will produce any other ouster. *Winterburn v. Chambers*, 27 Pac. 658, 659, 91 Cal. 170.

Ouster, both where the property is owned in severalty and where it is held in divided interests, depends upon the intent of the party taking and holding possession. If a person without title enters into possession of land and subjects it to his will and dominion, the inference of his intent to oust the true owner is patent. A co-tenant, however, has a right to enter upon the realty, and when he does so, and exercises acts of ownership, the law presumes that he intends nothing beyond the assertion of his right, and the apparent intent to oust his co-tenant is wanting. *Bath v. Valdez*, 11 Pac. 724, 726, 70 Cal. 350.

The mere taking of a deed by one of two co-tenants to the entire estate, and putting

the same on record, is not an ouster of the other co-tenant, nor a notice of claim to exclusive and adverse possession. *Towery v. Henderson*, 60 Tex. 291, 297 (citing 3 Washb. Real Prop. [4th Ed.] p. 142).

Where a tenant takes possession of the land owned by him and a co-tenant in common, and openly and notoriously exercises acts of exclusive ownership for a series of years—as by removing the soil, quarrying and selling rock, and by such acts as amount to the destruction of the thing itself, takes all the rents and profits without accounting to his co-tenant, and by other acts which exclude the idea of his merely claiming as a tenant—a jury are warranted in finding an ouster, notwithstanding the legal presumption that the possession of one tenant in common is the possession of his co-tenant. *Warfield v. Lindell*, 88 Mo. 561, 581, 90 Am. Dec. 443.

It seems that the notion once entertained in regard to what was necessary to constitute an actual ouster by a tenant in common has given way, and that an undisturbed and quiet possession for a certain length of time is sufficient ground for the jury to find an actual ouster. *Milliken v. Brown*, 10 Serg. & R. 188. In Pennsylvania such quiet possession and exclusive claim of the whole for the period of limitation is evidence from which the jury may presume an actual ouster, and in that state it seems well established that the sole undisturbed possession of one tenant in common receiving the rents and profits for himself without recognition of the claim of his co-tenant will be evidence from which an ouster may be presumed. In the case of *Law v. Patterson* (Pa.) 1 Watts & S. 184, in which this rule was distinctly affirmed, the acts of ownership by the tenant in common in possession were very unequivocal; such as, for instance, leasing the land in his own name, and receiving the rents for 23 years, without any claim by the other tenant in common, erecting a dwelling house and other improvements, paying the taxes, and even paying the purchase money of the land. *Alexander v. Kennedy*, 19 Tex. 488, 493, 70 Am. Dec. 358.

A partition by judicial proceedings among several tenants in common claiming the whole estate to the exclusion of others, is an act of ouster. *Cryer v. Andrews*, 11 Tex. 170, 181.

## OUT.

See "Carry out."

Where property was described on a tax duplicate as "Out. 66," parol evidence was admissible to show that this stood for "Outlot 66," and, as so explained, the description was sufficient. *Barton v. Anderson*, 104 Ind. 578, 582, 4 N. E. 420, 422.



**OUT AND OUT.**

Out and out, as used in a deed of trust containing a power to sell the trust property for a price or consideration to be paid "out and out" in money, means a sale for cash. "Lexicographers define this expression as meaning completely, entirely, without reservation; consequently when applied to an act to be performed 'out and out,' it must mean ended and complete." *Philadelphia & R. R. Co. v. Lehigh Coal & Navigation Co.*, 36 Pa. (12 Casey) 204, 210.

**OUT OF.**

"Out of," as used in an agreement between a debtor and creditor by which the debtor, in consideration of forbearance on the part of the creditor, promised that he would, "out of" the first moneys he might receive on certain claims, pay the creditor the sum of £500, and "out of any further moneys" he might receive on the same claims he would pay the creditor 10 per cent. on the net amount which he might from time to time receive, the words "out of," relating to the first payment, imported that there should be a residuum, and the creditor was not entitled to the £500 and also to the 10 per cent. on such residuum, but the 10 per cent. was intended only on the further moneys received. *Cochrane v. Green*, 9 C. B. (N. S.) 448, 469.

Nothing appearing to the contrary, a bequest of a certain sum of money "out of" or "to be paid out of" a designated fund will create a demonstrative legacy, pledging a particular fund as a collateral security, and being as to that security merely directory, but not depending for its validity or value on the sufficiency or existence of the fund thus specially dedicated for its security. On the other hand, where the legacy is made payable "in" Confederate state bonds, rather than "out of" Confederate state bonds, it will be a general, rather than a demonstrative, legacy. *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9, 16.

The promise to pay for cotton gins purchased "out of the proceeds of the first cotton ginned," fixes the time of payment, but does not show, or intend to show, that the seller of the property is to look for his pay alone to the profits made in ginning that season. *White v. Chaffin*, 32 Ark. 59, 67.

An agreement of partnership between two solicitors, who held themselves out as partners, provided that one of them should receive a certain amount annually "out of the profits," and that he was not to be liable for any losses in the business. Held that, as the amount which was to be received out of the profits—that is, out of the net profits—could not be ascertained until an accounting should be had at the end of the year, the agreement created a partnership between the

parties, so far as related to liability for work and labor performed by the firm. *Bond v. Pittard*, 3 Mees. & W. 357, 359.

**OUT OF COURT.**

A court will take no notice of agreements made by attorneys "out of court," unless reduced to writing. Plaintiff's attorney moved for judgment for want of plea, which the court granted, but the attorney then stated that he would not enter the default if defendant's attorney, who had entered an appearance, would stipulate to plead in ten days, so that the cause might be carried down for trial to the then ensuing circuit court. This proposition was agreed to by defendant's attorney. This agreement was not an agreement "out of court." *Welsh v. Blackwell*, 14 N. J. Law (2 J. S. Green) 344, 345.

**OUT OF DOORS.**

"Out of doors," as used in Code, § 985, declaring that any person who should willfully burn any other person's oats, etc., or other provender in stacks, hills, ricks, or pen, or secured in any other way "out of doors," does not require that the property should actually be in the open, and not within a building, in order to complete the offense, but were merely used as a recognition of the fact that provender was not stacked "within doors"; and an indictment alleging such offense was not defective in not containing an allegation that the property destroyed was out of doors. *State v. Huskins*, 35 S. E. 608, 126 N. C. 1070.

Code, § 985, par. 5, as amended by Act 1885, c. 42, provides that any person who shall burn or destroy any other person's corn, cotton, etc., secured in any way, by stack, hill, etc., "out of doors," shall be guilty of misdemeanor, etc. Held, that the phrase "out of doors" means "not housed." *State v. Avery*, 13 S. E. 931, 932, 109 N. C. 798.

**OUT OF TERM.**

The words "out of term" in Code, § 423, with regard to referee's reports, which enacts that either party during the term, or upon ten days' notice to the adverse party "out of term," may move the judge to review such report, and set aside, modify, or confirm the same, mean "out of term, but within the territorial jurisdiction of the judge as to that action not beyond and outside of it, unless by the common consent of the parties." *McNeill v. Hodges*, 6 S. E. 127, 128, 99 N. C. 248.

**OUT OF THE COMMONWEALTH.**

A showing that defendant is "out of the commonwealth," within the meaning of Act Ky. Dec. 19, 1893, authorizing service by publication in certain cases on satisfactory proof

that defendant is out of the commonwealth, is sufficiently made by proof that defendants are not inhabitants of the commonwealth. The legislative meaning of the words "out of the commonwealth" implies and embraces the case of one who is properly described as not an inhabitant. To be out of the commonwealth implies one permanently out, as a nonresident or noninhabitant. *Foster v. Givens* (U. S.) 67 Fed. 684, 693, 14 C. C. A. 625.

#### OUT OF THE COUNTRY.

Being "out of the country," within the meaning of the statute of limitation providing that, if the plaintiff be out of the country at the time the cause of action accrues, he shall be allowed to commence his action at any time within the time limited for such action after he returns from without the country, means without the state. *Graves v. Graves' Ex'rs*, 5 Ky. (2 Bibb) 207, 4 Am. Dec. 697.

#### OUT OF THE JURISDICTION.

"Out of the jurisdiction," as used in Code Civ. Proc. subd. 8, § 1870, relating to witnesses, means "without the state," and so beyond the reach of any process of the courts to compel testimony. *Meyer v. Roth*, 51 Cal. 582, 583.

#### OUT OF THE REALM.

"Out of the realm," as understood by the judges of England, Parliament, and law writers, meant, prior to the union of the crowns of England and Scotland, out of the realm of England, and subsequent to such union signified out of the realm of Great Britain, including England and Scotland. *Pancoasts' Lessee v. Addison* (Md.) 1 Har. & J. 350, 353, 2 Am. Dec. 520.

#### OUT OF THE STATE.

The phrase "out of the state" is analogous to the phrase "beyond sea." *Faw v. Roberdeau*, 7 U. S. (3 Cranch) 174, 177, 2 L. Ed. 402; *West v. Pickesimer*, 7 Ohio (7 Ham.) 235, pt. 2.

"Out of the state," as used in Gen. St. 1878, c. 57, § 50, providing that persons out of the state may commence an action to recover real estate sold by an executor or administrator within five years after their return to the state, extends to persons who have always resided abroad as well as to those who have resided within the state and returned after an absence therefrom. *Jordon v. Secombe*, 22 N. W. 383, 384, 33 Minn. 220.

2 Rev. St. p. 289, § 178, provides that the heirs, devisees, and distributees of a decedent shall be liable to the extent of the prop-

erty received by them from decedent's estate to any creditor whose claim remains unpaid, who, six months prior to the final settlement of the estate, was out of the state. Held, that the words "out of the state" were intended to include creditors whose residence was continuously in a place outside the state, and that where a creditor came into the state, and begun a suit which was dismissed, the limitation of one year began to run from such time. *Yoast v. Willis*, 9 Ind. 548, 550.

A foreign corporation is a person out of the state, within the meaning of Rev. St. § 4231, providing that when any person is outside of the state when a cause of action accrues it may be commenced within the time limit therefor after his return. *Larson v. Aultman & Taylor Co.*, 56 N. W. 915, 917, 86 Wis. 281, 39 Am. St. Rep. 893.

Where a party has commenced a journey leading out of the state, and has progressed thereon at the commencement of a suit so far as to rebut any presumption of notice, though not yet actually over the line, he is to be regarded as being "out of the state," within the meaning of section 18 of the justice act (St. 129, c. 9, § 18), giving a writ of review where it is made to appear to the justice that the defendant is out of the state, etc. *Marvin v. Wilkins* (Vt.) 1 Alk. 107, 110, 111.

#### OUT OF USE.

"Out of use" is defined to be "not in employment." *Astor v. Merritt*, 4 Sup. Ct. 413, 419, 111 U. S. 202, 28 L. Ed. 401.

#### OUT WEST.

Where, at the time a note was made, the makers resided and were doing business in a city of New York, and at maturity it was presented at the place at which they had been doing business, and the notary was informed that they had gone "out West," the term "out West" meant in the Western States, and that they had left the state of New York. *Adams v. Leland*, 30 N. Y. 309, 312.

#### OUTAGE.

A charge payable on withdrawing hogsheads from inspectors under an act providing that it should not be lawful to carry tobacco out of the state in hogsheads which had not been inspected and marked. The charge was for labor for receiving and handling them, and appears to be a charge for services properly rendered. *Turner v. Maryland*, 2 Sup. Ct. 44, 61, 107 U. S. 38, 27 L. Ed. 370.

The term "outage" was used in Maryland to include a charge made to reimburse the state for the expense of requiring the delivery of export tobacco at one of the state tobacco warehouses in order that the suspect-

or could ascertain whether it conformed to the requirements of the law, whether it was the true growth of the state, and packed by the grower or purchaser in the county or neighborhood where it was grown. Such a charge is not an inspection law, within the meaning of the laws of the federal Constitution prohibiting the states from levying export or import duties except as necessary for the execution of inspection laws. *Turner v. State*, 55 Md. 240, 264.

## OUT-BOUNDARIES.

The term "out-boundaries" was used in early Mexican land laws to designate certain boundaries within which grants of a smaller tract, which designated such out-boundaries, might be located by the grantees. *United States v. Maxwell Land-Grant Co.*, 7 Sup. Ct. 1015, 1023, 121 U. S. 325, 30 L. Ed. 949.

## OUTBUILDING.

An "outbuilding" is something which is to be used in connection with a main building. *Commonwealth v. Intoxicating Liquors*, 3 N. E. 4, 140 Mass. 287. Where there was no main building, a stable cannot be deemed to be a necessary outbuilding. *Blakemore v. Stanley (Mass.)* 33 N. E. 689, 690.

"Outbuildings," as used in a complaint and warrant for the search for intoxicating liquors describing the premises to be searched as a certain building, the cellar under the same, and the outbuildings within the curtilage thereof, means those that from their character are to be used in connection with the main building, and may thus be held to be a parcel thereof, even if not immediately attached thereto, as the barns, shed, wood and store house belonging to a dwelling house; but cannot be construed to include another building connected with the building described by a covered passageway giving access thereto, which was in all respects adapted for independent use, and actually thus used, except so far as the basement was concerned. *Commonwealth v. Intoxicating Liquors and Vessels*, 3 N. E. 4, 5, 140 Mass. 287.

In a deed of warranty of "the north half of the double dwelling house, situated, \* \* \* and the lands used with it and belonging thereto, and all outbuildings and fences thereon and thereto belonging," etc., the phrase "belonging thereto" refers to the house, not to the defendant. The "outbuildings thereon" are outbuildings on the land used with it; i. e., the house. If the phrase "belonging thereto" meant land belonging to the defendant, then, if he had no title, and the covenant was as to what he owned and not as to what he did not, the warranty would be useless and unavailable just precisely where it was needed for the protection of the grantee.

Such deed included a barn which was on the land, which had been used with the dwelling house and was on the land used with it. *Woodman v. Smith*, 53 Me. 79, 80.

## OUTCROP.

The definition of the word "outcrop" as used in mining law is "given by one learned author (Gelke) as the edges of strata which appear at the surface of the ground, and by another (Van Cotta) as that portion of a vein appearing at the surface." It is defined "by Dr. Daymond in his Glossary as the portion of a vein or strata emerging at the surface or appearing immediately under the soil and surface debris." *Duggan v. Davey*, 26 N. W. 887, 896, 4 Dak. 110.

"Outcrop," in mining, relates to the apex of the vein, and means a presentation of the mineral to the naked eye on the surface of the earth. *Stevens v. Williams (U. S.)* 23 Fed. Cas. 40, 42.

## OUTCRY.

Synonymous with auction, see "Auction."

## OUTER DOOR.

The term "outer door" may properly designate a door leading from the cellar way into the cellar of the house, and opening inwardly, though there is a second door before such entrance, opening outwardly; and therefore a breaking of the door first mentioned is a sufficient breaking to constitute the crime of burglary. *McCourt v. People*, 64 N. Y. 583-586.

## OUTFITS.

See "Original Outfit."

The word "outfits" in its original use, as applying to ships, embraced those objects connected with a ship which were necessary for the sailing of her, and without which she would not in fact be navigable. It included the sails and rigging, boats, and provisions for the ship's crew; and it has long since been determined that such items enter into the value of the ship, and are covered by an insurance upon her. 1 Phil. Ins. (1st Ed.) 71, and authorities there cited. But in ships engaged in whaling voyages the word has acquired a much more enlarged signification. It has embraced within it not only the ordinary tackle and apparel of the ship, and the provisions of a common voyage from port to port, but the casks and staves, the fishing gear, and the stores and clothing necessary for the successful prosecution of such voyages; articles not for sale, like a common outward cargo of a ship, but for consumption and use during a protracted voyage of years,

and for the storing of the cargo or catchings to be obtained. *Macy v. Whaling Ins. Co.*, 50 Mass. (9 Metc.) 354, 364.

**Outfits**, though a distinct subject of insurance are neither ship nor cargo, as these words are ordinarily used. A part of the outfits themselves resemble the provisions, tackle, apparel, and furniture of a commercial vessel. *Macy v. China Mut. Ins. Co.*, 135 Mass. 328, 330.

## OUTHOUSE.

The term "outhouses" in a statute providing for the punishment of every person who shall willfully burn any barn, stable, or other outhouses in parcel of any dwelling house, means houses separated from the main building, but useful to it as a dwelling. *State v. Powers*, 36 Conn. 77-79.

An outhouse is one that belongs to a dwelling, and is in some respects a parcel of such dwelling house, and situated within the curtilage. *State v. Roper*, 88 N. C. 656, 658.

An outhouse is any house necessary for the purposes of life in which the owner does not make his constant or principal residence. *State v. O'Brien* (Conn.) 2 Root, 516.

An outhouse is a building appurtenant to some main building or mansion house. *State v. Bailey*, 10 Conn. 143, 145.

"An outhouse is a building without the mansion house, intended for the accommodation of the owner or occupant. It is the subserviency of it to the mansion house that gives it the denomination of an outhouse, and not the fact that it is included within the same fence, or within what is denominated the curtilage or homestead." *State v. Brooks*, 4 Conn. 446, 448.

A house contiguous to and used in connection with a hotel, the two belonging to and being controlled by the same person, is an outhouse. It is not proper to define an outhouse as one within the curtilage. *Shotwell v. State*, 43 Ark. 345, 349.

### Car used as freighthouse.

Outhouse primarily means a building adjacent to a dwelling house, and subservient thereto, but distinct from the mansion itself. A freight-car body, which has been detached from the wheels and placed upon permanent posts near a track at a station, and to which a platform has been attached, thus constituting a structure to be used as a freight warehouse, located elsewhere than a city, town, or village, may be characterized as an outhouse, though not appurtenant to any other building; and an indictment charging the burning of an outhouse is sustained by proof of the burning of such building. *Carter v. State*, 32 S. E. 345, 346, 106 Ga. 372, 71 Am. St. Rep. 262.

### Cart or implement shed.

A building intended for and constructed as a dwelling house, but which had not been completed or inhabited, and in which the owner had deposited straw and agricultural implements, is not a "house, outhouse, or barn," within St. 9 Geo. I, c. 22, § 7, entitling the owner of a "house, outhouse, or barn" to maintain an action against the hundred for an injury sustained in consequence of malicious setting fire to the same. *Elsmore v. The Inhabitants of St. Briavells*, 8 Barn. & C. 461.

A cart hovel, consisting of a stubble roof supported by uprights, in a field at a distance from other buildings, is not an outhouse. *Rex v. Parrot*, 6 Car. & P. 402.

### Chicken house.

A chicken house on the same lot as the dwelling house, and owned and used by the same person, is an outhouse, within Gen. St. c. 29, art. 5, § 4, providing that any person who shall break into a dwelling house or any outhouse belonging to or used with any dwelling house, and carry away anything of value, shall be guilty of felony. The outhouse is not to be understood as being part of the dwelling house in order to constitute such felony, but it must be a house belonging to or used with the dwelling house, or "contributory to habitation." *Price v. Commonwealth* (Ky.) 25 S. W. 1062.

### Cowshed.

Outhouse applies to a dwelling house, and in some respects parcel of such dwelling house. A building built for a brick kiln, and afterwards roofed, and in which was kept a cow, and which was one hundred yards from the nearest dwelling house, was not an outhouse within the law relating to arson. *Rex v. Haughton*, 5 Car. & P. 555, 556.

### Pigsty.

A pigsty situated in a yard, into which the back door of a house opened, and which yard was bounded by fences and by other buildings, and by a cottage and barn which were let to a tenant, but which did not open into the yard, is an outhouse within the meaning of statute 1 Vict. c. 89, § 3, relating to setting fire to an outhouse. *Reg. v. James*, 1 Car. & K. 303.

### Schoolhouse.

An outhouse is any house necessary for the purposes of life in which the owner does not make his constant or principal residence. Education and schooling are necessary to the well-being of individuals and of society. A schoolhouse, in this sense, may be considered as the most important outhouse to all the inhabitants of the district who built it. *State v. O'Brien* (Conn.) 2 Root, 516.

A district schoolhouse is not an outhouse within the meaning of Act 1830, § 30, concerning the breaking and entering of outhouses. An outhouse is a building appurtenant to some main building or mansion house; and whether it be parcel of it or not depends upon its particular location, or its connection with such mansion house. *State v. Bailey*, 10 Conn. 144, 145.

The term "other outhouse not parcel of any dwelling house," in a statute making it criminal to willfully burn any mill, distillery, barn, meathouse, tobacco house, stable, warehouse, or other outhouse not parcel of any dwelling house, includes a schoolhouse. *Jones v. Hungerford (Md.)* 4 Gill & J. 402, 406.

#### Spring house.

"Outhouse," as used in the act concerning mills and milldams, providing that, before an increase in the altitude of the dam would be allowed, the jury must inquire whether the mansion house of any other proprietor or other outhouse, curtilages, or gardens thereto belonging would be overflowed, etc., includes a spring house. *Willoughby v. Shipman*, 28 Mo. 50, 52.

#### Storehouse or tobacco barn.

The term "outhouse" could not include an old building located at a crossroad, not inclosed, or used in any way as a dwelling house, and occupied only as a storehouse. *State v. Roper*, 88 N. C. 656, 658.

"Outhouse," as used in Gen. St. c. 29, art. 5, § 4, providing for the punishment of any person who feloniously breaks any dwelling house or part thereof, or any outhouse belonging to or used with any dwelling house, and feloniously take away anything of value, embraces such structures as are ordinarily attached to and used in connection with dwelling houses. It cannot reasonably be construed to include a tobacco barn built and used expressly for the storage of tobacco, for it would not ordinarily be understood as an outhouse of the dwelling house in its usual and ordinary acceptance and meaning. *White v. Commonwealth*, 9 S. W. 303, 87 Ky. 454.

#### OUTHOUSE WHERE PEOPLE RESORT.

"Outhouse," as used in a statute prohibiting a playing of cards for money in an outhouse where people resort, does not mean that it should be in the same inclosure with a mansion house or other building in which persons reside, however far removed from these. If it is a house to which people resort, it is sufficient to entitle it to the designation of an outhouse. The fact that it was detached from others, and inclosed by

a fence, does not affect its character. *Cameron v. State*, 15 Ala. 383, 384.

The word "outhouse" in the statute prohibiting gaming in any outhouse where people resort is used in its ordinary and popular acceptance as meaning any house standing out and apart from houses occupied and used as dwelling houses or business houses, and includes any unoccupied house. The word differs in meaning in the law of burglary, where it is used to designate a small house or dwelling belonging to a mansion or dwelling house, and usually standing separate from or without it, and a small distance from it. *Wheelock v. State*, 15 Tex. 253, 255.

Code, § 4052, prohibiting playing with cards in any public house or in any "outhouse where people resort," means a house or place which is not strictly a public one or made public temporarily, although the house must be public to some extent in that it must be a place where people resort. *Downey v. State*, 8 South. 869, 870, 90 Ala. 644.

"An outhouse where people resort" as used in Hart. Dig. art. 1474, making it criminal for any person to play in any outhouse where people resort, is a house not used as a dwelling or business house where persons have resorted on more than one occasion for the purpose of playing cards, or where more persons were present on one occasion than those who went for the purpose of playing. *Wheelock v. State*, 15 Tex. 260, 261.

It is error to charge that under the statute making playing cards at an outhouse where people resort a misdemeanor, an outhouse is one where parties may go for the purpose of playing cards, whether they go there once or a dozen times. *Downey v. State*, 20 South. 439, 440, 110 Ala. 99.

#### Distillery.

"Outhouse," as used in a statute prohibiting gaming in any tavern, inn, store for the retailing of any spirituous liquors, or in any other public house, or in any street, highway, or in any open wood, race field, or open place, or in any barn, kitchen, stable, or other outhouse, means outhouses of every description, and includes a distillery. It is not limited to outhouses appurtenant to mansion houses, though such is the literal meaning of the word. *State v. Faulkener (S. C.)* 2 McCord, 438, 439.

#### Dwelling or business house.

Code 1886, § 4052, making it a misdemeanor to play at dice at enumerated places or in any other public place or "outhouse where people resort," means any house standing out and apart from the houses used as dwellings or business houses. Even if it be shown that people are in the habit of resort-

ing to a residence or business house, that does not constitute it an outhouse where people resort. *Pickens v. State*, 14 South. 672, 100 Ala. 127.

#### **Sleeping apartment.**

"Outhouse," as used in Pen. Code, art. 355, prohibiting card playing in an outhouse, should be construed to include a room furnished and occupied as a sleeping apartment only, no other room in the house being occupied. *Sisk v. State*, 13 S. W. 647, 649, 28 Tex. App. 432.

An outhouse, within the meaning of a statute prohibiting gambling at outhouses, etc., includes any house not occupied as a dwelling house or business house, and the fact that it is occupied as a sleeping apartment is immaterial. *Wheelock v. State*, 15 Tex. 257, 259.

#### **Storehouse.**

A building used only for the keeping of stock and storing of grain, in which the defendant and another played a game of cards, no other persons being present when the game was played, was not an outhouse within the meaning of the statute prohibiting the playing of cards in an outhouse where people resort for the purpose of gaming. *Stockton v. State* (Tex.) 44 S. W. 509, 510.

"Outhouse," as used in a statute prohibiting the playing at cards for money in an outhouse where people resort, should be construed to include a vacant storehouse, if habitually resorted to by persons for the purpose of playing at cards. *Swallow v. State*, 20 Ala. 30, 32; *Downey v. State*, 22 South. 479, 481, 115 Ala. 108.

### **OUTLAW.**

By the common law an outlaw is one who has been so declared by the judgment of the court in some regular judicial proceedings for that purpose, and this could take place only in a civil or criminal proceeding. The word "outlaw," as used in Acts Dec. 28, 1868, § 1, declaring counties liable for persons killed by an outlaw, etc., does not mean an outlaw in the strict sense of the common-law use of the term, but is used in the act in a loose sense, having reference to the disturbed condition of society at the time, and includes the lawless and disorderly persons then addicted to roving through the state in disguise and committing habitually acts of violence and outrage. It is to be understood as referring to the character of the persons named in the act entitled "An act for the suppression of secret organizations of men disguising themselves for the purpose of committing crimes and outrages." *Dale County v. Gunter*, 46 Ala. 118, 138.

By the unlearned the word "outlawed" is often used as applying to notes, bills, and other evidences of debt invalid by lapse of time, or as tantamount to the legal language "barred by the statute of limitations." Thus a barred note in popular phrase is said to be "outlawed," and it will be given this sense in an agreement by one to pay a certain note in case the promisor therein did not pay it before it was "outlawed." The word "outlaw" has a distinct technical signification, and when used in that sense refers to persons, and not to things. Thus, an outlaw is one who is put out of the law; that is, deprived of its benefit and protection. In earlier times he was called a "friendless man"; one who could not by law have a friend. An outlaw was said "caput genere lupinum," by which it was meant that any one might knock him on the head as a wolf, because he would not surrender himself peaceably. He forfeited everything he had, whether in right or possession. *Reeves, Eng. Law*, 20. But in modern times the word has a much less stringent meaning, importing, however, the forfeiture of property and civil rights. *Drew v. Drew*, 37 Me. 389, 391 (citing *Burrill's Law Dict.*).

The term "outlaw," as used in an agreement that a certain mortgage be discharged of record unless the same shall "outlaw" before a certain time, is held to have reference to the time when by law the mortgage will be presumed to be paid. *Curtis v. Goodenow*, 24 Mich. 18, 22.

### **OUTLAWRY.**

"Judgment of outlawry in England is given by the coroner, and is in these words: 'Therefore the said A. B., by the judgment of the coroner of our Lord the King, of the county aforesaid, is outlawed.' The party is thereby attainted, and shall forfeit and lose as much as if sentence had been given against him upon a verdict or confession. And after such outlawry, if the party is brought before the Court of King's Bench, execution shall be awarded against him, but no sentence pronounced, because the outlawry is a judgment, and no man shall have two judgments for the same offense." *Respublica v. Doan* (Pa.) 1 Dall. 86, 91, 1 L. Ed. 47.

Outlawry, legally speaking, is a judicial proceeding, and no one can be outlawed but in such a proceeding, and by due process of law, and an act of the Legislature is not in this connection due process of law. *Dale County v. Gunter*, 46 Ala. 118, 138.

### **OUTLOT.**

In construing 2 Stat. 748, confirming the claims of the inhabitants of the several towns and villages in Missouri to the town

or village lots, outlots, common field lots, and commons in, adjoining, and belonging to the several towns or villages, may properly include vacant land contiguous to the town of St. Louis, bounded on all sides except the one fronting on the river. "The term 'outlot' is said to be of American origin, and to be unknown to those who preceded us in the possession and government of this country. If this be so, we would naturally look for an American interpretation of it, and, as the public authorities from Congress to the recorder have applied it to property situated in relation to the town just as that now in controversy was situated, we would have the signification of the term conveyed in the most forcible manner." *Kissell v. St. Louis Public Schools*, 16 Mo. 553, 592.

In construing Act June 13, 1812, in reference to outlots in the city of St. Louis, the court says that: "No court by perspective definition can embrace all lots which must come under the class of outlots. Each lot must depend on the evidence in relation to it in order to its classification. It is obvious that it is not necessary that a lot should touch the town to make it an outlot. If it is adjacent to the common fields it is near the town; as the common fields must, in the words of the act, be adjoining and belonging to the town." *City of St. Louis v. Toney*, 21 Mo. 243-256.

The term "outlot" as used in the acts of Congress relating to lands included in the Louisiana purchase, must be construed in connection with the subject-matter in the view of the Legislature. Mere contiguity to the village, coupled with the fact that the owner of the lot is an inhabitant of the village, will not alone constitute an outlot within the meaning of the act. These two circumstances may be predicated of any tract of land in the vicinity of the town or village, although cultivated merely as a farm, and not subject to the control of the village authorities. Why were the common field lots regarded as part of the village or belonging to the village? They did not belong to the inhabitants as a corporation, or to the mass of the villagers, as the commons did, but were owned by individuals; yet they were subject to the regulations of the village authorities, and this circumstance determined their character as outlots of the village. *Eberle v. St. Louis Public Schools*, 11 Mo. 247, 265.

"Town lots, outlots, common field lots, and commons were known and recognized parts of the Spanish town or commune of St. Louis. They existed by public authority, whether by concession, custom, or permission. It has been settled that the existence of the facts necessary to constitute an outlot is a matter of fact for the jury to determine, but that what facts will constitute an outlot

is a question of law for the court." *Vasquez v. Ewing*, 42 Mo. 247, 256.

"Outlot," as used in act of Congress June 13, 1812, requiring the out-boundary lines of the city of St. Louis to be run so as to embrace the villages "and the outlots, common field lots, and commons thereto respectively belonging," meant nothing other than common field lots. *Trotter v. Board of President & Directors of St. Louis Public Schools*, 9 Mo. 69, 76.

## OUTRAGE.

The word "outrage" is variously defined, and the particular definition to be applied should be the one indicated by considering the word in the connection in which it is used. It signifies a bold or wanton injury to person or property; wanton mischief; gross injury, etc. Under all definitions it is an aggravated wrong. *Mosnat v. Snyder*, 105 Iowa, 500, 504, 75 N. W. 356.

Within the meaning of a statute which expressly excludes the allowance of damages for an alleged outrage to the feelings of the plaintiff, and vindictive damages in an action to recover for a nuisance, personal annoyance or inconvenience is not included and comprehended in the term "outrage to the feelings." The term "outrage" implies something more than mere inconvenience or annoyance or injury. It implies excess, violence, as well as injury and wrong, intended and designed; and when applied to the feelings it implies not merely a physical pain, but mental. *Aldrich v. Howard*, 8 R. I. 246-250.

"Outrages," as used in the acts of the fifth Congress, p. 19, § 3, providing that a divorce by stipulation may be decreed where either the husband or wife is guilty of excesses, cruel treatment, or outrages towards the other, rendering their being together insupportable, means an outrage to the person, and will not admit of a construction embracing larceny or crimes against law or sound morality. *Lucas v. Lucas*, 2 Tex. 112, 114.

An instruction in an action for injuries caused by beating and forcible resistance of a railroad brakeman, stating that the plaintiff was entitled to recover compensatory damages for the "outrage and indignity" put upon him, must be construed to mean and include mental anguish or pain, as distinguished from bodily suffering. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 814, 319, 24 Am. Rep. 748.

## OUTSIDE THE BAR.

By the term "outside the bar" in Rev. St. 1895, § 3801, giving the pilot one-half pilotage, etc., against a vessel outside the bar

refusing his services, the Legislature probably meant outside the harbor limits. *Olsen v. Smith* (Tex.) 68 S. W. 320, 321.

## OUTSTANDING.

"Outstanding crop," as used in Act Feb. 20, 1875, making it criminal to steal part of an outstanding crop of corn, means "a crop in the field, not gathered thence and housed, without regard to its state. It is an outstanding crop from the day it commences to grow until it is finally gathered from the ground on which it is planted and taken away." *Sullins v. State*, 53 Ala. 474, 476.

## OUTSTANDING ACCOUNTS.

"Outstanding accounts," as used in a contract providing that an account of the stock of a business should be taken, and from the outstanding accounts of the firm there should be first deducted five per cent. thereof to cover losses and bad accounts, and then should be paid to such party the share of net profits, after the deduction, to which he was entitled under the agreement, should be construed in its mercantile sense, which, when net profits are to be ascertained, means such accounts as are deemed good and collectible, and from which accounts deemed to be bad and uncollectible have been segregated and charged to profit and loss, and not in its general sense as meaning such accounts as are due, unpaid, and uncollectible, as an ordinary outstanding draft or bond or other indebtedness, and it is broad enough to include within its terms good and bad accounts which are due and unpaid. *McCulsky v. Klosterman*, 25 Pac. 363, 367, 20 Or. 108, 10 L. R. A. 785.

## OUTSTANDING LIABILITIES.

"Outstanding liabilities," as used in a stipulation by the vendee of a newspaper to pay all the "outstanding liabilities of the paper," meant such debts and liabilities as created some legal or equitable right or lien on the property, types, presses, stock, etc., such as wages, sums due for paper and supplies, salaries of editors and writers; and hence the vendee was not liable for damages for libel subsequently recovered in a suit pending when the stipulation was made. *Perret v. King*, 80 La. Ann. 1368, 1370, 31 Am. Rep. 240.

## OUTSTANDING TITLE.

An outstanding title in another which will give protection to a defendant in ejectment, the Court of Appeals of Maryland decided in *Hall v. Gitting's Lessee* (Md.) 2 Har. & J. 112, "means such a title as the stranger could recover on in ejectment against either of the contending parties."

It must be, therefore, a clear, subsisting title on which recovery can be had. *Waltemeyer v. Baughman*, 63 Md. 200, 203.

"A mere right of redemption in a third person after foreclosure is not such an outstanding title as will defeat a recovery in ejectment." *Lanier v. McIntosh*, 23 S. W. 787, 789, 117 Mo. 508, 38 Am. St. Rep. 676.

## OUTWARD.

The words "outward," "open," "actual," "visible," "substantial," and "exclusive," in connection with a change of possession, mean substantially the same thing. They mean not concealed, not hidden, exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable, genuine, certain, absolute, real at present time, as a matter of fact, not merely nominal, opposed to form, actually existing, true; not including, admitting, or pertaining to any others; undivided, sole, opposed to inclusive. *Bass v. Pease*, 79 Ill. App. 308, 318.

## OVER.

See "Assign Over."

Lexicographers, among other definitions of the word "over," give it the meaning of from one to another by passing. In *re Miller's Will*, 70 Tenn. (2 Lea) 54-70.

A charter of a railroad giving it power to construct its line "over and across a ferry to East Boston," etc., did not give the railroad authority to establish and maintain a ferry for toll at the place there mentioned. *The Maverick* (U. S.) 16 Fed. Cas. 1186, 1188.

Where it appears from the testimony in a cause that a party at the time of his death was "over thirty years of age," it will be presumed that he was under 40. *Johnson v. Hudson River R. R. Co.*, 13 N. Y. Super. Ct. (6 Duer) 633, 648.

An affidavit for an attachment stating only that defendant is indebted to the attaching creditor in a sum named "over and above all discounts" is insufficient to sustain the process, the words "over and above all discounts" not being equivalent to the words in the statute "over all payments and set-offs." *Solinger v. Patrick* (N. Y.) 7 Daly, 408, 410.

"Over and above capital stock," as used in Rev. Code 1855, p. 1322, authorizing the taxation of shares of stock in banks and other incorporated companies except, etc., and all other property owned by incorporated companies over and above their capital stock, does not authorize the taxation of cor-



porate property which is represented by its capital stock, but only includes the property which is owned over and above its capital stock. *Hannibal & St. J. R. Co. v. Shacklett*, 30 Mo. 550, 558.

#### As upon or along.

In construing a statute granting to railroad companies the right of way and providing that any railroad company may raise or lower any turnpike, plank road, or other way for the purpose of having their railroad pass over or under the same, the court say that "the word 'over' means undoubtedly an elevation above, as opposed to 'under,' but it is clearly not limited to this meaning in this section, but includes the idea of crossing highways on the surface thereof and also running upon them lengthwise. The first definition given to the preposition 'over' by Webster is 'across'; its fifth meaning is 'on the surface of'; its sixth definition is 'upon.' And it is in the sense of these last two definitions that the Legislature in the fourth section of the same act referred to use it when it is enacted that if the owner of any real estate over which said railroad corporation may desire to locate their road shall refuse, etc. In the sense of our statute the words 'over' and 'upon' are synonymous, and, without giving it an unduly liberal construction, we can safely conclude that the Legislature did mean by such language to give the railroad companies the privilege of running their tracks upon the highways in the country and streets in the city." *Milburn v. City of Cedar Rapids*, 12 Iowa, 246, 258; *Gear v. C. & D. R. Co.*, 43 Iowa, 83, 84.

"Over," as used in Code, § 1262, providing that any railroad corporation may raise or lower any highway for the purpose of having its railway pass over or under the same, is substantially the same in meaning as the word "upon," as used in an indictment for causing a nuisance by constructing and maintaining a railway upon a highway. *State v. Davenport & St. P. Ry. Co.*, 47 Iowa, 507, 508.

By the word "over" in Rev. Laws, § 3381, reading: "If after laying out and making a railroad, a turnpike road or other way is so laid out as to cross said railroad, the turnpike road or other way may be so made as to pass under or over the railroad, and shall be so made as not to obstruct or injure it," was intended not "upon," but "above," so that the railroad should pass under the highway. *Central Vermont R. Co. v. Town of Royalton*, 58 Vt. 234, 240, 4 Atl. 868.

#### As across at same or higher level.

"Over," as used in a grant by a city of authority to a telephone company to run and maintain wires "over" and through the

streets of the city, does not include permission to lay them under, below, or beneath. "Over" is equivalent to "across." *Commonwealth v. Warwick*, 40 Atl. 93, 94, 185 Pa. 623.

The word "over" means "above," and not "upon," as used in Rev. Laws, § 3381, providing that highways, when laid out so as to cross a railroad, shall pass over the same. *Central Vermont R. Co. v. Royalton*, 4 Atl. 868, 872, 58 Vt. 234.

The two words "over" and "across" may be used interchangeably as having the same meaning. Webster defines the word "across" from side to side; athwart; crosswise; quite over. He defines the word "over" as above, or higher than, in place or position, with the idea of covering; across; from side to side of; upon the surface of. Over has also been construed to denote a crossing of the higher level, and not the same level, and it has been held to mean not upon, but above. The word "over," in the statute authorizing a city to extend any street over or across any railroad track, right of way, or land of any railroad company, is broad enough to confer the power of extending the street above and over the track or right of way by means of a viaduct or bridge, but the word "across" is used to designate a grade crossing on the same level as the railroad right of way. *Illinois Central R. Co. v. City of Chicago*, 30 N. E. 1044, 1046, 141 Ill. 586, 17 L. R. A. 530.

"Over," as used in Rev. St. c. 39, § 67, providing that every railroad corporation may raise or lower any turnpike or way for the purpose of having their railroad pass over or under the same, as applied to the surface, is not precisely the opposite of "under." One passes over a road if he crosses it on the surface as well as when he crosses over it on a bridge, but he cannot be said to pass under it unless on another surface at a lower level. To raise the turnpike road to permit the railroad to pass over it at the same level is as much within the words and intent of the statute as the power of raising it much higher to carry the travel over the railroad by an independent bridge. *Newburyport Turnpike Corp. v. Eastern R. R. Co.*, 40 Mass. (23 Pick.) 326, 328.

"Over," as used in Rev. St. c. 39, § 69, providing that if, after the laying out and making of any railroad already granted or which may be hereafter granted, any turnpike road or other way shall be so laid out as to cross such railroad or turnpike road, or may be so made as to pass under or over such railroad, and be so made as not to obstruct or injure such railroad, does not mean at the same level as the railroad, but at a higher level. *Boston & Maine R. v. City of Lawrence*, 84 Mass. (2 Allen) 107, 109.

**OVER SEA.**

"Over sea," as used in the statute of limitation providing that persons over sea or legally incapable of bringing their actions may bring them within four years after coming over sea, means, literally, "beyond the seas," and a person at Halifax, without the jurisdiction of the court, is not over the seas within the meaning of the term. *Gustin v. Brattle* (Conn.) Kirby, 299, 300.

**OVEREXERTION.**

"Overexertion," as used in an accident policy excepting the insurer from liability for injury or death caused by "overexertion," is to be construed "to mean an exertion which is the voluntary and unnecessary act of the insured; one from which injury might reasonably be anticipated, and which might, in the exercise of reasonable care, have been avoided; and an overexertion put forth in an emergency of danger—as, for instance, in the effort to save oneself from being crushed by a descending weight—is not within the exception of the policy." *Reynolds v. Equitable Acc. Ass'n*, 1 N. Y. Supp. 738, 739, 49 Hun, 605.

**OVERCHARGE.**

"Overcharge," as used in Rev. St. art. 4357, providing that a shipper shall have the right to recover a penalty of \$500 from railroad companies for willful discrimination in freight charges, if the company refuse, on notice, for 20 days, to refund the overcharge, means a charge of more than is permitted by law, and unless there has been a charge of more than the maximum rate allowed by law no notice is necessary in order to maintain an action for the penalty. *Woodhouse v. Rio Grande Ry. Co.*, 3 S. W. 323, 324, 67 Tex. 416.

**OVERDRAW.**

The offense of overdrawing an account is properly described as one whereby one unlawfully obtains money from a bank on his check, and the money is drawn from the bank by him who draws the check, and not by him who receives it, and it is drawn upon the account of the individual by whose check it is drawn, though it be paid to and for the benefit of another. *State v. Stimson*, 24 N. J. Law (4 Zab.) 478, 483.

**OVERDRAFT.**

"Overdraft occurs when a depositor of a bank checks out more money than he has in the bank. Sometimes the bank permits this to be done without security and without previous arrangement, and sometimes a pre-

vious arrangement to this effect is made, and security for the repayment of that amount is given, and a rate of interest is agreed on. But every overdraft, whether by previous arrangement or not, and whether secured or not, and whether drawing interest or not, is a loan." *United States v. Allis* (U. S.) 73 Fed. 165, 178.

"An overdraft arises when a customer of a bank draws from that bank more money than is standing to his credit in his account with the bank. Such a sum so appearing from a depositor's account to be overdrawn is an overdraft, and should be reported as such in reports made to the Comptroller of the Currency, although arranged for or covered by a note in the hands of the bank, called an 'overdraft note.' This is the ordinary meaning of the word 'overdraft,' as used among bankers; and it must be presumed, therefore, that when the Comptroller of the Currency calls upon a national bank for a report of its condition, and asks for a statement of the amount of overdrafts, secured and unsecured, he uses the word in the sense last mentioned, and desires a statement of the total amount which customers of the bank have drawn in excess of the sums that have been placed to their credit on the books of the bank." *Bacon v. United States* (U. S.) 97 Fed. 35, 43, 38 C. C. A. 37.

As between a banking firm and a depositor not a member of the firm, an overdraft is a loan; but the situation changes when the person making the overdraft is a member of the firm which advances it; and an agreement between the partners in a banking firm that, if either of them should overdraw his account, he should pay interest on such overdrafts at the rate of 10 per cent. per annum, is not a charging of interest on a loan, and is not usury. *Payne v. Freer*, 91 N. Y. 43, 48, 43 Am. Rep. 640.

**OVERDUE.**

As a general rule, a note or bill may be said to be overdue when a period has elapsed in which it should have been presented. If the parties reside in different towns, the note should be presented for payment in the due course of the mail, which would not commonly require above one or two weeks at most. In such a case two months having elapsed, a note must be considered as overdue. *Camp v. Scott*, 14 Vt. 387, 390.

"Overdue," as applied to a demand bill of exchange, and used in reference to a right of action against the drawer or indorser, means a bill which has come into the hands of an indorser so long after its issue as to charge him with notice of its dishonor. *Le Due v. First Nat. Bank of Kasson*, 16 N. W. 426, 428, 31 Minn. 33.

**OVERFLOW.**

See "Periodical Overflow."

The word "overflow," as used in a petition alleging that land was damaged by the "overflow" of water, should be construed to include the percolating of water through the earth so as to rise and stand therein within one or two feet of the surface, it being set back by a dam, and causing it to stand at a greater depth in the bed of a stream by reason thereof. Though the word "overflow," when applied to the surface of land, doubtless is correctly defined by Webster, "to fill beyond the brim or margin, to deluge, to submerge or drown," its sense as used in the petition is not necessarily confined to the surface of the land, but to the ground itself. *Pierce Mill Co. v. Koltermann*, 42 N. W. 877, 878, 26 Neb. 722.

**OVERFLOWED LANDS.**

See "Swamp and Overflowed Lands."

"Overflowed lands," as used in Act Cong. Sept. 20, 1850, granting swamp and overflowed lands to the states, mean "those lands which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers or lakes, or by the overflow of the tide." *San Francisco Sav. Union v. Irwin* (U. S.) 28 Fed. 708, 712.

Lands described in the approved plats of township surveys made under the federal authority as "subject to periodical overflow" are not swamped and overflowed lands within Act Cong. July 23, 1866, making it the duty of the Commissioner of the General Land Office to certify over to the state as swamped and overflowed all lands represented as such on such plats. The term "overflowed," as thus used, having reference to a permanent condition of the lands, to which it is applied—that is, to those lands which are overflowed and will remain so without reclamation or drainage, while "subject to periodical overflow"—has reference to a condition which may or may not exist, and which, when it does exist, is of a temporary character. *Heath v. Wallace*, 11 Sup. Ct. 380, 384, 138 U. S. 573, 34 L. Ed. 1063. See, also, *McDade v. Rossier Levee Board*, 33 South. 628, 631, 109 La. 625.

**OVERISSUED STOCK.**

By overissued stock is to be understood stock to be issued in excess of the amount limited and prescribed by the act of incorporation. Certificates of stock issued in ex-

cess of the certificates that represent the full authorized capital of the corporation represent overissued stock. Such stock is spurious, and wholly void. *Hayden v. Charter Oak Driving Park*, 27 Atl. 232, 233, 63 Conn. 142.

**OVERLOAD.**

The words "overloaded," "injured," etc., in Code, § 2482, declaring it a misdemeanor to "willfully overdrive, overload, wound, \* \* \* any useful beast, Towl, or animal," do not imply or describe the acts charged to have been done with certainty. They each imply a variety of acts that may or may not constitute the offense or parts of it. The acts should be so specified and charged as to show that they mean what the statute intends by overdriving, overloading, etc. *State v. Watkins*, 8 S. E. 346, 347, 101 N. C. 702.

**OVERPERSUASION.**

"Overpersuasion," as used in an instruction in an action for seduction and breach of promise of marriage, that there must be some "overpersuasion by the man, followed by sexual intercourse as the result of such overpersuasion, to constitute the offense of seduction," does not mean that mere persuasion, followed by illicit intercourse, constitutes the offense, where, in the same instruction, the words "inducements," "promise," "artifice," and "deception" are used as equivalents of "overpersuasion," and the phrase "false or fraudulent persuasion" is used as the equivalent of "false or fraudulent acts, promises, or inducements." *Graham v. McReynolds*, 18 S. W. 272, 273, 90 Tenn. 673.

**OVERPLUS.**

"Overplus," as used in St. 2 Wm. & Mary, Sess. 1, c. 5, § 2, providing that the overplus on a distress shall be left in the hands of the sheriff, under-sheriff, or constable for the owner's use, means that which remains after payment of the rent and of the reasonable charges. *Lyon v. Tomkies*, 1 Mees. & W. 603, 608.

"Overplus," in a will, usually imports whatever shall turn out to be overplus; but it may be given a different meaning, and it may be inferred from the expressions of the will that the testator was contemplating a certain overplus, and was making his disposition accordingly. *Page v. Leapingwell*, 18 Ves. 463, 466.

**OVERRATE.**

Though in its strict sense overrating means rating for more than it ought to be,

yet it may also mean rating when the party ought not to have been rated at all. The latter meaning is to be given the word in 43 Geo. III, c. 99, § 23, which enacts that, if any person shall think himself overcharged, or overrated by any assessment or surcharge, etc., it shall be lawful for him to appeal to the commissioners. *Allen v. Sharp*, 2 Exch. 352, 364.

## OVERSEE.

To oversee is to superintend. *Bylow v. Union Casualty & Surety Co.*, 47 Atl. 1066, 1067, 72 Vt. 325 (citing *Webst. Int. Dict.* 1024).

As used in St. 1808, p. 382, authorizing the county court to appoint some person a conservator to "take care of and oversee" idiots and their estates, the words "to oversee" authorize the conservator to superintend, and the expression "to take care of" makes it his duty to assume the requisite charge in order to the preservation and profit of the estate. *Treat v. Peck*, 5 Conn. 280, 284.

## OVERSEER.

See "Road Overseer."

Overseers are a class of men who have the management of slaves on a plantation or elsewhere as the agents or employes of the owner, and the term is used in the statutes to distinguish them from the class of owners. It has become a technical word, and is used in this sense in the statutes. Overseers, in our slaveholding states, compose an industrial class well defined and distinctly recognized. In the popular acceptance of the term, they are persons who superintend and manage the slaves of others, and direct their labors, and are contradistinguished from owners who manage their own slaves. In this sense the term is used in the statutes and judicial decisions of this state, and in the acts of Congress. In re *State ex rel. Dawson & Mays*, 39 Ala. 367, 374, 392 (citing Code, pt. 1, tit. 13, c. 4, art. 1; *Gilliam v. Senter*, 9 Ala. 395).

The word "overseer," in relation to the husband's position as manager of the wife's separate property, is used as a convertible term with "agent," so that it made no difference whether the husband received the rents and interest by the wife's express direction, or by that implied by the statute. *Faircloth v. Borden*, 41 S. E. 381, 382, 130 N. C. 263.

The term "overseer of a slave" means a person who, as the agent or employe of another, has a right to command the obedience, and, of course, is entitled to the services, of the slave placed under his charge, within the meaning of St. 1822, § 44, providing for the

punishment of any master or other person entitled to the service of any slaves who shall inflict cruel or unusual punishment on them. *Scott v. State*, 31 Miss. 473, 479.

The words "overseer" or "overseers," wherever used in the chapter relating to the superintendent and overseers of the poor, shall be construed as if followed by the words "of the poor." Code Va. 1887, § 889.

## As a laborer.

An overseer is one who is employed, not to labor himself, but to overlook and direct the labor of those who are employed to do the manual work of planting, cultivating, and gathering the crop, and it would be a confusion of terms to call such a person a laborer. *Isbell v. Dunlap*, 17 S. C. 581. A farm overseer is not a laborer, within the meaning of *Gantt's Dig.* §§ 4079-97, giving a laborer a lien for his services. *Flournoy v. Shelton*, 43 Ark. 168, 170; *Barkman v. Duncan*, 10 Ark. (5 Eng.) 465, 466; *Rust v. Billingslea*, 44 Ga. 306, 318; *Caraker v. Matthews*, 25 Ga. 571, 576.

An overseer is an agent; a superintendent; a sort of alter ego. His business is not to labor, but to oversee those who do work in subjection to his authority. He might in special cases unite both capacities, and be both laborer and overseer. Where an overseer did not perform any labor except to supervise and superintend a farm and laborers, he was not a laborer, within the meaning of Acts 1870, c. 206, giving laborers a lien for wages. *Whittaker v. Smith*, 81 N. G. 340, 342, 31 Am. Rep. 503.

Overseers of mines and railroad construction crews are within the term "laborer." *Warner v. Hudson R. Co.* (N. Y.) 5 How. Prac. 454, 455; *Hovey v. Ten Broeck*, 26 N. Y. Super. Ct. (3 Rob.) 316, 320.

## OVERSEER OF HIGHWAYS.

An overseer of a highway is a township officer, and not an officer of a particular road district only. *Green v. Kleinhans*, 14 N. J. Law (2 J. S. Green) 473, 476.

Code, § 1223, declaring that every overseer of a public road should put at every crossing of any railroad of such public road a sign marked, "Look out for the cars when you hear the whistle or bell," and the county court should defray the expense of such sign, cannot be construed to include a turnpike company, as the "overseer of a public road" means the overseers of common roads, upon which overseers are annually appointed by the county courts. *Louisville & N. Turnpike Co. v. State*, 50 Tenn. (3 Heisk.) 129, 130.

Under a statute (Code, § 1166) making it the duty of the overseer of every public road crossed by a railroad to place at each cross-

ing a sign warning the public of the cars, a municipal corporation is the overseer charged with such duty as to the portion of a public road which passes within its limits, and is used by its inhabitants and the public in general. *State v. Town of Loudon*, 40 Tenn. (3 Head) 263-265.

Wherever the word "overseer" is used in the act relating to highways, it shall be construed to mean the commissioner of highways elected or appointed over and for each road district. *Comp. Laws Mich.* 1897, § 4192.

## OVERSIGHT.

The term "oversight," in Code, §§ 4501, 4502, allowing the Supreme Court, after the term, to vacate or correct mistakes in judgments given through inadvertence or oversight, does not apply to any judgment which was given upon the deliberate consideration and judgment of the court, though the court may have since adopted a different ruling as correct. It will be seen that the case provided is where judgment is given through inadvertence or oversight, and not where an opinion is formed from inadvertence and oversight. *Russell v. Colyer*, 51 Tenn. (4 Helsk.) 154, 176.

## OVERT ACT.

An overt act sufficient to justify the taking of human life must be some demonstration made by the deceased against the accused of such character as to impress upon him that he was in imminent danger of his life or some great bodily harm. In some instances the extent of the overt act which would induce the accused to act in self-defense is measured by the character of the deceased for a violent, quarrelsome, dangerous and turbulent disposition, notorious in the community or known to the accused. *State v. Williams*, 15 South. 82, 83, 46 La. Ann. 709.

The overt act of the deceased justifying another person in the exercise of the right of self-defense is a hostile demonstration of a character to create a belief in such person that he was about to lose his life or suffer great bodily harm at the hands of deceased; and this belief could have been entertained honestly by accused, though deceased did not strike, or come within striking distance of, him. *State v. Frontenot*, 23 South. 634, 635, 50 La. Ann. 537, 69 Am. St. Rep. 455.

No exact definition of an overt act justifying a person in the exercise of the right of self-defense can be given. It may be a motion, a gesture, conduct, or demonstration, or anything else which evidences reasonably a present design to take the life of the de-

fendant, or to do him great bodily harm. Trifles light as air when viewed alone may become fraught with deadly meaning when viewed in connection with all the preceding facts disclosed, and with all the evidence in the case. *Hood v. State* (Miss.) 27 South. 643, 644.

The term "overt acts," as used in an instruction in a prosecution for murder, with reference to the right of self-defense, means any acts of the deceased which manifested to the mind of a reasonable person a present intention on his part to kill defendant or do him great bodily harm. *State v. Harrington*, 12 Nev. 125, 134.

## OVERT DEMONSTRATION.

What is or is not an overt demonstration of violence, as used in the law of self-defense, varies with the circumstances. Under some circumstances a slight movement may justify instant action, because of reasonable apprehension of danger, while under other circumstances this would not be so. And it is for the jury, and not for the judge, passing upon the weight and effect of the evidence, to determine how this may be. *Allison v. United States*, 16 Sup. Ct. 252, 257, 160 U. S. 203, 40 L. Ed. 395.

## OVERTAKING.

Within the meaning of the rules for preventing collisions in harbors, rivers, and inland waters, every vessel coming up with another vessel from any direction more than two points abaft her beam—that is, in such a position with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's sidelights—shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel. *U. S. Comp. St.* 1901, p. 2883.

"Overtaking," as used in Act March 3, 1885, art. 20, providing that every ship overtaking any other shall keep out of the way of the overtaking ship, means that one vessel must be ahead, and the other more or less astern. A vessel coming up from abeam, or not aft of the other's beam, is not astern of the other, and is not an overtaking vessel. *The Aurania* (U. S.) 29 Fed. 98, 103.

## OVERTIME.

"Overtime," as used in relation to the services of railroad employes, is the time which they are delayed on their runs beyond that fixed by the schedule. *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (U. S.) 62 Fed. 17, 21.

## OVERVALUATION.

"Overvaluation," as used in an assessment for taxes, means valuation in excess of the market value of the property. *People v. Feltner*, 58 N. Y. Supp. 869, 871, 27 Misc. Rep. 384.

Under an insurance policy providing that it should be void in case of an overvaluation of the property insured, the term "overvaluation" meant a substantial overvaluation; that is, one which would not ordinarily arise from a difference of opinion, whether fraudulent or otherwise. *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4, 5, 31 Am. Rep. 668.

## OVERWHELMING.

In an action to cancel a satisfaction and discharge of a mortgage which had been executed by mistake, the mortgagee supposing that he was discharging another mortgage, the court, in discussing the rule that in such case the proof must be "clear and overwhelming," said: "What is intended to be understood by the very strong expression 'overwhelming proof' is explained by other authorities. It cannot be disputed that proof sufficient to remove every doubt from the mind is, in effect, overwhelming, because it establishes the fact sought to be proved, and no proof can usefully accomplish more than this result." *Bond v. Dorsey*, 65 Md. 310, 314, 4 Atl. 279, 281.

## OWE.

See "Actually Owning."

"Owes and is indebted," as used in a recognizance declaring that the party owes and is indebted, etc., is synonymous with the words "is held and firmly bound to pay." The language, though varied in form, has the same force and meaning. *Shattuck v. People*, 5 Ill. (4 Scam.) 477, 480.

"Owe," as used in a statement in a will that "I owe him that," implies a debt; and, as there can be no debt, in a legal sense, without a consideration to support it, the words imply both debt and consideration. *Kellogg v. Ogden*, 50 N. Y. Supp. 650, 651, 27 App. Div. 214 (citing *Gallagher v. Brewster*, 153 N. Y. 864, 47 N. E. 450).

The word "owe," in the provision of the Code that children owe alimony to their father and mother and other ascendants who are in need, "implies a debt imposed on them by law in that respect, for which a civil action lies. The fulfillment of that obligation does not transform the child into a creditor capable of claiming reimbursement in any contingency." *Succession of Guidry*, 4 South. 893, 895, 40 La. Ann. 671.

A man is said to owe a sum of money when he is absolutely and unconditionally bound to pay it—not when he is contingently and conditionally liable to pay it on the happening of some future event. One who guarantees the payment of a sum due from a principal debtor, provided the debtor does not pay it by a given day, and due demand and notice is made on the guarantor, does not owe the money. *Doolittle v. Southworth* (N. Y.) 3 Barb. 79, 85.

### Due synonymous.

The word "owing" is often used in business transactions as synonymous with "due" or "remaining unpaid." *Fowler v. Hoffman*, 31 Mich. 215, 219.

The word "due" was held to be equivalent to "owed" or "owing," so that an allegation that a certain sum is wholly owing and unpaid is equivalent to an allegation that the same is due and unpaid. *Tomlinson v. Ayres*, 49 Pac. 717, 718, 117 Cal. 568.

### Enforceable obligation.

The word "owing," as used in a will remitting certain debts which shall be owing and unpaid at the time of the death of testator, does not necessarily imply an enforceable obligation. In *re Tompkins*, 64 Pac. 268, 270, 132 Cal. 178.

### Future advances.

"Owing," as used in a deed stating that it is given to secure money owing, cannot be construed to mean money that may be owing in the future, so as to secure future advances. *Swedish-American Nat. Bank of Minneapolis v. Germania Bank*, 79 N. W. 399, 401, 78 Minn. 409.

### Unliquidated claims.

In an action by a father to recover the penalty imposed by statute for selling or giving intoxicating liquors to his minor son, the allegation at the end of the counts of the declaration that the defendant owes the plaintiff the penalty does not render such counts bad. The statute makes the defendant liable to pay the plaintiff a definite sum, and this liability may be expressed by the word "owes," although it is required to be enforced in an action of tort. *Hamer v. Eldridge*, 171 Mass. 250, 251, 50 N. E. 611.

"Due and owing," as used in an assignment for benefit of creditors, does not apply to a debt for rent under a lease after the voluntary retaking of possession by the landlord; the amount being uncertain and unliquidated. In *re Willis*, 18 N. Y. Supp. 412, 63 Hun. 634.

### Unmatured debt.

The term "owing" may properly be used to designate money which is not due. A

man may owe the money represented by his note, but the money is not due until the note matures. *Coquard v. Bank of Kansas City*, 12 Mo. App. 261, 265.

The phrase "debts owing or accruing" in Common-Law Procedure Act 1854, § 61, authorizing an attachment of all debts owing or accruing from the garnishee to the judgment debtor, includes all debts, though not presently payable. *Jones v. Thompson*, 1 El., Bl. & El. 63, 64.

"Owes," as used in a complaint charging that the defendant owes the plaintiff the price of an article sold, means simply to be obliged or bound to pay, and applies as well to an immature as to an overdue obligation. *Musselman v. Wise*, 84 Ind. 248, 250.

Within the common-law procedure act, enabling a judge, on its being made to appear that any person is indebted to the judgment debtor, to order that all debts owing or accruing from such third person to the judgment debtor shall be attached to answer the judgment debt, "owing" applies only to a debt perfected. When the words "owing" and "accruing" are used to designate two classes of debts, they can each receive a distinct meaning only by taking one as denoting debts which are not yet payable, and the other as denoting those which are. There is no existing debt until judgment, and, where orders were obtained to attach moneys in the hands of the company which were to become payable to the debtor on a verdict recovered by him in his action against the company, there was no debt owing or accruing from the company; the judgment not then having been entered. *Dresser v. Johns*, 6 O. B. (N. S.) 429, 434.

## OWELTY.

The term "owelty" is usually, if not universally, applied to partition of lands. *Smith v. Hall*, 37 Atl. 698, 699, 20 R. I. 170.

## OWN.

See "For His Own."

When following a possessive pronoun, "own" is used to emphasize or intensify the idea of peculiar or personal interest, so that, as used in Const. art. 13, § 5, providing that no public officer shall accept or receive for his own use or benefit any pass, it indicates that the practice of giving passes to public officers for their individual use, and to save them from personal expense, should be stopped, but does not prevent the Legislature from providing for their expenses while engaged in public business by means of passes. In re Board of Railroad Com'rs, 32 N. Y. Supp. 1115, 1116, 11 Misc. Rep. 103.

The term "own manufacture," in a license law authorizing any person to sell certain articles of his own manufacture without payment of the prescribed tax, limits the right to things made by the person who actually does the selling, not things made by the principal and sold by his agent. "The definition of the word 'own' in the Century Dictionary is: 'Belonging to one's self; peculiar; particular; individual; following the possessive (usually a possessive pronoun) as an intensive to express ownership interest or individual peculiarity with emphasis, or to indicate the exclusion of others, as my own house; his own idea.' So, when the law allows a person to sell articles of his own manufacture, it must refer to ownership in a sense peculiar and intensive as to the owner." *State v. Rhyne*, 26 S. E. 126, 127, 119 N. C. 905.

The term "own establishment," in a license to use an invention at the licensee's own establishment, cannot be construed to include an establishment owned by the licensee and others. *Providence Rubber Co. v. Goodyear*, 76 U. S. (9 Wall.) 788, 19 L. Ed. 566.

A will directing "the rest and residue of my money in banks, stocks and bonds to be paid to" a certain person "for his own" should be construed as a legacy of the property mentioned to the person to whom the testator directs it to be paid. *Sanborn v. Clough*, 10 Atl. 678, 64 N. H. 315.

The term "carpenters at work in their own shops," in a memorandum attached to a fire policy as to the conclusions of the hazards, which mentions carpenters at work in their own shops as applying to one class, does not include a carpenter constantly employed in a china factory in making the racks, shelves, etc., necessary for the proper conducting of business therein. *Delongue-mare v. Tradesmen's Ins. Co.*, 2 N. Y. Super. Ct. (2 Hall) 629, 644.

## OWN (Verb).

See "Absolutely Own."  
All I own, see "All."

Perhaps the word "own" cannot strictly be regarded as a technical term, but both in legal and common use it implies estate, and applies only to things subject to sale and transfer. The use of the word "own" in Rev. St. c. 95, § 2, providing that the property owned by a woman at the time of her marriage shall continue to be her sole and separate property after marriage, clearly applies the provision to actual property only, and not to possible damages to be recovered in actions ex delicto. *Gibson v. Gibson*, 43 Wis. 23, 34, 28 Am. Rep. 527.

A bequest of "stock owned by me" is sufficient to render the bequest specific, and to show that testator intended to devise the specific property, and not a quantity or species of the thing bequeathed. *Norris v. Thompson's Ex'rs*, 18 N. J. Eq. (1 O. E. Green) 218, 222.

"Owned by them," as used in a deed conveying a title in fee simple to certain land, and describing the same as that part of lot 44 owned by the vendors, are "mere words of description, and not of restriction, and would not confine the vendee to what the vendor owned, if it is less than the amount indicated, but he had a right to the whole according to the lines mentioned." *Champion v. White* (N. Y.) 5 Cow. 509, 512.

In a policy of fire insurance on carpets, describing them with relation to the insured as their own, or held by them in trust, "own" is broad enough to cover everything answering the description and intended to be covered, but the property and interest the word is intended to cover must be averred and proved. The word "owners" does not necessarily cover all owners. The parties insured by such general terms are only those for whom the insurance was intended. *Richardson v. Home Ins. Co.*, 47 N. Y. Super. Ct. (15 Jones & S.) 138, 154.

#### As absolute ownership.

The word "own," in Comp. Laws, § 3393, providing that each stockholder of a corporation shall be entitled to as many votes as he or she may own shares of stock, does not require that a person having stock shall be the absolute owner thereof, but stock which has been legally transferred by a father to his son in order to make the son eligible for a corporate office makes the son an owner, within the meaning of the statute. *State v. Leete*, 16 Nev. 242, 249.

"Own," as used in the description of a deed conveying all the land "which I own in said town," means all the lands claimed and possessed by the grantor, and includes land conveyed to him, but to which he did not appear to have any title by record, or any other than a title acquired by possession. *Field v. Huston*, 21 Me. (8 Shep.) 69, 74.

A public highway is not a public work owned by a city or town, within St. 1892, c. 270, providing that a person to whom a debt is due for labor on such public work shall have a right of action therefor against the city. In no proper sense can the public ways be said to be "owned" by the town, within the ordinary meaning of such word. *McHugh v. City of Boston*, 58 N. E. 905, 906, 173 Mass. 408.

#### As now owned.

"Owned," as used in a mortgage of land, describing the land conveyed as "all the land  
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owned by me," must be construed as meaning "all the land now owned by me," which is equivalent to "all the land which I have not heretofore conveyed." *Fitzgerald v. Libby*, 7 N. E. 919, 142 Mass. 246.

As used in a power of attorney to sell real estate, "I own" means present possession or ownership, as distinguished from that which is to be acquired in the future. *Weare v. Williams*, 52 N. W. 328, 332, 85 Iowa, 253.

#### Leasehold interest.

As used in Rev. St. § 3333, providing that, when the tracks of two railroads cross each other or in any way connect at a common grade, the crossing shall be made and kept in repair, and watchmen retained thereat, at the joint expense of the companies owning the tracks, depends somewhat for its signification upon the connection in which it is used. "To own" is defined "to hold as property; to have a legal or rightful title to; to have; to possess." And an owner is one who owns; a rightful proprietor. The owner is not necessarily one owning the fee simple, or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner, and, indeed, there may be different estates in the same property vested in different persons, and each be an owner thereof. Lessees operating a railroad are companies owning the tracks of the roads operated by them, in the sense in which that phrase is used in the statute. *Baltimore & O. R. Co. v. Walker*, 18 N. E. 475, 480, 45 Ohio St. 577.

A corporation owning a railroad in Connecticut, running from the southern line of that state to the Massachusetts line on the north, which takes a perpetual lease on a fixed rent of two Massachusetts roads, one connecting at the state line with its own road, and the other with the latter at its northern terminus, thereafter operating the two roads in Massachusetts as if they were its own property, and the three roads one entire road, is not to be regarded as owning the Massachusetts roads, within the meaning of Act 1876, providing that where only a part of a railroad lies in the state the company owning such road shall pay 1 per cent. of such proportion of the valuation as the length of its road lying in the state bears to the entire length of the road. *State v. Housatonic R. Co.*, 48 Conn. 44, 54.

#### OWN ACCOUNT.

In her own name and on her own account, see "Own Name."

#### OWN AND OCCUPY.

Where a homestead exemption statute authorized the exemption to a householder



who owned and occupied the same, the term "owned and occupied" should be construed to mean ownership coupled with residence, and therefore could not include the right of an adult son, having a family of his own, who was engaged in cultivating a distant farm, to his interest in homestead property occupied by his father's widow, though he occasionally occupied the homestead jointly with his mother, and had some of his furniture stored there. *Brokaw v. Ogle*, 48 N. E. 394, 397, 170 Ill. 115.

#### OWN MEMBERS.

A city charter providing that the mayor and aldermen of the city shall constitute the common council thereof, and that the common council shall be the judge of the election and qualification of its own members, does not include the mayor. *Garside v. City of Cohoes*, 12 N. Y. Supp. 192, 196, 58 Hun, 605.

#### OWN NAME.

The use of the phrase "in her own name" in Rev. St. c. 61, § 4, providing that a married woman shall be liable for all her debts contracted before marriage, and for debts contracted afterwards in her own name for any lawful purpose, seemed to indicate that the wife's power to contract is not unlimited; that it is confined to her separate business or estate. *Haggett v. Hurley*, 40 Atl. 561, 565, 91 Me. 542, 41 L. R. A. 362. But the statute does not prevent a wife from contracting with her husband, or joining with her husband in contracts with other parties, nor in becoming a surety for a husband, nor making contracts through him as her agent. *Peaks v. Hutchinson*, 53 Atl. 38, 39, 96 Me. 530, 59 L. R. A. 279 (citing *Haggett v. Hurley*, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362).

The words "in his own name" in Rev. St. § 784 [U. S. Comp. St. 1901, p. 607], providing that suit can be brought by a party injured by a breach of a United States marshal's bond, "in his own name and for his own use," should be construed to mean that, instead of suing in the name of the United States, the obligee of the bond, a private party can sue in his own name. *Bollin v. Blythe* (U. S.) 46 Fed. 181, 183.

A Chinaman claiming to be a merchant, and making application for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, is required by Act Nov. 3, 1893 (28 Stat. 7), to establish by the testimony of two credible witnesses, other than Chinese, (1) that he was engaged in this country in buying and selling merchandise; (2) at a fixed place of business; (3) that the business was conducted in his own name, etc. Proof that

Quan Gin was a member of a firm doing business under the name of Yow Kee & Co. is not sufficient to entitle him to admission to the country. A Chinese person does not bring himself within the statutory definition of "merchant" unless he conducts his business either in his own name, or in a firm name of which his own is a part. The requirement that a merchant must conduct the business in his own name can have but one purpose, to wit, that he who is a merchant in fact should also be known to be such by the parties with whom he deals, and by the public generally. That purpose could readily be defeated if it were possible to conceal his identity by trading under an assumed name or the disguise of a "Co." In *re Quan Gin* (U. S.) 61 Fed. 395, 397.

The phrase "in his own name, without any such addition," in Code, § 1300, requiring persons doing business as agents, factors, partnerships, etc., to designate the nature of the business by the words "agents, factors, and company," and making the property of any such person liable for any debts contracted if he transacts business in his own name without any such addition, is designed to meet the case of one who transacts business without any such addition and not in the name of some other person than himself, who is the real owner. Whoever transacts business without doing it in the name of another does it in his own name and character necessarily. The statute does not mean that it shall be defeated by the easy disguise of a fictitious name or the real name of one not the owner or evaded by the artful dodge of not using any name at all. *Hamblet v. Steen*, 4 South. 431, 433, 65 Miss. 474.

The statute in relation to married women as sole traders, providing that any married woman shall have the right to carry on and transact business under "her own name and on her own account" by making a declaration of her intention before any person authorized to take acknowledgements of conveyances, etc., means that she must make a declaration stating that she intends to carry on business not only "in her own name," but "on her own account." Both of these terms are natural, and each is essential to the validity of her declaration. They are not synonymous. The one term does not presume the other, for she might transact business in her own name, and not on her own account, or vice versa. *Manton v. Tyler*, 1 Pac. 743, 744, 4 Mont. 364.

#### OWN PREMISES.

"Own premises," as used in Pen. Code, art. 319, providing for the punishment of any person carrying a weapon, except on his own premises, cannot be construed to include premises which were in the possession

of a tenant under an unexpired lease containing no reservation, authorizing the owner to enter upon the premises. *Zallner v. State*, 15 Tex. App. 23, 24.

The phrase "own premises" does not apply to the common stairway of a building, on the upper floor of which a defendant and other persons rent and occupy offices for business purposes, as used in *Mansf. Dig.* § 1907, making the carrying of weapons a misdemeanor, except upon the defendant's own premises. *Clark v. State*, 4 S. W. 658, 49 Ark. 174.

### OWN PROPER.

"Own proper," as used in *St. 1798*, § 34, providing that where a feme sole is or shall be possessed of any slave as of her own proper slave or slaves, the same shall accrue to, and be absolutely vested in, her husband when she marry, imports a possession *sua jure*, as contradistinguished from a trust or possession *en autre droit*. *Hykes v. White's Adm'r*, 30 Ky. (7 J. J. Marsh.) 134, 135.

### OWN RIGHT.

"In his own right," as used in *Rev. St. 1841*, c. 105, § 18, as amended by Act April 14, 1841, c. 105, § 15, providing that the estate of a deceased person shall be settled in another county whenever the judge of probate shall be interested therein in his own right, means the direct personal interest previously described in the statute as that of an "heir, legatee, creditor, or debtor." In *re Marston*, 3 Atl. 87, 89, 79 Me. 25.

Where a person enters upon land as a tenant in common, his claim of a right to occupy it in his own right does not necessarily imply that he asserts a right to the portion of the land occupied by him adversely to the rights of his co-tenant. *Teal v. Terrell*, 58 Tex. 257, 262.

*Comp. St. c. 17*, § 1, cl. 4, as amended in 1856, which provides that every person of full age, who shall reside in any town in this state, and whose ratable estate held "in his own right," shall be listed at the sum of \$3 or upward for five successive years, shall have a settlement in such town, "refers to the title which the party has in the estate—not necessarily a title in form, but one which he may assert." *Town of Newfane v. Town of Somerset*, 49 Vt. 411, 414.

The phrase "own right" in *Gen. St. c. 19*, § 1, subd. 4, providing that a legal settlement may be gained in a town, where a person of full age resides in the town, and whose ratable estate, "held in his own right," shall be set in the grand list of such town at the sum of \$3 or upwards for five years in succession, should be construed to include a

holding of a farm by one under a bond conditioned that he should have a deed thereof on the payment of the sums specified in it. *Town of Weston v. Town of Landgrove*, 53 Vt. 375, 377.

*Const. art. 2*, § 1, providing that no person is a legal voter unless he is possessed in his own right of real estate of a certain value, being an estate in fee simple, fee tail for the life of any other person, or an estate in reversion or remainder, which qualifies no other person to vote, means an estate which the party holds beneficially for himself, and not simply as trustee or custodian. In *re Horgan*, 18 Atl. 279, 281, 16 R. I. 542.

### As creating separate estate.

The conveyance of land to a married woman "in her own right" is not a sufficient conveyance of it to her sole and separate use, free from the interference or control of her husband, within the meaning of *St. 1845*, c. 208, § 3. *Merrill v. Bullock*, 105 Mass. 486, 489.

"Own right," as used in a grant of property to a married woman in her own right, means to her own use and benefit, and not that the grantee should have a separate estate in the property. *Grand Gulf Bank v. Barnes*, 10 Miss. (2 Smedes & M.) 165, 185.

A testator, by making a bequest to two daughters of realty and personalty "in their own rights," did not create separate estates which will deprive their future husbands of marital rights in the property. *Hart v. Leete*, 15 S. W. 976, 977, 104 Mo. 815.

### OWN RIGHT HEIRS.

Where a will devised all of the property of the testator, both real and personal, to his wife for life, with remainder to the issue of the marriage living at her death, and in default of such issue to his own right heirs, the testator meant by the use of the words "own right heirs" such persons as were his heirs by the laws of Pennsylvania, where the will was made, and such persons were his brothers and sisters of the full blood, to the exclusion of brothers and sisters of the half blood. *Guerard v. Guerard*, 73 Ga. 506, 510.

### OWN USE.

Where a marriage settlement contained a limitation "to the executors" or assigns of the settlor, to and for his and their "own use and benefit," the words, though strong, as showing that the executors were entitled to take beneficially, will not be so construed where the opposite intention is shown by the entire context. *Hames v. Hames*, 2 Keen, 646, 652.

The phrase "for his own use," in Rev. St. § 784 [U. S. Comp. St. 1901, p. 607], providing that suit can be brought by a party injured by a breach of a United States marshal's bond "in his own name and for his own use," should be construed to mean that the benefit of the suit would inure primarily not to all persons injured, but to him solely. *Bollin v. Blythe* (U. S.) 46 Fed. 181, 183.

A conveyance of a full fee simple to premises, reserving to the grantor, his heirs and assignees, a free toleration of getting "coal for their own use," does not necessarily or naturally mean getting coal for the market, or the exclusive right to get all the coal underlying the tract. On the other hand, the words are capable of being understood as meaning supplying the personal needs of the grantor, his heirs and assignees, for fuel from the coal granted by the deed. This is the plain, natural meaning of the words employed, when read in connection with the deed in which they are found. *Algonquin Coal Co. v. Northern Coal & Iron Co.*, 29 Atl. 402, 403, 162 Pa. 114.

A will giving testator's wife the stock—horses, mules, cattle, and hogs—and provisions, as she may want "for her own use" during her natural life, does not limit her interest in the property, but refers to the amount and quality of the stock, plantation, tools, and furniture which she might need in operating the farm and keeping up the establishment as he left it at his death. It merely indicates how much of the stock she was to take. *Roundtree v. Roundtree*, 2 S. E. 474, 475, 26 S. C. 450.

#### As creating separate estate.

A bequest to a married woman for her own use is equivalent to a bequest to her for her separate use, and, in an action by the husband and wife for the legacy, a debt due by the husband to the testator cannot be set off against it. If by such bequest it had been intended merely to give the legacy subject to the marital rights of the husband, it would have been sufficient to say, "I give it to" the wife, but the addition of the words "for her own use" is tantamount to saying "not for the use of her husband," because, if it was for his use, it could not be for her own use. If the legacy were to be deducted from the debt of the husband to the testator, the legatee would have no use whatever of it. *Jamison v. Brady* (Pa.) 6 Serg. & R. 466, 467, 9 Am. Dec. 460.

A legacy given to a married woman for her own use, and at her own disposal, vests in her a separate estate. *Prichard v. Ames*, 1 Turn. & R. 222, 223.

A gift or bequest to a married woman after marriage, giving her property to "her

own use during life, independent of her husband," is to be construed to exclude the marital rights of the husband, and the property will be for her exclusive use. *Clark v. Maguire*, 16 Mo. 302, 314 (citing *Story*, Eq. § 1382).

In *Jamison v. Brady* (Pa.) 6 Serg. & R. 466, 9 Am. Dec. 460, where a testator gave to his sister, who was intermarried with Brady, a legacy for her own use, the use of the phrase "for her own use" was held to be tantamount to saying "not for the use of her husband," because, if it was for his use, it could not be for her own use. *Heck v. Clippenger*, 5 Pa. 385, 388.

A deed executed by a feme sole the day before her marriage with an insolvent man, conveying all her property, real and personal, to a trustee, in trust that "he shall permit her to remain in quiet and peaceable possession of the same, and take the profits thereof to her own use and benefit during her natural life, and at her decease to descend and go to her heirs absolutely forever," does not exclude the husband's marital rights. The force of the word "own" has been often considered in this connection, and sound criticism has pronounced that it cannot be held to be equivalent to "sole or separate." It does not point at the marital rights, as these do. To say "We take property to our own use," seems mainly intended to negative the idea that we are taking it for another, with some trust or agency. "To have and hold the same to his own proper use and behoof" are words to be found in almost every deed a man takes to himself for land in fee simple, or absolute bill of sale of chattels. It is a common sort of tautology, more used for sound and emphasis than to express any special quality of ownership, out of the ordinary way. "To his use," "To his own use," "To his own proper use and behoof"—what are they but the same thing? The meaning of the first words is not amplified in the least when we get to the last. There are more words, but that is all. You gather no new idea. *Mitchell v. Gates*, 23 Ala. 438, 446, 447.

#### OWNER.

See "Absolute Owner"; "Acting Owner"; "Former Owner"; "General Owner"; "Joint Owners"; "Managing Owner"; "Mill Owner"; "Original Owners"; "Reputed Owner"; "Riparian Proprietor"; "Shore Owner"; "Sole Owner"; "Special Owner."

Abutting owner, see "Abutting."  
Owner or otherwise, see "Otherwise."

"The popular definition of the word 'owner' is the right to own; exclusive right of possession; legal or just claim or title; proprietorship." *Woodward v. Republic Fire Ins. Co.* (N. Y.) 32 Hun, 365, 369.

"The owner of property is one who has dominion of a thing, real or personal, corporeal or incorporeal, which he has the right to enjoy and to do with it as he pleases—either to spoil or destroy it as far as the law permits—unless he be prevented by some agreement or covenant which restrains his right." *Garver v. Hawkeye Ins. Co.*, 28 N. W. 555, 556, 69 Iowa, 202; *McLain v. Maricle*, 83 N. W. 85, 87, 60 Neb. 353; *Territory v. Young*, 2 N. M. 93; *Turner v. Cross*, 18 S. W. 578, 580, 83 Tex. 218, 15 L. R. A. 263; *Dow v. Gould & Curry Silver Min. Co.*, 31 Cal. 629, 649; *Directors of Fallbrook Irr. Dist. v. Abila*, 39 Pac. 794, 796, 106 Cal. 355; *Larimer County Ditch Co. v. Zimmerman*, 34 Pac. 1111, 1112, 4 Colo. App. 78; *Johnson v. Crookshanks*, 21 Or. 339, 28 Pac. 78

An owner is one who has dominion over that which is the subject of the ownership. He has the right to make such use of it, consistently with the rights of others, as he may see fit. The ownership may extend to the entire thing, or may be limited to an interest in it, and whatever is the subject of the ownership is held by the owner for his own individual benefit. *Florman v. School Dist.* No. 11, 40 Pac. 469, 6 Colo. App. 319.

The word "owner," as applied to land, has no fixed meaning which can be declared to be applicable under all circumstances, and as to any and every enactment. It usually denotes a fee-simple estate, but it has been defined to be "one who has the usufruct, control, or occupation of land, with a claim of ownership, whether his interest be an absolute fee or a less estate." *Coombs v. People*, 64 N. E. 1056, 1057, 198 Ill. 586.

An owner, according to Black's Dictionary, is a person in whom is vested the ownership, dominion, or title of property. It is defined by Webster as one who owns; a rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not. It is a sufficient allegation of ownership in an action of ejectment to authorize proof of any right to property, general or special. *Atwater v. Spalding*, 90 N. W. 370, 371, 86 Minn. 101, 91 Am. St. Rep. 331.

Code Civ. Proc. § 2140, defines the word "owner" thus: "Every person, including guardians of minors, married women and any company or corporation any tenants or lessees for whose use, benefit or enjoyment any property, building, structure, or improvement mentioned in this chapter is constructed, repaired, or altered, is deemed the owner thereof for the purpose of this chapter." *Missoula Mercantile Co. v. O'Donnell*, 60 Pac. 991, 993, 24 Mont. 65.

By statute the term "owner," with respect to condemnation proceedings, is defined to mean all persons having any interest, estate, or easement in the property to be tak-

en, or any lien, charge, or incumbrance thereon. In re Opening of Oneida St., 49 N. Y. Supp. 828, 832, 22 Misc. Rep. 235.

The words "owner, resident, or householder," as used in the homestead statute to describe the persons entitled to the homestead exemption, are not limited to married men; and therefore a widower whose children are all married and away from home, and who has rented the premises claimed as his homestead, but who still boards and lodges in the house, is entitled to the homestead exemption. *Myers v. Ford*, 22 Wis. 139, 141.

The word "owner," as used in Burns' Rev. St. 1894, § 782 (*Horner's Rev. St. 1897, § 770*), which provides that lands sold under a judgment, when redeemed by the owner, shall be subject to resale to pay an amount remaining unpaid on such judgment, means any owner of the real estate whose interest is subject to payment of the judgment, without regard to whether or not he is the judgment debtor, or claims under him. *Lemon v. Osborn*, 54 N. E. 1058, 1060, 153 Ind. 172.

Under St. 1888, c. 390, § 40, providing that if taxes are not paid, the whole of the land may be sold, and, after the taxes and charges are paid therefrom, the city or town shall pay the balance to the owner of the estate on demand, the word "owner" means the owner at the time of the sale, and not the owner at the time of the assessment. *Worcester v. City of Boston*, 60 N. E. 410, 411, 179 Mass. 41.

"Owner of the land," as used in Rev. St. c. 117, § 7, directing that the court shall order notice of the filing of a petition for a mechanic's lien to be given to the owner of the land, means the contractor—the debtor—the party who procures the work to be done, by which various designations the same person is intended, such is the party intended to be the defendant, and to be summoned in the suit. *Howard v. Robinson*, 59 Mass. (5 Cush.) 119, 122.

In an action under Rev. St. 1889, § 4512, authorizing a recovery against the owner or keeper of dogs for damages for stock killed or maimed by such dogs, an instruction was given, and approved on appeal stating that the words "owner and keeper" meant one who actually owns or claims to own a dog, or who maintains or controls and uses the dog of another. *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560, 563.

The remedy against the "owner or occupant" in Rev. St. c. 14, § 16, providing that, "when any source of filth or other cause of sickness is found on private property, the owner or occupant thereof shall, within 24 hours after notice," etc., at his own expense, remove or discontinue it—all expenses of removing the same by the committee or officer

of the town, in case of failure to comply with the notice, to be paid by such owner or occupant—would be construed, in common parlance, to be against either, at the option of the officer, as he should decide as to the responsibility of the respective parties. An owner of land is liable under this section for the expense of removing a nuisance therefrom, although a tenant for a term of years caused the nuisance, and continued to be the occupant of the premises under his lease when the nuisance was removed. *City of Bangor v. Rowe*, 57 Me. 436, 439.

Under Act May 2, 1834, § 12, "to provide for supplying the city of New York with water," and authorizing the water commissioners to enter upon land and agree with the owner of any property which may be required as to the amount of compensation to be paid to him, the word "owner" means the person or persons who represent a particular piece of property, where there is a unity of possession. *Dyckman v. City of New York* (N. Y.) 7 Barb. 498, 506.

In the provisions of the revenue laws of the United States which require the delivery of distilled spirits by the government warehousemen to the owner when the tax is paid, Congress merely intended by the use of a general word of description to designate, without circumscription or needless specification, any person who upon the payment of the government dues is in law entitled to the possession of the goods. *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147.

The term "owner," as used in determining who may redeem from tax sale, has been construed to include mortgagees, judgment creditors, and holders of contingent interests in the land affected by the sale. *Lane v. Wright*, 96 N. W. 902, 903, 121 Iowa, 376.

The word "owner," as used in an act relating to municipal liens, means the person or persons in whose name the property is registered, if registered according to law, and in all other cases means any person or persons in open, peaceable, and notorious possession of the property, as apparent owner or owners thereof, if any, and, if not, then, the reputed owner or owners thereof in the neighborhood of such property. *P. & L. Dig. Laws Pa.* 1897, vol. 4, col. 1269, § 55.

As used in the chapter relating to domestic animals, the term "owner," used with reference to animals, means any one entitled to the present possession thereof—the one having care or charge of them—and the person holding the legal title to them, and, as to land, the person having title thereto, or the lessee or occupant thereof. *Code Iowa* 1897, § 2311.

"Owner," as used in the herd law act, includes the person entitled to the immediate possession of the animal, and also the per-

son having care or charge of the same, and also the person having the legal title thereto. *Rev. St. Okl.* 1903, § 51.

"Owner," as used in the herd law act, providing for actions by the owners of land injured by animals trespassing thereon, includes the owner, homesteader, tenant, or other person in possession of or cultivating the land trespassed upon. *Rev. St. Okl.* 1903, § 55.

The term "owner," as used in the act relating to mines, is defined to mean the immediate proprietor, lessee, or occupier of any coal mine, or any part thereof. *Horner's Rev. St. Ind.* 1901, § 5463.

The terms "owner," "owners," "lessee," "agent," or "operator," as used in the act relating to mines and mining, shall include the immediate proprietor, lessee, or occupier of any coal mine, or any person having on behalf of any owner or owners or lessee as aforesaid the care and management of any coal mine, or any part thereof. *Gen. St. Kan.* 1901, § 4141.

Any person, association of persons, or corporation in the peaceable possession of any mining claim under claim or color of title, and engaged in the mining and sale of ores therefrom, shall, as to all persons purchasing such ore or ores in good faith, and without notice of the claim or claims of any other person, association, or corporation to such mining claim or claims, be deemed to be the owner or owner of such ore or ores. Any person who, or association or corporation which, shall in good faith, and in the usual course of business, and without notice, purchase and obtain delivery of any ore or ores from any person, association, or corporation in possession of any mining claim or claims, shall be deemed the owner or owners of such ore or ores. *Mills' Ann. St. Colo.* 1891, §§ 3235, 3236.

The terms "owners" and "operators," as used in the act relating to mines and mining, mean any person or body corporate who is the immediate proprietor or lessee or occupier of any coal mine or colliery, or any part thereof. The term "owner" does not include a person or body corporate who merely receives a royalty, rent, or fine from a coal mine or colliery, or part thereof, or is merely the proprietor of the mine subject to any lease, grant, or license for the working or operating thereof, or is merely the owner of the soil, and not interested in the minerals of the mine, or any part thereof. But any contractor for the working of a mine or colliery, or any part or district thereof, shall be subject to this act as an operator or owner, in like manner as if he were the owner. *P. & L. Dig. Laws Pa.* 1894, vol. 2, col. 3110, § 193.

Whenever the term "owner or manager" is used in the chapter relating to coal mines,

the same shall include lessees or other persons controlling the operation of any mine. Rev. St. Utah 1898, § 1525.

Laws 1881 (Act March 23) making it the duty of the owner, agent, or proprietor of any coal mine to keep a sufficient supply of timber when required to be used as props to secure the mine against caving in, etc., expressly defines the word "owner" to mean the immediate proprietor, lessee, or occupant of any coal mine, or any part thereof. *Leslie v. Rich Hill Coal Min. Co.*, 110 Mo. 31, 41, 19 S. W. 308; *Fell v. Rich Hill Coal Min. Co.*, 23 Mo. App. 216.

The term "owner," in the Pennsylvania act of March 3, 1871, requiring owners of coal mines to ventilate the same, is defined by the act itself to mean the immediate proprietor, lessee, or occupier of the coal mine or colliery, or of any part thereof; and the term "agent," in the act, is defined as meaning any person having, on behalf of the owner, the care or direction of any coal mine or colliery. *United States v. Gratiot*, 39 U. S. (14 Pet.) 526, 533, 10 L. Ed. 573.

#### As occupier.

The word "owner," as applied to realty, does not necessarily import that the party is the occupier of the premises. *Russell v. Shenton*, 3 Q. B. 449, 451.

Every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, shall be included in the word "owner" thereof, as used in the act relating to mechanics' liens. Code Civ. Proc. S. D. 1903, § 710.

The term "owner, or reputed owner," as used in an act relating to the powers of boroughs, means any person or persons in open, peaceable, and notorious possession of property, remaindermen, or other persons interested in expectancy. P. & L. Dig. Pa. vol. 3, p. 50, § 82.

#### As owner at the time of.

Rev. St. c. 18, § 53, as amended by Acts 1872, c. 46, providing for the recovery of damages for an injury to the owner of adjoining land by the raising or lowering of a street or way, applies to the owner of the property at the time of the injury. *Sargent v. Inhabitants of Machias*, 65 Me. 591, 592.

Under Act 1854, making taxes a lien upon land throughout the state, and directing that all lands shall be assessed in the name of the owner, and declaring that any assessment of taxes against any person or persons on account of lands "of such person or persons"—that is, lands of which he or they are the owner—shall be a lien on the said lands, etc., the phrase "owner or owners" was used to denote the owner of an estate in

possession at the time of the assessment, and not a prior owner, or the owner of an estate in expectancy, or any executory or contingent interest; and the design of the act was to make the interest of such owner, and those claiming under him, liable to the tax assessed. *Hopper v. Malleson's Ex'rs*, 16 N. J. Eq. (1 C. E. Green) 382, 387.

#### As payee.

In an action on a written "promise to pay steamship *Juda* and owners or order" a certain sum of money 30 days after date, it was claimed that the instrument was not a promissory note, and that an indorsee was not vested with the legal title thereto, on the ground that the name of the payee did not appear on the face of the note. In considering this objection, the court said: "The statute does not require that the real name of the payee should be expressed in the note. It must contain a promise to pay a person, etc., but we perceive no reason why such person may not be designated on the face of the note under any style or description agreed on by the parties. Indeed, in the case before us it may be said that the term 'owners,' as it occurs in the note, sufficiently indicates a person, within the intent of the law." *Moore v. Anderson*, 8 Ind. 18, 22.

#### As right to possession.

The term "owner," as used in the replevin statute, is defined by *Cobbey*, Repl. § 533, as meaning not the absolute and unqualified title, but as meaning a right to possession. "Any interest coupled with a right of immediate possession constitutes ownership, under these statutes." Therefore the failure of a complaint in a replevin action to show right to immediate possession to chattels on the part of the plaintiff is not supplied by averment in the answer that defendant is the owner and entitled to immediate possession. *W. W. Kimball Co. v. Redfield*, 54 Pac. 216, 218, 33 Or. 292.

In an action of forcible entry and detainer, an allegation that plaintiff is the owner of the premises therein described does not raise a question of title, so as to deprive a probate court of jurisdiction; the word "owner," as there used, being merely descriptive of plaintiff's right of possession, and not changing the character of the action. *McClung v. Penny*, 69 Pac. 499, 500, 11 Okl. 474.

#### Absolute or qualified owner.

Laws 1885, c. 349, declares that a mechanic's lien shall also attach to, and be a lien on, the real property of any person on whose premises improvements are made; such owner having knowledge thereof. Held, that the words "real property of any person" and the word "owner," in the statute, were synonymous, and meant the same thing. The word "owner" does not always mean absolute

ownership. *Edwards & McCulloch Lumber Co. v. Mosher*, 60 N. W. 264, 265, 88 Wis. 672.

The term "owner," in an action of claim and delivery, in which the plaintiff alleges generally that he is the owner and entitled to immediate possession, does not necessarily import general or absolute ownership. *Cumbey v. Lovett*, 79 N. W. 99, 100, 78 Minn. 227.

The word "owner," in the revenue act, is always used in the sense of absolute owner. For example, it provides that the real estate becoming taxable for the first time shall be listed to the owner thereof, that the owner of the property on the 1st day of April in any year shall be liable for the taxes of that year, that the purchaser of property on the 1st day of April shall be construed the owner on that day, and that land comprising more than one subdivision belonging to one owner may at his request be listed as one tract. These provisions of the revenue act clearly indicate that the Legislature uses the word "owner" in the popular sense—the sense in which it is understood by the people at large. *Leigh v. Green*, 86 N. W. 1093, 1096, 62 Neb. 344, 89 Am. St. Rep. 751.

Under a statute requiring a juror to be the owner of real estate, it is not necessary that he should be the absolute owner of the fee, and the requirement is met if the juror be in possession of, or have a qualified interest in, the real estate. *Territory v. Young*, 2 N. M. 93.

The word "owner," as used in the charter of a railroad, which directs the method by which the railroad may acquire land or other materials when the owner thereof cannot agree with the company for the use or purchase thereof, means the person having some legal estate which the company proposes to acquire by the condemnation. *National Ry. Co. v. Easton & A. R. Co.*, 36 N. J. Law (7 Vroom) 181, 184. It includes any person having a claim or interest in real property, though less than an absolute fee. *Larimer County Ditch Co. v. Zimmerman*, 34 Pac. 1111, 1112, 4 Colo. App. 78 (quoting *Lozo v. Sutherland*, 38 Mich. 171).

The word "owner," as used in Gen. St. 1878, c. 90, § 1, providing for a mechanic's lien in favor of one performing labor or furnishing material by virtue of a contract with the owner, does not mean the absolute owner, but includes a qualified ownership. *Benjamin v. Wilson*, 34 Minn. 517, 520, 28 N. W. 725.

The term "owner," when used alone, imports an absolute owner, or one who has complete dominion of the property owned, as the owner in fee of real property. But its meaning is varied according to the connection in which it is used, and is to be understood according to the subject-matter to which it relates. *McFeters v. Pierson*, 24

Pac. 1076, 1077, 15 Colo. 201, 22 Am. St. Rep. 338.

#### Administrator.

The word "owner," as used in the statutes, means any one who has the right of possession to property. An administrator appointed in Nevada cannot sue to redeem from a mortgage on land of his intestate in another state, by setting off against the mortgage debt waste committed thereon by the mortgagee in possession after the death of the intestate, nor to recover for damages to, or trespass committed on, the land, since he is not an owner thereof; and is not entitled to its possession, nor are the assets in his hands for the payment of debts. *Price v. Ward*, 58 Pac. 849, 852, 25 Nev. 203, 44 L. R. A. 459.

#### Agent or servant.

The word "owner," as used in the charter of the city of St. Paul, c. 4, § 10, subd. 42, compelling the owner or occupant of any grocery, etc., to cleanse, remove, or abate the same from time to time, as may be deemed necessary for the health, comfort, and convenience of the inhabitants of the city, includes an agent who is endowed with full power to control or regulate the premises. *City of St. Paul v. Clark*, 86 N. W. 893, 894, 84 Minn. 138.

One who is an agent and in possession of land through which a railroad runs, but who is not the owner of such land, cannot maintain an action against a railroad company under Code, § 3480, providing that railroads shall construct cattle guards wherever the owner of land through which the road passes shall make demand on them or their agents, etc. The language of the statute forbids a construction extending its provisions to any other person than the owner of the land. *Louisville & N. R. Co. v. Murphy*, 29 South. 592, 593, 129 Ala. 432.

Sp. St. 1868, c. 448, § 3, providing that if any sawdust or refuse wood or timber of any sort shall be thrown in the Penobscot river "by any person or persons who may be in the employ of any mill owner or owners, mill occupant or occupants, such owner or owners, occupant or occupants, shall also be liable" for such offenses, does not apply to the agent of the owner and lessor of a mill. *State v. Coe*, 72 Me. 456, 459.

The term "owner or holder," within the meaning of a statute requiring notice of application for a public road to be served on the owner or holder of the land over which the road is to run, includes an overseer on the premises. The words "owner or holder" were not used as meaning the tenant only, or the person holding under a lease, but reasonably extend to any person occupying or in possession, placed there by the owner, who may be expected to take care of his in-

terests in this as on other matters connected with the land. *In re Kinney* (Del.) 5 Har. 18.

An indictment charging larceny, and alleging that the property taken was the property of one who was a mere superintendent of the owner, is insufficient. A bailee or person who has a special property in a chattel may be alleged, in an indictment for larceny of it, to be the owner, when it is taken from his possession, but not a servant. The servant's possession is construed as that of the master or employer. The distinction, though, between these relations, is not always clear. It has also been suggested that, as larceny is always accompanied by a trespass, except in some cases of a peculiar kind, as larceny by a bailee, any person—and only a person—who could maintain the action of trespass for the taking of a chattel, may properly be alleged as an owner of it, in an indictment for the larceny of such chattel, and this is probably a good rule. *Heygood v. State*, 59 Ala. 49, 50.

Within the statute providing that the owners, lessees, and tenants of a disorderly house shall be punished, a servant of the owner of such house, merely taking care of the place, cannot be punished. By fair intendment, it would seem that only those who occupied the relation described should be punished. Speaking on the subject, Mr. Bishop says: "But when we descend among the minor misdemeanors, we find some differences occasioned by the smaller degrees of blameworthiness involved in the offense or the special terms of the statute creating it. If the terms of the statute distinctly limit the penalty to persons who participate in the act only in a certain way, these terms furnish the rule for the court. Or if the expression is general, then, if the offense is of minor turpitude, and especially if the thing is only *malum prohibitum*, the court will limit its operation to those persons who are more particularly within the reason or the expressed words of the enactment." *Mitchell v. State*, 30 S. W. 810, 34 Tex. Cr. R. 311.

Rev. St. c. 119, § 1, providing that "whoever willfully and maliciously sets fire to the dwelling house of another, or to any building adjoining thereto, or to any building owned by himself or another, with intent to burn such dwelling house, and it is thereby burnt in the nighttime, shall be punished with death," while in terms excluding only the owner of the dwelling house, also excludes, by a reasonable construction, the servant of such owner. *State v. Haynes*, 66 Me. 307, 308, 309, 22 Am. Rep. 569.

#### Agister.

Under a statute giving a remedy by distress to enforce in a summary manner a

claim for damages against the owner of cattle who is charged with the duty of keeping them off the cultivated lands of others, an agister is held to be an owner, within the meaning of the statute, but a mortgagee without possession is not an owner. *Goff v. Byers Bros. & Co.* (Neb.) 96 N. W. 1037, 1038.

#### All persons having an interest.

The words "owner or owners," used in Sp. Laws 1887, tit. 1, p. 335, § 4, indicating the procedure for the making of assessments of damages for injury to property resulting from a change of grade of a street under a city charter, are used to designate the parties interested, and in whose favor the assessment is to be made. The words are to be construed in a comprehensive sense, as including all persons having interests in the land, or who are entitled to the compensation to be awarded for the injury to the property. *Moritz v. City of St. Paul*, 54 N. W. 370, 371, 52 Minn. 409.

The word "owner," in the homestead exemption law, and even in the case of certain criminal offenses, includes all who have a claim or interest in the property, even though it is an undivided interest, or falls short of absolute ownership in fee. *Lozo v. Sutherland*, 38 Mich. 168, 171.

The word "owner," found in Gen. St. §§ 1550, 1561, prescribing how the right of way for a railroad may be acquired from the owner of land, is a word of general import, and applies to any one having a legal interest in the land. A mother devised real estate in trust for her son and his wife, and the survivor of either of them, during their natural lives, but in no wise to be subject to the debts or contracts of the son, and, after the death of the survivor, such land to be equally divided among the son's children. Held, that the son had power to release the right of way for a railroad through the land during the joint lives of himself and wife. *Railway Co. v. Scott*, 38 S. C. 34, 37, 36, 16 S. E. 185, 839.

The word "owner," as used in a statute authorizing the condemnation by a railroad for its right of way of private property, and the awarding of damages therein, applies to any person having an interest in the estate. *Gerrard v. Omaha N. & B. H. R. Co.*, 14 Neb. 370, 371, 15 N. W. 231.

For the purpose of the act relating to mechanics' liens, except when otherwise indicated, any person having an assignable, transferable, or conveyable interest or claim in or to any land, building, structure, or other property mentioned in the act shall be deemed an owner. *Mills' Ann. St. Colo.* 1891, § 2867.

Every person for whose use or benefit any building, erection, or other improvement



is made, having the capacity to contract, including guardians, shall be included in the word "owner," as used in the chapter relating to mechanics' liens. Code Iowa 1897, § 3096.

The term "owner or proprietor," as used in the chapter relating to liens, includes every person, including cestuis que trust, for whose immediate use, enjoyment, or benefit any building, erection, or improvement shall be made. Bates' Ann. St. Ohio 1904, § 3184f.

Every person, including married women and cestuis que trust, for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words "owner or proprietor," as used in the article of the Code relating to liens. Civ. Code Ala. 1896, § 2751.

Every person, including all cestuis que trust, for whose immediate use, enjoyment, or benefit any building, erection, or other improvement shall be made, shall be included in the words "owner or proprietor" thereof, under the act relating to mechanics' liens, not excepting such as may be minors over the age of 18 years, or married women. Ann. St. Ind. T. 1899, § 2886.

Every person for whose immediate use, enjoyment, or benefit any building, erection, or improvements shall be made, shall be included by the word "owner" or "proprietor" thereof, as used in the chapter relating to mechanics' and builders' liens, not excepting such as may be minors over the age of 18 years and married women. Rev. St. Wyo. 1899, § 2907.

The word "owner," as used in the mechanics' lien laws, means an owner in fee, a tenant for life or years, or one having any estate or interest in the property described in the claim, who, by contract or agreement, express or implied, in person or by another, contracts for the erection, construction, or removal of the structure or other improvement, or any part thereof, for the addition thereto, for the alteration or repair thereof, or for the fitting up or equipping the same, from time to time, for the purpose for which it is intended. 4 P. & L. Dig. Laws Pa. 1897, col. 1150, § 2.

The word "owners," as used in Gen. Laws, c. 71, § 4, providing that a town seeking to lay out a highway shall attempt to agree with owners of land as to resulting damage before an appraisalment shall be had, is comprehensive enough to include all persons who have an interest of record in the land over which the highway is laid. It therefore required an attempt by the town to agree with one who had the unmolested, perpetual, and exclusive right to take and carry away the black sand on certain land, and to erect necessary buildings thereon, at a stated annual rental. McCotter v. Town

of New Shoreham, 41 Atl. 572, 574, 21 R. I. 43.

#### Consignee synonymous.

See "Consignee."

#### Correlative of contractor.

The word "owner," as used in the mechanic's lien law, is a correlative of "contractor," and means the person who employs a contractor, and for whom the work is done under the contract. McDermott v. Palmer (N. Y.) 11 Barb. 9, 13; Mosher v. Lewis, 31 N. Y. Supp. 433, 435, 10 Misc. Rep. 373. The fact that subsequent to the execution of a building contract the parties entered into an agreement for the purchase by the contractor of the property and buildings when completed did not change their relations as to one furnishing work and labor on the property. McDermott v. Palmer (N. Y.) 11 Barb. 9, 13.

#### Corporations.

The word "owner" as used in Mass. Pub. St. c. 11, § 20, providing that all personal estate within or without the commonwealth shall be assessed to the "owner" in the city or town where he is an inhabitant on the 1st of May, cannot be construed to include a corporation. Boston Investment Co. v. City of Boston, 83 N. E. 580, 158 Mass. 461.

St. 1842, c. 60, § 4, imposing a penalty on the owner, agent, or superintendent of any manufacturing establishment who shall knowingly employ any child under the age of 12 years in such establishment, etc., refers only to natural persons, and does not include corporations. Benson v. Monson & B. Mfg. Co., 50 Mass. (9 Metc.) 562, 563.

The terms "owner, lessee, or operators of passenger terminals, and the person or company operating the same," in Laws 1899, c. 4700, § 6, relating to the power of railroad commissioners to compel admission into certain passenger terminals of railroad companies desired or required by the commissioners to enter, and to fix reasonable rates, etc., for the use and privileges conferred, cannot be limited to corporations only, but also includes associations and individuals. State v. Jacksonville Terminal Co., 27 South. 221, 237, 41 Fla. 363.

In the construction of statutes relating to and affecting animals, the words "owner" and "person" shall be held to include corporations as well as individuals. Ann. St. Ind. T. 1899, § 1298; Comp. Laws Mich. 1897, § 11,748; Rev. St. Wyo. 1899, § 2287; Cr. Code S. C. 1902, § 630; Rev. St. Utah 1898, § 4459; Bates' Ann. St. Ohio 1904, § 3721; People v. Brunell (N. Y.) 48 How. Prac. 435, 447.

In the chapter relating to offenses against chastity, morality, and decency, the

words "owner" and "person" include corporations as well as individuals. *Rev. St. Me. 1883, p. 911, c. 124, § 48.*

Under a statute requiring railroads to give signals at public road crossings, and providing a penalty for their neglect, to be paid by the corporation owning the railroad, it is held that a corporation representing the road as owner, lessee, or otherwise, is an owner, within the statute. *State, to Use of Ray County, v. St. Joseph, St. L. & S. F. Ry. Co., 46 Mo. App. 466, 469.*

The word "owner," as used in the article punishing the cutting down or destroying of any tree or timber, or the carrying away thereof, without the consent of the owner, includes the state and any corporation, public or private, owning lands within this state. *Pen. Code Tex. 1895, art. 826.*

#### **Dedicator before acceptance.**

"Owners of land," as used in Jersey City Charter, § 23, providing that no petition for any municipal improvements shall be of any force, avail, or effect unless the same be signed by the owners of one-third the frontage of land along the improvement desired, includes one owning land which he has dedicated to the public as a street, but which the public has not accepted or appropriated. *De Groot v. City of Jersey City, 25 Atl. 272, 55 N. J. Law (26 Vroom) 120.*

#### **Equitable owner.**

The word "owner," in the mechanics' lien statute, has always been construed to include and mean equitable owner, as well as the person who holds the legal title. His interest thereunder, whatever it may prove to be, is subject to the plaintiff's lien. This interest can be proceeded against, and the lien enforced as to it, without joining the legal owner as defendant in the same action. *Carey-Lombard Lumber Co. v. Bierbauer, 79 N. W. 541, 542, 76 Minn. 434.* See, also, *Wilder v. Haughey, 21 Minn. 101, 106; Atkins v. Little, 17 Minn. 342, 353 (Gil. 320, 327).*

The word "owner," in the lien law of August 12, 1858, providing that one who furnishes material or machinery for constructing, altering, or repairing any building by virtue of a contract with the owner, has a lien to secure payment upon the right, title, and interest of such owner, includes an owner in equity as well as at law. *Atkins v. Little, 17 Minn. 342, 353 (Gil. 320, 327).*

The word "owner," in the mechanic's lien law, is held to embrace one having an equitable as well as a legal title. *Belmont v. Smith, 11 N. Y. Leg. Obs. 216, 218.*

A contractor, who, under the provisions of his contract with the legal owner, has an equitable title to a house which he is build-

ing, is to be deemed the owner, within the meaning of the mechanic's lien law. *Belmont v. Smith, 8 N. Y. Super. Ct. (1 Duer) 675, 678.*

Where an insured is the absolute owner of the property destroyed, a dry trust of the legal title in another will not prevent a recovery, for he is still the owner of the property, within a warranty that he is the owner. *Watertown Fire Ins. Co. v. Simons, 96 Pa. 520, 525, 527.*

One having the beneficial title, while the naked legal title is in another, is the owner, within the meaning of the clause in a fire policy requiring that the insured shall be the entire, unqualified, and sole owner, for his own use and benefit, or otherwise the policy shall be void. *American Basket Co. v. Farmville Ins. Co. (U. S.) 1 Fed. Cas. 618, 619.*

The word "owner," as used in *Rev. St. 1860, §§ 1314-1331*, providing that, if the owner of real estate refuse to grant a right of way, the commissioners appointed to assess the damages may, on notice to the owner, proceed to assess such damages, means any person who has an equitable right to or interest in real estate. *Severin v. Cole, 38 Iowa, 463, 464.*

Where a member and officer of a company has the legal title to land belonging to it, and superintends the construction of a building thereon, he is the owner, within Mechanic's Lien Law, § 1, giving a lien to any person who shall, by contract with the owner of any lot or piece of land, furnish labor or material. The word "owner," in the statute, includes the owner in equity as well as at law. It covers one who has the equitable title. *Springer v. Kroeschell, 43 N. E. 1084, 1087, 161 Ill. 358.*

The term "owner," in an insurance policy, providing that it should be void if the insured was not the owner of the property, includes an equitable ownership, although the bare legal title was in the other. *Martin v. State Ins. Co., 44 N. J. Law (15 Vroom) 485, 490, 43 Am. Rep. 397.*

#### **Factor.**

A factor who has merely made advances on the property is not an owner, within the abandoned and captured property act, giving to the owner of any such property a right after it has been sold by the government to recover the proceeds of it in the treasury of the United States; there being another person who has the legal interest in the proceeds of the property. The factor owns of the property consigned to him nothing but a lien for his advances and expenses, and he is therefore not entitled to the entire proceeds of the sale of the property. No doubt, a factor who has made advances upon goods consigned to him may be regarded, in a lim-

ited sense, and to the extent of his advances, as an owner. Yet in reality he has but a lien, with a right of possession of the goods for its security. He may protect that possession by a suit against a trespasser upon it and he may sell the property to reimburse advances; remaining, however, accountable to his consignor for any surplus. But, after all he is not the real owner. He is only an agent of the owner for certain purposes. *United States v. Villalonga*, 90 U. S. (23 Wall.) 35, 43, 23 L. Ed. 64.

#### **Fee-simple owner.**

The word "owner" has a definite meaning, and signifies one who has dominion over a thing, which he may use as he pleases, except as restricted by law or by agreement. The precise meaning, perhaps, depends upon the nature of the subject-matter, and the connection in which it is used; but, when applied to real estate without any qualifying words, in common as well as legal parlance, it *prima facie* means an owner in fee. *Johnson v. Crookshanks*, 21 Or. 339, 340, 28 Pac. 78 (citing *And. Law Dict. tit. "Owner"*).

The term "owner," when applied to real estate, means an estate in fee simple. *Bowen v. John*, 66 N. E. 357, 358, 201 Ill. 292 (citing *Illinois Mut. Fire Ins. Co. v. Marseilles Mfg. Co.* [Ill.] 1 Gilman, 236).

The word "owner," in the mechanic's lien law, in the phrase "owner of property to be affected by the lien," means the owner of the fee when the fee in the land is to be affected, and the owner of a leasehold or less interest when such less interest is to be affected. *Poole v. Fellows* (R. I.) 54 Atl. 772.

The word "owner," as used in a notice given under a mechanic's lien proceeding, should be taken in its ordinary sense, as owner of the fee. *Hankinson v. Riker*, 30 N. Y. Supp. 1040, 1043, 10 Misc. Rep. 185.

In Rev. Laws, p. 602, providing that any person who shall cut timber without having first obtained permission to do so from the owner of the land shall forfeit a certain penalty for each tree, the term "owner" means a person who has an estate in fee simple. *Wright v. Bennett*, 4 Ill. (3 Scam.) 258, 259.

A city ordinance rendering abutting owners liable for the graveling of a street in which were located two strips of land originally dedicated for park purposes, except so much thereof as was occupied by the "public grounds owned by the city" bordering thereon, is not to be construed to mean simply such public grounds as are owned by the city in fee simple by deed, for, as the representative of the public, the city acquires by a dedication and acceptance such an interest in a public park as gives it, in some sense of the term, at least, an ownership of the land. Ownership does not necessarily

require the absolute title in fee. One may own a much less interest in land than fee. The word "owner" includes any person who has the usufruct, control, or occupation of the land, whether his interest in it is an absolute fee, or an estate less than a fee. *Bennett v. Seibert*, 35 N. E. 35, 39, 10 Ind. App. 369 (citing 17 Am. & Eng. Enc. Law, p. 299).

#### **Grantee of standing timber.**

The grantee in a deed of standing timber is not the owner of the land, within Code, § 3296, providing that any person who, without the consent of the owner of the land, willfully and knowingly cuts trees thereon, must pay to the owner certain sums. In reaching this conclusion, we have not been unmindful of the variant shades of meaning which variant circumstances may cast upon the word "owner," nor of the adjudged cases giving to it different interpretations in unlike connections, to which counsel have called our attention, nor yet to the well-established, and, with reference to this case, more concrete, proposition, that all that is on or under or above the surface of the earth are but constituent elements of what we denominate land, and that, of consequence, one who owns only minerals in the bowels of the earth, or only trees which grow upon its surface, is, to speak with legal precision, and technically, the owner of land. But at the same time we cannot overlook the fact that in common parlance the phrase "the owner of land" is primarily understood to mean the surface proprietor, having also, more as incidents than otherwise, the mineral and timber interests, and not one who owns only the one or the other, or even both of these interests, but not the surface. *Clifton Iron Co. v. Curry*, 18 South. 554, 555, 108 Ala. 581.

#### **Holder synonymous.**

See "Holder."

#### **Homestead entryman.**

One who resided upon land on which he had made a homestead filing, but had not made final proof, and for whose immediate use the house was built, was the owner of the land, within the mechanic's lien law (Comp. Laws, § 5483). Defining the word "owner," in this connection, it declares: "Every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, including guardians of minors, or other persons, shall be included in the words 'owner thereof.'" *Mahon v. Surerus*, 81 N. W. 64, 65, 9 N. D. 57.

#### **Homestead right.**

A husband who has elected to take his homestead right in lieu of distributive shares in the real estate of his deceased wife is an owner of such homestead, and may exchange

it for another homestead without subjecting such right to the claims of his creditors. *Green v. Root* (U. S.) 62 Fed. 191, 196.

Where real estate of the wife, held by her as her separate property, is occupied by the husband as a family homestead, he is not the owner of such homestead, within the meaning of statutes relating to the exemption of property from execution. *Davis v. Dodds*, 20 Ohio St. 473.

The word "owner," as used in Comp. St. 1899, c. 79, § 4, subd. 2, defining the qualifications of voters of a school district as "every person, male or female, who has resided in the district forty days, is twenty-one years old, and who owns real property in the district," does not include the wife of a person owning a homestead on which the family reside, for her homestead interest does not constitute her an owner of real estate in the district. *McLain v. Maricle*, 83 N. W. 85, 87, 60 Neb. 353.

A wife who, with her husband, had occupied a house and lot as the family homestead until he abandoned her and made a verbal gift of the property to her, and which she and the family thereafter occupied as the homestead, erecting a building thereon with her own money, had an insurable interest in such building, and proof of such facts sustained her averment that she was the owner of the building. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, 420.

#### **Husband as to property of wife.**

Under a statute of New York providing that real estate shall be assessed and taxed in the name of the owner or occupant, it is held that a husband living separately from his wife is neither an owner nor occupant of land belonging to his wife, so that an assessment to him of such land was void. *Smith v. Read*, 51 Conn. 10, 11, 13.

#### **Incumbrancer or lienholder.**

The term "owner," within the meaning of a statute making the owner or one in possession of Texas or Cherokee cattle liable for infection of other cattle, means absolute ownership, and not a conditional ownership growing out of a lien on the cattle. *Smith v. Race*, 76 Ill. 490, 491.

The word "owner," as used in Comp. St. art. 5, c. 77, § 4, refers to persons having estate in lands, and not to incumbrancers and lienholders. *Leigh v. Green*, 90 N. W. 255, 257, 64 Neb. 533.

#### **Insurable interest or title.**

The term "owner," as used with reference to fire insurance, must be held to include any insurable interest or title which the insured has, and which entitles him to possession and use. It does not necessarily

imply exclusive or absolute ownership. *Convis v. Citizens' Mut. Fire Ins. Co. of Calhoun County*, 86 N. W. 994, 996, 127 Mich. 616.

Under an averment in a declaration of an insurance policy that plaintiff was the owner of the property insured, she was bound to prove that she owned an insurable interest—such a title as, if there should be a loss, it would fall on, and have to be borne by, her. In a declaration on a policy of insurance, the averment that the assured was the owner of the property must be considered with reference to the contract of insurance. It amounts to an agreement that she had an insurable interest, and not that she was the absolute owner of the property. When she sues, her right to recover depends on whether she was the owner of an insurable interest, and not whether she was the absolute owner, and the agreement must be so construed. *Rockford Ins. Co. v. Nelson*, 65 Ill. 415, 420.

#### **Joint owners.**

Where a master of a vessel, who was also a part owner, carried to a foreign port property belonging to the owners of the vessel, and disposed of the same, and put on board the proceeds to be brought home, part of which was joint property and part separate property, and caused insurance to be made "on property on board for the owners of the vessel," it was held that the policy covered his own interest, both joint and separate, and that it did not protect the interest of other owners; there being no proof of a previous direction to place insurance, or a ratification of his act. It is also held in this case that, where a policy of insurance is made on property on board of a vessel for the owners of the vessel, extrinsic evidence is admissible to show that the insurance was not intended by the insured to cover both joint and separate property of the owners. *Foster v. United States Ins. Co.*, 28 Mass. (11 Pick.) 85.

#### **Lessee.**

An "owner" is one who owns; a rightful proprietor. An owner is not necessarily one owning the fee simple, or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner, and, indeed, there may be different estates in the same property, vested in different persons, and each be an owner thereof. It was held that lessees of a railroad were owners of the tracks of the roads operated by them, in the sense of a statute requiring the owner of a railway track to make grade crossings, and keep them in repair, and maintain watchmen thereat. *Baltimore & O. R. Co. v. Walker*, 16 N. E. 475, 480, 45 Ohio St. 577.

The word "owner" includes any person who has usufruct, control, or occupation of

real estate, whether his interest in it is an absolute fee, or an estate for years under lease. A tenant for a term of years is an owner of property, within the general or popular meaning of the word, and he may properly allege himself to be owner in a complaint in an action of ejectment brought against his landlord. *Parker v. Minneapolis & St. L. R. Co.*, 79 Minn. 372, 373, 82 N. W. 673.

A statute giving a right of action against the owner of any locomotive or car, by the defects in which a person is injured, means the owner at the time of the injury—owner for the purpose of operating the road—and not necessarily the party in whom the absolute right of property is vested. If a corporation hires cars from a car builder, and runs them on its road, the corporation, not the lessor, is the party liable to the statutory action. *Proctor v. Hannibal & St. J. R. Co.*, 64 Mo. 112, 123.

As used in St. 5 Wm. IV, c. 36, § 25, empowering the trustees of a turnpike road to enter upon and take certain lands, and pull down certain houses, etc., "making or tendering satisfaction to the owners or proprietors of all private lands, houses, buildings," etc., so taken, the word "owners" means the tenant of a term, and not necessarily the owner in fee simple. *Lister v. Lobleigh*, 7 Adol. & E. 124.

A statute making it the duty of owners of factories to provide permanent fire escapes for every such building, means the owner at the time of an injury for want of such fire escape, without regard to the quantity or duration of his estate, and does not mean the person who holds the fee in the land on which the factory building stands. It means the occupant in possession, who places the operatives in a position of danger, and enjoys the benefit of his services. If he is a lessee of the building, then he is a tenant in possession, and for all practical purposes is the owner until the end of his term, which may be in one year or in 100 years. A tenant for years, a tenant for life, and a remainderman in fee is each an owner. *Schott v. Harvey*, 105 Pa. 222, 227, 51 Am. Rep. 201.

Gen. St. c. 60, § 38, providing that any abutting owner shall be entitled to compensation for damages arising from a change of street grade, is comprehensive enough to include a tenant for life or for years, or from year to year, of the abutting estate, as well as the owner of the fee. A lessee is an owner pro tanto of the estate which is leased to him, and entitled to damages for a change of grade. *Gilligan v. Board of Aldermen of Providence*, 11 R. I. 258.

In a statute requiring "the owner, trustee, or lessee or occupant in the actual

control of any building," etc., to file a written application for a permit to erect or construct fire escapes, the word "owner" does not mean the owner in fee, but may mean the lessee in actual possession and control of the building. *Arms v. Ayer*, 61 N. E. 851, 192 Ill. 601, 58 L. R. A. 277, 85 Am. St. Rep. 357.

The word "owner," in the provision of the liquor tax law requiring the consent of the owner or agent of dwellings within 200 feet of a contemplated saloon before a liquor tax certificate will issue, is used in its ordinary sense, and does not include a lessee. *In re Sherry*, 55 N. Y. Supp. 421, 25 Misc. Rep. 361.

The word "owner," as used in Act March 11, 1843, giving a mechanic's lien on land for labor in the construction of improvements thereon, etc., under contract with the owner, does not mean merely an owner in fee, but includes also an owner of a leasehold estate. If the ownership is in fee, the lien is on the fee. If it is of a less estate, the lien is upon such smaller estate. *ChoctEAU v. Thompson*, 2 Ohio St. 114, 123.

The lessee of land for a fixed term is an owner thereof, within St. 1895, p. 53, requiring sheep owners who are not owners and holders of one acre of land for each two sheep to procure a license. The word is not always easily defined. Generally, as stated in 1 Hare, Const. Law, 355, it is a generalissimum, and may be applied to any defined interest in real estate. As used in statutes providing that property shall be assessed to the owner, it has been held to mean the owner in fee, and not to include a lessee, while in other cases what would seem to be exactly the opposite has been decided. *State v. Wheeler*, 44 Pac. 430, 433, 23 Nev. 143.

One to whom a reservoir is leased in consideration of his completing its construction and maintaining it is an owner, within Mills' Ann. St. § 2272, providing that the owners of reservoirs shall be liable for floods from the breaking of the embankments. The word "owner" is rather embarrassing, without qualification or assistance, and can only be construed in a legal or modified sense. *Larimer County Ditch Co. v. Zimmerman*, 34 Pac. 1111, 1112, 4 Colo. App. 78.

Within Gen. St. p. 234, § 21, providing that the driver of any vehicle meeting another on the public highway, who shall neglect to turn to the right, and thereby drive against the vehicle so met, and injure its owner, shall pay to the party injured treble the damages, and that the owner of the vehicle so driven shall, if the driver is unable to do so, pay such damages, the word "owner" means the person in control of the

vehicle, either mediately or immediately, and not the literal and technical owner. Any person hiring a carriage for the time for which he takes it, in a certain sense, is its owner. He has a special property in it. *Camp v. Rogers*, 44 Conn. 291, 298.

An incorporated agricultural society holding lands used exclusively for fair grounds under a lease for years from the owner of the fee is not the owner thereof, within Rev. St. § 1038, subds. 4, 17, exempting from taxation lands owned and used by any such society exclusively for fair grounds. In *Katzer v. City of Milwaukee*, 79 N. W. 745, the Supreme Court of Wisconsin held that the word "owner" must be deemed to have been used in its ordinary sense, calling for proprietorship of the title to the property, not a mere right or privilege to use it. True, such word has often been construed so as to be satisfied by less than possession of the legal title. Such lesser significance is doubtless within its reasonable meaning, and may be adopted in a proper case. But in a tax exemption statute the words cannot be bent from their ordinary meaning to favor the exemption, in the absence of a legislative intent clearly manifested pointing that way. *Douglas County Agricultural Soc. v. Douglas County*, 80 N. W. 740, 104 Wis. 429.

The term "owner," as used in the Code of Iowa, relating to homesteads, includes one who has merely a term of years or leasehold interest in the land. *Green v. Root* (U. S.) 62 Fed. 191, 196. See, also, *Johnson v. Richardson*, 33 Miss. 462, 464.

Under St. 1889, p. 694 (Municipal Charter Act, c. 6, §§ 1, 2), authorizing the appointment of water commissioners when a city shall become the owner of any water supply, or shall decide to construct a system of water supply, the word "owner" is used in the sense that the city should have control over the water supply, and includes a case where a city leases a water plant, as the term "owner" includes any person having a claim or interest in real property, though less than an absolute fee. *Higgins v. City of San Diego*, 131 Cal. 294, 308, 63 Pac. 470, 476.

While it is held that the word "owned," in statutes describing exempt property, must receive its most limited meaning, and be satisfied only by complete and entire ownership, or at least not by leasehold title, nevertheless, under Rev. St. 1898, § 1038, subd. 14, subjecting street railway companies to a charge on their gross revenues in lieu of other taxation, and exempting from taxation on the payment of such license fee all real estate owned and actually and necessarily used by the company in the operation of its business, real property leased by a street railway company which has paid the license

tax for five years, and actually and necessarily used by it in the operation of its business, is exempt from general taxation. *Merrill Ry. & Lighting Co. v. Merrill*, 96 N. W. 686, 119 Wis. 249.

#### Lessor.

The word "owner" is a general term, which, under varying conditions, may include different estates. As applied to real estate, it doubtless means *prima facie* one who holds the fee, but it may mean less. So the word "owner" is defined as any person who has the usufruct, control, or occupation of the land, whether his interest in it be less than a fee. So it is held that when the owner of the fee of leased premises is sued for negligence in their management, resulting in injuries to one invited on the premises, a special plea alleging the leasing of the premises was demurrable, because the owner might prove under the general issue that he was not the owner, within the meaning of that term in the declaration, inasmuch as in that sense it implies one charged with an active duty towards the premises. *McKee v. McCardell*, 46 Atl. 181, 22 R. I. 71.

#### Mortgagee.

The popular definition of the word "owner," as given by lexicographers, is the right to own; exclusive right of possession; legal or just claim of title; proprietorship. Where a policy of insurance provided that if the interest of the assured in the property should be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be represented to the company and expressed in the written part of the policy—otherwise the policy to be void—the assured held the legal title to the property, and was the sole owner thereof, within the meaning of those terms as they are in use, although there were two mortgages upon the property at the time. The mortgagee is not the owner; he has a lien on the title, and that is all; and a mortgage on real estate is not, in legal sense, an alienation of the property. *Woodward v. Republic Fire Ins. Co.* (N. Y.) 32 Hun, 365, 369.

"Owner," as used in Civ. Code, § 909, authorizing the owner of lands sold for taxes to redeem the same within a certain period, means one who has any right which, in law or equity, amounts to ownership in the land—any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it—and a mortgagee will not be deemed an owner entitled to redeem the same. *Mixon v. Stanley*, 28 S. E. 440, 441, 100 Ga. 372.

A mortgagee of land is an owner, within Duluth City Charter, relating to assessments for local improvements, and provid-

ing that persons interested and the owner may properly oppose the confirmation of the assessment, and the entry of judgment therefor. The term "owner" was not used in the strict meaning of the term—that is, he who possesses the legal title—but it means a person interested in the land, which includes mortgagees. *Morey v. City of Duluth*, 77 N. W. 829, 831, 75 Minn. 221.

A mortgagee is not an owner within the meaning of the mechanic's lien law, and is not entitled to a notice of a suit upon a lien claim. The owner, under such a statute, of the legal estate, is alone to be made a party. The word "owner" means the person for whom, as the owner of the land, the building is constructed. *Cornell v. Conline-Eaton Lumber Co.*, 47 Pac. 912, 914, 9 Colo. App. 225.

While the word "owner," as used in our statutes with reference to real estate, has a very broad meaning, it cannot be construed to apply to persons who have no interest whatsoever. In *Chicago, K. & W. R. Co. v. Sheldon*, 53 Kan. 169, 35 Pac. 1105, it was held that a mortgagee had only a lien upon the land out of which the right of way for a railroad was taken. He was not the owner of the same—not the owner of an interest therein. A mortgagee is not an owner, with an interest in the lands mortgaged, so as to make him a proper party to condemnation proceedings by a railroad. *Chicago, K. & W. R. Co. v. Need*, 43 Pac. 997, 998, 2 Kan. App. 492.

A mortgagee is an owner, within Rev. St. 1860, §§ 1314–1331, providing that, if the owner of real estate refuse to grant a right of way, the commissioners may, on notice to the owner, proceed to assess such damages. *Severin v. Cole*, 38 Iowa, 463, 464.

The term "owner," as applied to real estate, is undoubtedly one of variable meaning. Thus in contracts of insurance it has received much latitude of interpretation, so as to embrace persons entitled to particular estates and equitable interests, where such construction was necessary to preserve the validity of the policy, or prevent the forfeiture of rights under it. May, Ins. § 285. Likewise, in statutes providing a compensation to owners for lands taken for public use, where the Constitution required that special interests should be paid for, similar scope has also necessarily been given to the language, in order to render the acts consistent with the fundamental law. Thus, in *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122, and *Parks v. City of Boston*, 32 Mass. (15 Pick.) 198, it was held to include every person having a valuable vested interest in land, capable of being indemnified by the laying out of a street, because a narrower construction would have infringed upon the Constitution of the commonwealth. But in *Watson v. New York Cent. R. Co.*, 47 N. Y.

157, where, upon the same principle, it was urged that the phrase "owners of land" should embrace judgment creditors of the legal owner, the court refused to construe it so broadly, because the remedies of such creditors against the land were supposed to be subject to legislative supersedure, by the power of eminent domain, without compensation. Whether this reason was sound in law need not be here considered. The case is cited merely to mark the limit of the ground upon which an extended signification of the word "owner" is adopted. The term in the charter of the city of Elizabeth, requiring compensation to be made to the owner or owners of lands and real estate taken for streets, does not include a mortgagee of the lands, though the value of the damage to all interests is to be paid to the owner. But if other claimants interfere, and if in any case such owner ought not to receive the whole, timely resort must be had to the chancery court for an equitable distribution of the fund. *Crane v. City of Elizabeth*, 36 N. J. Eq. (9 Stew.) 339, 341.

Under a statute giving a remedy by distress to enforce in a summary manner a claim for damages against the owner of cattle, who is charged with the duty of keeping them off the cultivated lands of others, an agister is held to be an owner, within the meaning of the statute, but a mortgagee without possession is not an owner. *Goff v. Byers Bros. & Co.* (Neb.) 96 N. W. 1037, 1038.

As a mortgage does not pass title to the mortgagee, the latter is not an owner of the mortgaged property, and therefore is not entitled, under section 909 of the Civil Code, to redeem land on which he holds a mortgage, where the same was sold under a tax execution against the mortgagor. *Mixon v. Stanley*, 28 S. E. 440, 441, 100 Ga. 372.

The word "owner," as used in the statutes relating to condemnation proceedings, may perhaps be construed to apply to every person having any interest in the property to be taken. It will be noted, however, that this observation was purely speculative. But *Goodrich v. Atchison Co. Com'rs*, 47 Kan. 455, 27 Pac. 1006, 18 L. R. A. 113, holding a mortgagee not entitled to notice of the opening of a road, if the case previously cited were correct, would be wrong, for certainly a mortgagee has an interest in the land covered by his mortgage, but he is not an owner; and a wife occupying with her husband a homestead, legal title to which is in the latter, is not an owner of the land, within Gen. St. 1901, § 6019, relating to notice of proceedings in the establishment of a highway. *Mathewson v. Skinner*, 71 Pac. 580, 581, 66 Kan. 309 (citing *Smith County Com'rs v. Labore*, 37 Kan. 480, 15 Pac. 577).

A mortgagee is an owner, within the meaning of the statute providing for the taking of land under the power of eminent

domain; and, as such owner, he has the right to prosecute an independent appeal from the freeholders' award. *Omaha Bridge & Terminal Ry. Co. v. Reed* (Neb.) 96 N. W. 276.

In replevin the term "owner" does not necessarily import general or absolute ownership, and, under an allegation of ownership and right of possession, plaintiff may prove a chattel mortgage on the property from the owner to himself, and a breach of its conditions which, by the terms of the instrument, entitles him to the possession of the mortgaged property. *Miller v. Adamson*, 47 N. W. 452, 45 Minn. 99.

Under a statute providing that when municipal corporations seek to appropriate private property the owners of the property shall be notified of the resolution before the passage of the same, it is held that a mortgagee is not an owner. *Incorporated Village of Put in Bay v. Stimmel*, 18 Ohio Cir. Ct. R. 644, 7 O. C. D. 380.

Under the charter of the city of New Haven, providing that the common council, in taking land for a street, shall give or shall make compensation to the owner of the land so taken, where land so taken is covered by a mortgage, the mortgagor, and not the mortgagee, is the owner of the land. *Whiting v. City of New Haven*, 45 Conn. 303, 305.

#### Mortgagor.

The word "owned," in the statute declaring that a homestead situate, etc., "owned and occupied by a resident of this state," etc., shall be exempt from forced sale on execution, is not used in a restricted sense, as meaning the person having both the legal and equitable title to the homestead. A person who has mortgaged his homestead is an owner thereof, within the meaning of the act; and where a husband has the entire equitable estate, although the legal title may be vested in his wife, he is the owner, within the meaning of the statute. *Dreutzer v. Bell*, 11 Wis. 114, 118.

The mortgagor is the substantial owner of the property, though the legal estate is in the mortgagee, and he can transfer or vest his interest at his own pleasure so long as the right of redemption exists. The interest of the mortgagor is also subject to attachment and execution. So a mortgagor in possession and before foreclosure has an absolute and insurable interest in the property. *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421, 438, 3 Am. Rep. 149.

A mortgagor after foreclosure ceases to be the owner of the lands, and therefore cannot then redeem from a tax sale under Pub. St. c. 12, § 49. *Da Silva v. Turner*, 44 N. E. 532, 533, 166 Mass. 407.

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#### Occupant.

As used in the chapter relating to trespassing animals, making owners liable for trespasses, the term "owner" includes any person occupying or cultivating lands. Rev. Codes N. D. 1899, § 6154; Code Civ. Proc. S. D. 1903, § 818.

The term "owner," as used in the herd law act, applies to the occupant or tenant when the owner does not reside in the county. Rev. St. Okl. 1903, § 66.

#### Officers of corporation.

The term "owner," as used in the act relating to pipe line companies, in reference to an effort to agree with, or to the tender of a bond to, or service of notice upon, the owner of roads, railroads, turnpike roads, canals, or other highways, shall be taken to mean the officers in charge of said road, railroad, turnpike road, canal, or other public highways, on whom service of process could be made in any action at law or in equity. P. & L. Dig. Laws Pa. 1894, vol. 2, col. 3492, § 7.

#### Operators.

The word "owners," in Laws 1893, c. 66, § 5, providing that "it shall be the duty of the owners of every railroad or steamboat situate or operated \* \* \* within this state, to redeem," etc., unused railroad tickets, etc., is evidently used in a comprehensive sense, so as to include all that are operating a railroad or steamboat, whether as owners of the property, or as lessees, receivers, or the like. *State v. Corbett*, 59 N. W. 817, 320, 57 Minn. 345, 24 L. R. A. 498.

#### Ostensible owner.

The phrase "family of the owner," in the constitutional provision declaring that a homestead occupied as a residence by the family of the owner shall not be alienated without the joint consent of husband and wife, "clearly implies that it was not intended that the family, as a family, or any member thereof except the ostensible owner, should be considered as an owner." *Vining v. Willis*, 20 Pac. 232, 234, 40 Kan. 609.

#### Person in possession or control.

The word "owner" conveys the idea of property in the thing in right of the person who is said to be the owner, and excludes that of a mere possessor in the right of another, although the possession may be coupled with the duty or obligation to take care of or even use the thing in that other's right. *Turner v. Cross*, 18 S. W. 578, 580, 83 Tex. 218, 15 L. R. A. 262.

Pen. Code, art. 724, relative to larceny, and providing that, to constitute the offense, the property must be owned by some one other than the thief, and the taking must be



without his consent, does not necessarily mean the consent of the owner, unless he is in actual possession at the time of the taking, but means the consent of the special owner, or the person who is in possession. The phrase "without his consent" refers specially to possession, rather than ownership. *Frazier v. State*, 18 Tex. App. 434, 441.

The word "owner" will include the person in possession and control of any article of personalty, as one who hires a carriage. Thus, where a husband and wife keep a dog on the premises, exercising apparent ownership and control, the actual ownership is unimportant. *Hornbein v. Blanchard*, 35 Pac. 187, 188, 4 Colo. App. 92.

The word "owner" is not a technical term. It is not confined to a person who has the absolute right in the chattel, but also applies to the person who has the possession and control of it. Thus it has been said in this commonwealth, in *Hartford v. Brady*, 114 Mass. 468, 470, 19 Am. Rep. 377—a case under Gen. St. c. 25, § 25; Pub. St. c. 36, § 27—by which the owner of cattle is made liable for injury done by them, "the word 'owner' is intended to include all persons in whom is the general property of animals, while it embraces also those who are in possession of them under a special title, or by virtue of any lien." Pub. St. c. 192, §§ 24, 25, provided for the sale of personal property on which there is a lien for work and labor and for money expended, if the amount due is not paid within 60 days after demand, and also provided for notice of the intended sale to the owner of the property. We are of the opinion that where a person, by the consent of the owner of goods, stores them with a third person as his own, by contract, express or implied, and this third person does not know that any one else is the real owner, it is enough to give notice to the person with whom the contract is made. *Keith v. Maguire*, 48 N. E. 1090, 170 Mass. 210.

Code, § 1485, makes the owner of a dog liable for all damage done by the dog, except where the party injured is doing an unlawful act. Held, that the word "owner" includes one who has a dog in his possession, and harbors it on his premises. *Shultz v. Griffith*, 72 N. W. 445, 446, 103 Iowa, 150, 40 L. R. A. 117.

As to real property, the person who, by himself or his tenant, has the freehold in his possession, whether in fee or for life, shall be deemed the owner for the purpose of taxation. A person who has made a mortgage or deed of trust to secure a debt or liability shall be deemed the owner until the mortgagee or trustee takes possession, after which such mortgagee or trustee shall be deemed the owner. Personal property mortgaged or pledged shall, for the purpose of taxation, be deemed property of the party

who has the possession. Code W. Va. 1899, p. 196, c. 29, § 40.

Under Rev. St. § 5880, making any water craft navigating the waters within the state liable for all debts contracted on account thereof by the master, owner, steward, consignee, or other agent for materials, supplies, etc., furnished the same, and section 5882, giving any person having a demand under the former section a right to proceed against the owner of the craft, or the master who contracted the debt, etc., the word "owner" means the person who has the possession and control of the boat, and remains and operates it pro hac vice in his own interest. He may be the hirer of it, or the mortgagor in possession, and the owner of it as against all the world except the mortgagee or the vendee in possession, and also a like owner except against the vendor, who retains the legal title as a simple security. It is not necessary that he should be the absolute or legal owner, but one who simply holds the legal title to the water craft as security for the amount due him on the sale of it, having neither the possession nor control of the craft, is not such an owner, or liable for supplies furnished it. *Hemm v. Williamson*, 25 N. E. 1, 2, 47 Ohio St. 493.

The word "owner," as used in the statute making the owners of stock liable for all damage done by the same, is to be construed by extending it to persons in possession under some special title, and having the custody of the stock, as well as the general owner. *Lafin v. Svoboda*, 55 N. W. 1049, 1050, 37 Neb. 368.

The word "owner," in Gen. St. 1872, c. 63, § 83, requiring that a railroad shall, before entering on any land for the purpose of constructing its road, give notice to the owner, is not used in the sense of holder of the legal title, but rather in the sense of one who has control of the land. *Tompkins v. Augusta & K. R. Co.*, 21 S. C. 420, 431.

In any action or proceeding, civil or criminal, arising under the chapter relating to sheep, all persons having an interest in sheep, and controlling the same, concerning which such action or proceeding is had, shall be deemed to be the owners of such sheep. Rev. St. Wyo. 1899, § 2095.

#### Person taxed as owner.

The word "owner," as used in Acts 1872-73, c. 117, § 50, declaring that the owner of land may redeem from a delinquent tax sale, means the person charged for the taxes as owner. *Townshend v. Shaffer*, 3 S. E. 586, 587, 30 W. Va. 176.

#### Pledgee.

"Owned by, or in possession of the debtor," as used in the exemption law, does not apply to stock put in the hands of a creditor

as collateral, as against the debt for which it is pledged. *Hawley v. Hampton*, 28 Atl. 471, 472, 160 Pa. 18.

#### **Proprietor synonymous.**

An owner is one who has a legal right or exclusive title to anything, and the word "owner" is synonymous with the word "proprietor." *Turner v. Cross*, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262.

#### **Receiver.**

A receiver is an officer of the court appointing him, and holds possession of the property to which the receivership relates as an officer of the court, and is not a proprietor or owner, within Rev. St. art. 2899, giving a right of action for injuries resulting in death, caused by the proprietor or owner of a railroad. In cases of receiverships of railway property, the receiver often operates the road, and assumes the duties, burdens, and liabilities imposed by law upon common carriers, in addition to the ordinary duties attaching to the position; but he is at all times only an agent of the court, subject to its orders, and having no personal interest in the property in his hands, resulting from the existence of the receivership, though responsible officially for the proper management and custody of property confided to his care, and responsible personally in the same manner as other persons for his own unlawful acts working injury to others, but not so responsible for the negligence or unlawful acts of the servants he may be compelled to employ in the business confided by the court to his management and control. A receiver is not the representative of the company or persons whose property may be placed in his possession and under his management, and may only be subject to liability for injuries arising under the permission of the court appointing him, or from the negligence of himself or his employes. *Turner v. Cross*, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262.

The word "owner," as used in Rev. St. art. 2899, giving a right of action for injuries resulting in death, caused by the negligence of the owner of a railroad, does not include a receiver, though it is often used to express right to property in a thing less than absolute or exclusive right; but when this occurs it will ordinarily appear from the context, and in all such cases the person holds for himself, and in his own right. The ordinary meaning of the word "owner" is such that no person can hold such relation to property unless he has a personal interest in or right to it. *Turner v. Cross*, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262. See, also, *Yoakum v. Selph*, 19 S. W. 145, 83 Tex. 607; *Houston & T. C. Ry. Co. v. Roberts (Tex.)* 19 S. W. 512; *Bonner v. Thomas (Tex.)* 20 S. W. 722.

The term "owner," as used in Laws 1893, c. 66, § 5, providing that the owners of

any railway companies or common carrier within the state shall redeem tickets sold by it in any manner, no matter whether sold within or without the state, was intended to be used in a comprehensive sense, so as to include all who are operating a railroad or steamboat, whether as owners of the property, or as lessees, receivers, or the like. *State v. Corbett*, 59 N. W. 317, 320, 57 Minn. 345, 24 L. R. A. 498.

#### **Remaindermen.**

Remaindermen are owners, within Const. art. 1, § 17, providing that private property shall not be taken for private use without the consent of the owner. *Cureton v. South Bound R. Co.*, 37 S. E. 914, 915, 59 S. C. 371. See, also, *Johnson v. Richardson*, 33 Miss. 462, 464.

#### **School district.**

Whatever is the subject of ownership is held by the owner for his individual benefit. A school district is not the owner of school property, within Gen. Laws 1883, pp. 662, 669, providing for mechanics' liens in favor of contractors and subcontractors on the property of the owner. *Florman v. School Dist. No. 11*, 40 Pac. 469, 470, 6 Colo. App. 319.

#### **Tenant in common.**

The term "owner," as used in the Code of Iowa, relating to homesteads, includes one who, as tenant in common, has merely an equitable title in the land. *Green v. Root (U. S.)* 62 Fed. 191, 196.

Under Laws 1897, p. 101, § 4, providing that cities of a certain class can pass local improvement ordinances only on petition of the owners of a majority of the abutting property, it is held that the word "owners" means owner in fee, and that a tenant in common cannot sign a petition in behalf of his co-tenants. *Merritt v. City of Kewanee*, 51 N. E. 867, 872, 175 Ill. 537.

#### **Tenant for life.**

Any person holding an interest in land for years, for life, or any greater estate, freehold, in reversion or remainder is held to be an owner. *Johnson v. Richardson*, 33 Miss. 462, 464.

Under Acts 1874, c. 218, § 3, empowering the mayor and council of Baltimore to provide by general ordinance for a street improvement, and an assessment therefor upon the abutting property upon the application of the owners of a majority of the front feet, and declaring that a tenant for 99 years, or the executor or administrator of such tenant, or the guardian of an infant owner, or a mortgagee in possession, should be deemed the owner for the purposes of any application, it was held that a tenant for life was not the owner, within the mean-

ing of the statute, and could not bind the property. *City of Baltimore v. Boyd*, 20 Atl. 1028, 1029, 64 Md. 10.

The word "owner," in the homestead act (Scates' Comp. St. § 576), providing that, in addition to the property exempt by law from sale under execution, there shall be exempt from levy and forced sale the lot of ground and the buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family, to the value of \$1,000, etc., includes one who has a life estate in the property. Owning an estate for his own life in the premises, the home of his family, we do no violence to the language of the act by considering him the owner for all the purposes of the act. He is to all intents and purposes the owner of the immediate freehold, and seized thereof, and, as such, must be protected by the homestead act, and this is neither an unreasonable nor forced definition of the word "owner." It seems to us to be its most natural meaning, regarding, as we must, the purpose and object of the act. *Deere v. Chapman*, 25 Ill. (15 Peck) 610, 611, 79 Am. Dec. 350.

#### Trustee.

A trustee in a trust deed is a purchaser for value. Being a purchaser for value, and holding the legal title, he is an owner having a right to redeem from a tax sale, as permitted to owners under Code 1899, c. 31, §§ 15, 24. *Clark v. McClaugherty*, 44 S. E. 269, 271, 53 W. Va. 376.

A mere naked trustee of an equitable trust is not a necessary party to proceedings to condemn lands under the charter of a railroad, requiring notice of such proceedings to be given to owners and persons interested. *McIntyre v. Easton & A. R. Co.*, 26 N. J. Eq. (11 C. E. Green) 425.

#### User.

The right of the owner is more extended than of him who has only the use of the thing. He may commit what would be considered waste if done by another. *Territory v. Young*, 2 N. M. 93, 95; *City of Bangor v. Rowe*, 57 Me. 436, 439.

"Owners or occupants," as used in the Rochester city charter (Laws 1861, c. 143, § 41), conferring on the common council power to require the owners or occupants of any mill race within the city to cover the same with bridges or arches, meant only those who had occasion for the water thus conveyed for the purpose of propelling the machinery in their respective mills, and did not intend to enforce an expense on the owners or occupants of lots adjoining a street through the center of which ran a mill race. *People v. Common Council of City of Rochester*, 54 N. Y. 507, 510.

#### Vendee under bond or contract.

A party in possession of a dwelling house under a valid and subsisting contract of purchase, although he has not paid the whole consideration, he is properly spoken of as the owner of the house. *Ætna Fire Ins. Co. v. Tayler* (N. Y.) 16 Wend. 385, 394. See, also, *Green v. Root* (U. S.) 62 Fed. 191, 196.

A purchaser of land, holding a bond for a deed, cannot recover from his vendor under Code, § 3290, providing that any person cutting trees on land not his own, without the consent of the owner, shall pay to such owner a stated sum for each tree so cut. The purchaser is not the owner by legal title. Whatever may be the varied meanings of which the word "owner" is capable, and whatever may have been the signification attached when employed in other connections, or in reference to other subject-matters in this statute, it is limited to the owner of the legal estate in lands. This is its precise meaning, and it would be an unwarrantable interpretation, violative of the cardinal rule that penal statutes are to be strictly construed, if it were extended so as to include one who has but an equity, of which courts of law cannot take cognizance. *Gravlee v. Williams*, 20 South. 952, 953, 112 Ala. 539.

One in possession of land under a bond for title, with a part of the purchase money paid, is not the owner of such land, within Civ. Code, § 2243, so as to entitle him to recover the penalty therein provided, on failure of a railroad company to put in a cattle guard on notice. *Hardin v. Chattanooga S. O. R. Co.*, 113 Ga. 357, 38 S. E. 839. A son of the owner of land, who had given the notice provided by the statute, and who was cultivating the land, was not the owner. *Fenn v. Georgia Northern R. Co.*, 43 S. E. 378, 116 Ga. 942 (citing *Florida Cent. & P. R. Co. v. Judge*, 100 Ga. 601, 28 S. E. 379).

The word "owner," in a statute giving mechanics and materialmen a lien, and providing that the word "owner" shall include every person for whose immediate use or benefit any building, erection, or other improvement is made, having the capacity to contract, including guardians of minors or other persons, is not a limitation, but is intended to extend to the definition of the term "owner," so as to include persons who would not ordinarily be held to come within its meaning. The term was construed to include one contracting to purchase land under a contract requiring him to pay a part of the price upon delivery of the deeds, and to secure the balance by a mortgage to be junior to another mortgage to be placed thereon by the purchaser to secure funds with which to pay for improvements which he agreed to make, although the purchaser did not make the first payment, and did not negotiate the mortgage, but constructed the

improvements. *Janes v. Osborne*, 79 N. W. 143, 144, 108 Iowa, 409.

One holding a certificate of purchase from the state of school lands, upon which he has paid 20 per cent. of the price, is not a freeholder owning lands, within Wright Act 1877, § 2, requiring a petition to organize an irrigation district to be signed by 50 such freeholders. "Owner," in its general sense, means one who has full property in, and dominion over, property. In *Bouvier's Law Dictionary* it is said that the word "owner," when used alone, imports an absolute owner. The precise meaning, perhaps, depends on the nature of the subject-matter, and the connection in which it is used, but, when applied to real estate, without any qualifying words, in common as well as legal parlance it *prima facie* means an owner in fee. *Directors of Fallbrook Irr. Dist. v. Abila*, 39 Pac. 794, 796, 106 Cal. 355.

The word "owner" has no technical meaning. Under different circumstances the word "owner" has been held to mean the person having the legal title, or the owner who has the equitable title. And it has also been held to include every person having an interest in the estate. One in possession of land under a bond for title, with a part of the purchase money paid, is not the owner thereof, within Act Nov. 11, 1899, imposing on railway companies the duty of erecting and maintaining cattle guards at designated points along their lines of road. The Legislature used the word "owner," in this statute, as meaning the real owner as against the world. *Hardin v. Chattahoochee S. R. Co.*, 38 S. E. 839, 840, 113 Ga. 357.

#### Owner of corporate stock.

A person in whose name shares of stock stand on the books of a company shall be deemed the owner thereof, as it regards the company. Code Va. 1887, § 1131.

#### Owner of vessel.

In the construction of the title relating to merchant seamen, the term "owner" shall be taken and understood to comprehend all the several persons, if more than one, to whom a vessel shall belong. U. S. Comp. St. 1901, p. 3120.

#### Vendor in contract of sale.

The word "owner," as used in 1 Rev. St. p. 514, § 64, providing that no highway shall be opened or worked without a release by the owner of the land or an assessment of his damages, means the person entitled to the legal estate in the land, and therefore, where an executory contract for the sale of the land through which a highway is to be opened has been made, it is the consent of the vendor, and not of the vendee, which is required; the vendee not being the owner

of the land in a legal sense, though the vendor held the same in trust for him. *Smith v. Ferris* (N. Y.) 6 Hun, 553, 554.

Where a contract of sale required the erection by the vendee of a house on the land, and provided that the title to the house and land should remain in the vendor until the purchase price was paid, the vendor's interest in the land was that of an owner, so as to be subject to a mechanic's lien. *Edwards & McCulloch Lumber Co. v. Mosher*, 60 N. W. 264, 265, 88 Wis. 672.

Where the owner of a lot in the city of New York contracted with the purchaser to convey the lot to him for a certain sum, and to loan him money in installments for the location of a building thereon, the price and the money to be secured by bond and mortgage upon the premises at the completion of the building, at which time the lot was to be conveyed, the seller of the lot was not the owner of the building, within the meaning of the mechanic's lien act, although it was erected on land of which he had the legal title. *Loonie v. Hogan*, 9 N. Y. 435, 440, 61 Am. Dec. 706.

A contract for sale of land required the vendee to erect certain houses thereon; the vendor agreeing to advance a designated sum to partly pay for their construction. It was held that the vendor was the owner of the land, within the meaning of Laws 1885, c. 342, § 1, giving any one furnishing labor or materials in the erection of any house "with the consent of the owner" a lien thereon, and providing (section 5) that an owner who has entered into a contract to sell land shall be deemed to be the owner within the meaning of the act until the deed has been actually delivered and recorded. *Miller v. Mead*, 28 N. E. 387, 388, 127 N. Y. 544, 13 L. R. A. 701.

A person having only a vendor's lien on the property on which the work is to be performed, though he is in possession thereof, is not an owner, within the mechanic's lien law of 1883, which only authorized a mechanic's lien under a contract with the owner, although the law provides that the word "owner" includes any person having a presentable or conveyable interest in a claim, since the grantor's lien is not a claim to the land or an interest in it. *Griffin v. Seymoure*, 63 Pac. 809, 811, 15 Colo. App. 487.

#### OWNER'S RISK.

See "At Owner's Risk."

In England it is held that shipment at the "owner's risk" in general terms exonerates the carrier or bailee from all responsibility, thus putting the questions of diligence and neglect out of the case. In West Virginia it has been held, following the United States Supreme Court in *New Jersey Steam*

*Nav. Co. v. Merchants' Bank*, 47 U. S. (6 How.) 344, 12 L. Ed. 465, that it limits the railroad to loss or damage resulting from ordinary neglect. *Baltimore & O. R. Co. v. Rathbone*, 1 W. Va. 87, 107, 88 Am. Dec. 664.

## OWNERSHIP.

See "Absolute Ownership"; "Act of Ownership"; "Apparent Ownership"; "Claim of Ownership"; "Entire, Unconditional, and Sole Ownership"; "Imperfect Ownership"; "Several Ownership"; "Sole Ownership"; "Unconditional and Sole Ownership."

Change of ownership, see "Change."

Unqualified ownership, see "Unqualified."

Ownership is the right by which a thing belongs to an individual, to the exclusion of all other persons. *Converse v. Kellogg* (N. Y.) 7 Barb. 590, 597; *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. (9 P. F. Smith) 474, 477.

The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of the others. *Civ. Code Mont.* 1895, § 1070; *Civ. Code La.* 1900, art. 488; *Maestri v. Board of Assessors* (La.) 34 South. 658, 661; *Rev. Codes N. D.* 1899, § 3266; *Civ. Code S. D.* 1903, § 182; *Rev. St. Okl.* 1903, § 4017.

A contract for the sale of realty, no deed having been made and part of the purchase money being unpaid, does not invest the vendee with ownership of the property. *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. (9 P. F. Smith) 474, 477.

Where a fire policy required that the insured should, in case of loss, make affidavit stating the value and "ownership" of the insured property, such language did not require the insured to make any statement with regard to incumbrances on the property. *Taylor v. Aetna Ins. Co.*, 120 Mass. 254, 257.

The ownership of property is a matter of fact, although it may result from a question of law. *Turner Falls Lumber Co. v. Burns*, 45 Atl. 896, 898, 71 Vt. 354.

The ownership of property may be in the sovereign and the use private or public, or the ownership may be public and the use private. This depends upon the character of the ownership and dedication, and the circumstances of the use. *Hart v. Burnett*, 15 Cal. 530, 548 (citing *Bouv. Law Dict. verb. "Dedication"*); *Town of Pawlet v. Clark*, 13 U. S. [9 Cranch] 292, 3 L. Ed. 735).

### Occupancy, possession, or seisin.

An indictment for burglary, alleging that the building burglarized was owned by the prosecuting witness, is sufficient, since "ownership" implies occupancy. *Price v. State* (Tex.) 58 S. W. 83, 85.

"Ownership," as used in the Penal Code relative to larceny, is synonymous with "possession." *Frazier v. State*, 18 Tex. App. 434, 441.

Seisin and ownership, as to corporeal hereditaments in the common-law sense of the term, mean practically the same thing. Mere occupancy does not constitute seisin in the legal sense of that term. *Ft. Dearborn Lodge, I. O. O. F., v. Klein*, 3 N. E. 272, 273, 115 Ill. 177, 56 Am. Rep. 133.

The term "ownership," within the meaning of the law of larceny, requiring that stolen property be taken from the possession of the owner, may be predicated of the right in notes of the cashier of a bank to whom the notes are intrusted to convey them to his bank, and from whom they are stolen. *Commonwealth v. Butts*, 124 Mass. 449, 453.

"Ownership," says Bishop in his work on *Criminal Procedure* (volume 2, §§ 137, 138), "is one thing in one offense and another thing in another. In burglary ownership means any possession which is rightful as against the burglar." *State v. Gilligan*, 50 Atl. 844, 845, 23 R. I. 400. See, also, *Trice v. State*, 42 S. E. 1008, 116 Ga. 602.

### Title distinguished.

See "Title."

Ownership means title to property. *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. (9 P. F. Smith) 474, 477.

## OWNERSHIP BY SEVERAL.

The ownership of property by several persons is either (1) of joint interests, (2) of partnership interests, or (3) of interests in common. *Rev. Codes N. D.* 1899, § 8282.

## OX—OXEN.

See "Yoke of Oxen."

An indictment charging the theft of an ox is a sufficient allegation of the kind of animal stolen, in an indictment under a Code prescribing a penalty for the theft of cattle. *Parchman v. State*, 44 Tex. 192.

"Ox," and "steer," in the popular use of words, are equivalent, and are used to designate a castrated taurine male which has been brought under the yoke. In this case the word "steer" was held to be a sufficient description in an indictment of the animal stolen. *Watson v. State*, 55 Ala. 150.

"Oxen" are included in the term "cattle," as used in a statute providing for damages for killing cattle. *Randall v. Richmond & D. R. Co.*, 107 N. C. 748, 749, 12 S. E. 605, 11 L. R. A. 460; *Id.*, 10 S. E. 691, 692, 104 N. C. 410.

"Oxen" is a word of sufficiently definite meaning to furnish an accurate description of property in an indictment for theft. The term cannot be regarded as an exact synonym of "cattle," which has such an inclusive meaning as to include various different species of animals and goods. While an indictment charging defendant with theft of "cattle" might be held insufficient on the ground that the term was of indefinite signification, being used with reference, not only to all domestic animals, but to inanimate goods as well, and even extended by Shakespeare to include boys and girls, it cannot be said that the term "oxen" is capable of the same extended meaning, so that it would not include either inanimate goods or human beings, but is a sufficiently definite description of animals of the bovine genus. *Henry v. State*, 45 Tex. 84, 87.

#### OX CART.

"Ox cart," as used in the statute exempting an ox cart from execution, is not employed literally, so as to mean that a cart is not exempt if drawn by any other animal than oxen, but means any vehicle of such nature possessed by a debtor. *Webb v. Brandon*, 51 Tenn. (4 Heisk.) 285, 289.

#### OXIDE.

See "Metallic Oxide."

#### OXIDE OF ZINC.

Oxide of zinc is manufactured in European establishments as follows: Sheets of zinc ordinarily sold in commerce are placed in retorts. The face of the retort has an opening large enough to admit the sheet. The backs of the retorts are inclosed in a furnace, and the retorts are heated by bituminous coal to a white heat. The action of the heat vaporizes the spelter, which is entirely consumed. The vapor passes out of the mouth of the retort into large pipes, into which currents of air are forced. The vapor combines with the oxygen of the air, and becomes white, snowlike flakes. The current bears these flakes along through the pipes, which terminate in long chambers. At the mouth of the pipes bags are suspended, in which the flakes are caught. No further process is re-

quired. *Meyer v. Arthur*, 91 U. S. 570, 576, 23 L. Ed. 455.

#### OYSTER.

As fish, see "Fish."

As shell fish, see "Shell Fish."

#### OYSTER BED.

"Very few people know what is, or what constitutes, a natural oyster bed. Indeed, it is only a matter of opinion, at the best; and opinions are likely to be influenced largely by self-interest. A large number of persons make a distinction between oyster beds that ebb dry and those that are covered at all states of the tide; a distinction which, it is needless to say, does not have any sound foundation to rest upon. Many also appear to think that a natural bed is not a natural bed, in the meaning of the law, because it is a little one. On the other hand, there are some whose definition of natural bed is so liberal that it not only covers all places where oysters were in the past, or are in the present, but includes any area where they might, could, would, or should grow in the future. The best legal definition of what is an oyster bed is as follows: "A bed not made by man, and of sufficient area to have been profitably worked by the general public as common property within some recent period of time. A natural, as distinguished from an artificial, bed, is one not planted by man, and in any shoal, reef, or bottom where oysters are to be found growing, not sparsely, or at intervals, but in a mass or stratum, and in sufficient quantities to be valuable to the public." *State v. Willis*, 10 S. E. 764, 765, 104 N. C. 764.

#### OYSTER SPAT.

"Oyster spat" is the spawn or young brood of oysters. *Borough of Maldon v. Woolvet*, 12 Adol. & E. 12, 15.

#### OYSTERY.

"Oystery" is a particular species of fishing, and of course includes the common right of fishery. *Moulton v. Libbey*, 87 Me. 472, 492, 59 Am. Dec. 57.

## P

## P. A.

"p. a." as used in a promissory note reciting "Int. @ 6% p. a.," is an abbreviation for "per annum." *Simmons v. Brooks*, 34 N. E. 175, 177, 159 Mass. 219.

## P. P. A.

The letters "p. p. a.," added to an agent's signature should be construed as evidence that the agent professes to be acting "per power of attorney." *Mt. Morris Bank v. Gorham*, 48 N. E. 341, 342, 169 Mass. 519.

## PA.

The fact that depositions were taken pursuant to a commission addressed "to any notary public within and for Dauphin Co., Pa.," was held not ground for suppressing such deposition. It is a matter of common knowledge that "Co." is used as an abbreviation of "county," and "Pa." is an abbreviation of "Pennsylvania," and proof of such facts was not required. *Gilman v. Sheets*, 78 Iowa, 499, 501, 43 N. W. 299, 300.

## PAT.

"As part of plaintiff's registered label, there appeared in very small letters the words 'Pat. Aug. 13, 1872.' It is claimed that this must be taken as a false affirmation that the whisky was patented. I do not think it amounts to this. As used on the barrels of whisky, it is almost impossible that it could suggest to any one this idea. The words were not used in such a way as naturally to indicate the existing or present protection to the whisky of a patent. The words seem to indicate the date of registry of the trademark, and not to have been used for the purpose of deceiving the public." Held not to be a false affirmation that the whisky was patented, so as to deprive plaintiffs of relief for infringement. *Cahn v. Gottschalk*, 2 N. Y. Supp. 13, 17, 14 Daly, 542.

## PACK.

The term "to pack," in its ordinary signification, especially when used in reference to carriage, means to place together and prepare for transportation, as to make up a bundle or bale. *Keith v. State*, 8 South. 353, 354, 91 Ala. 2, 10 L. R. A. 430; *State v. Parsons*, 27 S. W. 1102, 1104, 124 Mo. 436, 46 Am. St. Rep. 457.

## PACKAGE.

See "Original Package"; "Single Package."

The term "package" means a bundle or parcel made up of several smaller parcels, combined or bound together in one bale, box, crate, or other form of package. *Haley v. State*, 60 N. W. 962, 963, 42 Neb. 556, 47 Am. St. Rep. 718; *Commonwealth v. Schollenberger*, 27 Atl. 30, 33, 156 Pa. 201, 22 L. R. A. 155, 36 Am. St. Rep. 32.

A package is a number of things done up conveniently for handling and convenience; a bundle put up for transportation or commercial handling. *State ex rel. Gelpi v. Board of Assessors*, 15 South. 10, 11, 46 La. Ann. 145, 49 Am. St. Rep. 318 (cited and approved in *May v. City of New Orleans*, 25 South. 959, 960, 51 La. Ann. 1064).

A package is a bundle put up for transportation or commercial handling. It is a thing in form to become as such an article of merchandise for transportation or delivery from hand to hand. It denotes a thing in form suitable for transportation or handling as an article of sale. *United States v. Goldback* (U. S.) 25 Fed. Cas. 1342.

A package is a bundle or bale made up for transportation. It usually consists of a single article; but, when separate articles are placed together and prepared for transportation in a bundle, bale, box, or other receptacle, they do not form as many separate and distinct packages as there are bundles, though they may be wrapped separately. *State v. Parsons*, 27 S. W. 1102, 1104, 124 Mo. 436, 46 Am. St. Rep. 457; *Keith v. State*, 8 South. 353, 354, 91 Ala. 2, 10 L. R. A. 430.

A "package," within the meaning of a receipt given by a common carrier, providing that the company shall not be liable for any loss or damage to any box, package, or thing for over \$50, means each separate package, although a number of such packages are included in one receipt. *Boscowitz v. Adams Exp. Co.*, 93 Ill. 523, 524, 34 Am. Rep. 191.

## Corn in bulk.

"Package," as used in a printed clause in a bill of lading, restricting a carrier's liability for the loss of packages, does not include 70,000 pounds of corn in bulk. *Rosenstien v. Missouri Pac. R. Co.*, 16 Mo. App. 225, 230.

On receiving certain corn for transportation from Chicago to Baltimore the carrier issued receipts partly in print and partly in writing. The printed part contained the lan-

guage: "The following packages (contents unknown), in apparent good condition." Then followed in writing the number of bushels of corn, and printed conditions, including, "that the defendants are not to be held accountable for any damage or deficiency in packages after the same shall have been receipted for in good order by consignees or their agents at point of delivery." The court held that the term "package," as used in this receipt, referred to any package where the contents were unknown, and that it was not designed to be applied to corn. *McCoy v. Erie & W. Transp. Co.*, 42 Md. 498, 509.

#### Cotton bales.

In a bill of lading limiting the liability of the carrier for loss or damage occurring to "packages" in transit, the word "package" should be construed as embracing cotton bales. *Lamb v. Camden & A. Railroad & Transportation Co.* (N. Y.) 2 Daly, 454, 480.

In a receipt given by a common carrier limiting its liability to a certain sum unless the value of each package is named and stated, the word "package" means small parcels or bundles whose appearance would give no adequate information of their value to the carrier. Bales of cotton and articles of a similar nature, the value of which can easily be seen by a casual inspection, are not packages. *Southern Exp. Co. v. Crook*, 44 Ala. 468, 475, 4 Am. Rep. 140.

#### Liquor.

"Package," as used in Rev. St. § 3449, providing that whenever any person ships any spirituous or fermented liquors or wines under any other than the proper name or brand known to the trade, as designating the kind and quality of the contents of the packages containing the same, he shall forfeit such liquors and "packages," etc., includes every box, barrel, or other receptacle into which distilled spirits have been placed for shipment or removal, either in quantity or in separate small packages, as bottles or jugs. *United States v. 132 Packages of Spirituous Liquors and Wines* (U. S.) 76 Fed. 364, 368, 22 C. C. A. 228.

#### Match box.

A match box of capacity to hold less than 100 matches, which contains two sliding drawers, which are open on the top when drawn out, is but one package, inasmuch as each drawer is not of itself a package in the mercantile sense. *United States v. Goldback* (U. S.) 25 Fed. Cas. 1342.

#### Milk can.

Milk cans are "packages," within a fire policy on a creamery building, butter and cheese manufactured and in process of manufacture, and all materials and supplies for the same, including packages. *Cronin v. Fire*

Ass'n of Philadelphia, 112 Mich. 106, 70 N. W. 448.

#### Oil.

The word "package" includes not only barrels, but casks and small tanks as well, as used in Rev. St. § 5842, fixing a fee for the inspection of petroleum oils, for gauging and branding each barrel or larger or smaller package. *State ex rel. Waters-Pierce Oil Co. v. Baggott*, 8 S. W. 737, 738, 96 Mo. 63.

"Package," as used in the act of 1878, providing for the inspection of illuminating oils, the fees being at a specified rate per barrel, cask, or package, cannot be construed to include a storage tank in which the oil was put, not for the purpose of handling, transportation, or sale, but only for keeping. *Willis v. Standard Oil Co.*, 52 N. W. 652, 653, 50 Minn. 290.

#### PACKET.

A packet is two or more letters under one cover. *Chouteau v. The St. Anthony*, 11 Mo. 226, 230; *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 58, 11 Am. Dec. 133.

A letter is a message in writing. A packet is two or more letters under one cover. The merely covering a parcel of gloves, silk hose, or other merchandise with paper, and directing it to a person to whom it is sent, would not make such parcel a letter, nor is there any difference between such parcel and one containing bank notes. A parcel or bundle of merchandise is not a letter or packet, within St. U. S. 11th Cong. c. 54, § 18, making it unlawful for a carrier of the mail to take any letter or packet and deliver it to the person to whom it was sent. *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 58, 11 Am. Dec. 133.

Rev. St. § 3891, providing for the punishment of any employé of the postal department who shall unlawfully detain, delay, or open any letter, packet, bag, or mail of letters intrusted to him, or which has come into his possession, and which was intended to be carried by mail, etc., means any packet which is mailable, such as merchandise, and not necessarily a bag of letters. *United States v. Blackman* (U. S.) 17 Fed. 837, 838.

#### PACKING HOUSE.

Packing houses are houses used for the purpose of packing meats. *Ford v. State*, 14 N. E. 241, 244, 112 Ind. 373.

#### PACKING HOUSE BUSINESS.

It is a matter of common knowledge that a part of the business of a packing house consists in the sale of products which it pre-



pare for this purpose. It would be sticking in the bark to hold that a firm is doing a packing house business when it is engaged in slaughtering animals and dressing and preparing the products of their carcasses for food and other commercial purposes, but it is not carrying on a packing house business when it is selling fresh, cured, and salt meats, and other products that it has manufactured from the carcasses of slaughtered animals for this very purpose, so that a packing house company located in one state is doing a packing house business when it sells its products in another state. *Stewart v. Kehrer*, 41 S. E. 680, 682, 115 Ga. 184.

## PACKING A JURY.

"Packing a jury," as used in an article in a newspaper charging a justice of the peace with malpractice in packing a jury, must be construed as clearly importing the improper and corrupt selection of a jury sworn and impaneled for the trial of a cause. *Mix v. Woodward*, 12 Conn. 262, 289.

## PAGANISM.

Paganism is the religion of those who have not the knowledge of the true God, but worship idols. *Hale v. Everett*, 53 N. H. 9, 54, 16 Am. Rep. 82.

## PAGE.

A page, when used as a measure of computation, shall mean 224 words. *Rev. Laws Mass.* 1902, p. 1736, c. 204, § 35.

## PAID.

See "Sum Paid"; "To be Paid."

A statute in reference to mortgages executed as a security for the repayment of money to be hereafter lent, advanced, or paid, will be construed to mean "money so paid as to constitute a debt the repayment of which the mortgage is to secure." *Wroughton v. Turtle*, 11 Mees. & W. 561, 568.

A debt is paid when the contract is performed pursuant to the stipulation made; but if, on an agreement, something collateral is received in satisfaction, although the demand is extinguished, the debt, technically speaking, is not paid. *Lockwood v. Sturdevant*, 6 Conn. 373, 390.

*Gantt*, Dig. § 2103, providing that no appeals shall be taken from a justice's judgment after it has been "paid or collected," does not include giving a mortgage for a fine adjudged to the state. *Floyd v. State*, 32 Ark. 200, 202.

In a deed stating that the same was executed "in consideration of our support during

our natural lives and sixty dollars paid to us annually to our satisfaction," the words "paid to our satisfaction" refer to future payments to be made, and is not an acknowledgment that payment had then been made. *Gage v. Hoyt*, 3 Atl. 318, 319, 58 Vt. 536.

"Paid," as used in a will giving and bequeathing all the property, of whatsoever kind, to executors to hold and invest one-half of the principal of the estate "to be paid" to testator's son, is a term applicable exclusively to personalty, and is an indication that the principal of testator's estate should exist in the shape of personalty. *Cook v. Cook* (N. J.) 47 Atl. 732, 733.

The word "paid" is often very loosely used, and always liberally construed. In a will providing that the interest on certain sums should be paid to testator's children annually during life, and after the death of any child the principal should be paid over to such child's children, the direction that the principal should be paid over was obviously used as nothing more than an order of distribution, and the word "paid" was not descriptive of the subject-matter. In *re Sheet's Estate*, 52 Pa. (2 P. F. Smith) 257, 268.

### As contracted for.

In a stipulation in a charter party by which the owner should receive the highest freight which he could prove to have been paid for ships on the same voyage or passage by water, the word "paid" was used in the popular and ordinary sense, meaning "contracted for," and the word would be satisfied by proof of a contract for payment. *Gether v. Capper*, 15 C. B. 696, 701; *Id.*, 29 Eng. Law & Eq. 242, 245.

### As discharged.

In an action against a surety to recover on a bond, it was shown that when the surety had asked the owner of the bond what condition it was in, the holder had stated that the principal had paid or settled the bond, and he, the security, need give himself no further uneasiness about it. In considering this defense, the court said: "The words 'paid' and 'settled,' when used in common conversation in relation to a debt, are understood equally as conveying the idea that the debt is discharged, particularly when, in reply to the question of one so deeply interested in knowing as the security, it is said that the principal has settled the debt, and that he need give himself no further uneasiness about it." *Waters v. Creagh* (Ala.) 4 Stew. & P. 410-414.

### As indicating acceptance.

"Paid," when stamped on a draft, does not indicate a promise. It implies none of the elements of an agreement, and does not amount to an acceptance of the agreement.

*Guthrie Nat. Bank v. Gill*, 54 Pac. 434, 436, 6 Okl. 560.

#### As indicating prior payment.

Where a telegraph message when delivered to the addressee is marked "Paid," it is evidence sufficient to warrant a finding that the telegraph company's charges had been prepaid, and that therefore the message should have been delivered with due diligence, as required by statute. *Conyers v. Post Tel. Cable Co.*, 19 S. E. 253, 255, 92 Ga. 619, 44 Am. St. Rep. 100.

The word "Paid" stamped on a note, and erased by a line being drawn through it, was held not to give notice of a prior payment of the note, the court saying that the reasonable inference was that the word had been placed on the note by mistake. *International Bank v. Bowen*, 80 Ill. 541-546.

#### As obtained.

"Paid," as used in an information alleging that on false representations and pretenses of defendant certain liens and incumbrances were paid, is not equivalent to "obtained," as used in Comp. Laws 1879, c. 31, § 94, providing for the punishment of any one who has obtained money or goods under false pretenses. *State v. Lewis*, 26 Kan. 123, 129.

#### As satisfied.

"Paid," as used in a judgment directing that a certain person be imprisoned until a fine against him be paid, and providing that such imprisonment shall not exceed one day for a certain amount of a fine remaining unpaid, should be construed to mean satisfied. *Ex parte Henshaw*, 15 Pac. 110, 114, 73 Cal. 486.

The word "paid" embraces the meaning of the words "satisfied by payment, redemption, or sale," as used in Laws 1881, c. 135, § 7, providing that a judgment and sale for taxes shall be void upon proof that such taxes shall have been paid. This is within the proper signification of the word itself, among the primary definitions of which are to satisfy; to discharge one's obligation to. *Forrest v. Henry*, 23 N. W. 848, 850, 33 Minn. 434 (citing *Webst. Dict.*).

Pen. Code 1895, § 2224, permitted the court in every case where a defendant, on conviction of crime, was adjudged to pay a fine, to also imprison him "until the fine and costs were satisfied," not exceeding one day for every \$2 of the fine and costs. Laws 1901, p. 167, § 2, provided for the punishment, on conviction of gambling, by a fine and "imprisonment until the fine and costs were paid." Held, that the word "paid" in the latter act was synonymous with the word "satisfied" as used in the general act, and hence a person convicted of gambling could be imprisoned not to exceed one day

for every \$2 of the fine and costs. *State v. Towner*, 67 Pac. 1004, 1005, 26 Mont. 339.

#### PAID IN.

"Paid in," as used in an affidavit stating that a person paid in to the common stock of a firm a certain sum, means paid in cash. The words "paid in" do not comprehend a promise or agreement to pay, but mean actual payment. *Crouch v. First Nat. Bank*, 40 N. E. 974, 979, 156 Ill. 342.

"Paid in" means a payment in money, and not a security by pledge of real estate, as used in Act July 18, 1863, § 81, providing that the certificate of a mining corporation filed with the Auditor General shall set forth the amount of capital already paid in. *Bailey v. Pittsburgh & C. Gas, Coal & Coke Co.*, 69 Pa. (19 P. F. Smith) 334, 341.

#### PAID IN ADVANCE.

A recital in a life insurance policy that the first premium is to be "paid in advance" is held in *Washington Life Ins. Co. v. Menefee's Ex'r*, 53 S. W. 260, 261, 107 Ky. 244, not to be notice to the insured that the general agent of the company has no authority to accept a note for such premiums, the court remarking that in its opinion nine persons out of ten would assume that the execution and acceptance of the note by the agent was a compliance with the provision.

#### PAID UP.

In Acts 15th Gen. Assem. c. 60, § 28, providing that paid-up capital of savings banks shall be subject to the same rates of taxation as other taxable property, the words "paid up," used in connection with capital, distinguish the capital which has come into the actual possession of the bank, from that subscribed, but not paid, and they do not refer to the mode by which the capital was obtained, so as to exclude undivided profits. *Iowa State Bank v. City Council of Burlington*, 61 N. W. 851, 852, 98 Iowa, 737 (citing *Sun Mut. Ins. Co. v. City of New York*, 8 N. Y. [4 Seld.] 241, 247).

A "paid-up insurance policy" is one reduced to an amount corresponding to the premiums paid, so that no further premiums are required. *McQuitty v. Continental Life Ins. Co.*, 10 Atl. 635, 637, 15 R. I. 573.

A "paid-up life policy" is the equivalent of the insurer's bond to pay a sum definite at a time certain or upon the happening of an inevitable contingency. Such a policy has a specific money value, and is a tangible, definable interest in property, subject to the owner's debts. *Planters' State Bank v. Willingham's Assignee*, 63 S. W. 12, 14, 111 Ky. 64.

In the statute providing that in no instance shall a policy be forfeited for non-payment of premiums after the payment of three annual premiums thereon, but in all instances where three annual premiums shall have been paid on the policy of insurance a holder of such policy shall be entitled to paid-up insurance, the term "paid-up insurance" means insurance for life, fully paid up, and not paid up temporary insurance. *Nichols v. Mutual Life Ins. Co.*, 75 S. W. 664, 670, 176 Mo. 355, 62 L. R. A. 657.

"Paid-up" nonassessable stock means a very different thing from stock simply non-assessable. Stock upon which nothing has been paid may be called nonassessable, and may be so treated; but paid-up nonassessable stock can only mean stock that is made non-assessable by reason of the fact that the amount for which it calls has been fully paid. The use of the word "nonassessable" in the clause in question is unnecessary in the connection in which it is found; but that is usual not only in commercial contracts, but also in more solemn writings. The words "paid up" have a meaning which is precise, and they are not, therefore, open to construction; their signification being more specific than that of the word "nonassessable." By no rule of interpretation can they be expunged from the context. *San Antonio St. Ry. Co. v. Adams*, 87 Tex. 125, 26 S. W. 1040, 1042.

"Paid up in full," as used in a report of a corporation made according to the statutes of Massachusetts, stating that the capital stock of the company or corporation had been paid up in full, imports that the capital has been paid in cash, where it is not specified that the whole or some part has been paid in property. *Bonnell v. Griswold*, 89 N. Y. 122, 125.

The term "paid-up stock" in reference to a building association is really an anomaly. Strictly speaking, there can be no such thing, for the moment stock is matured the holder thereof is entitled to his money and his connection with the association ceases, and one who purchases from a building association stock called "fully paid up stock" merely becomes a creditor of the company. *Cashen v. Southern Mut. Building & Loan Ass'n*, 41 S. E. 51, 53, 114 Ga. 983.

## PAIN.

Webster defines "pain" as mental distress, anxiety, grief, anguish, and does not necessarily mean physical pain, and will not be held to mean physical pain in an instruction in a breach of promise case that personal pain suffered by plaintiff might be considered by the jury. *Robertson v. Craver*, 55 N. W. 492, 495, 88 Iowa, 381.

In construing a pardon whereby a convict was released "from all pains, penalties,

and forfeitures that might or would have been inflicted on him," the court said: "Payment of the costs of the prosecution cannot be regarded as a pain, penalty, or forfeiture, within the meaning of the pardon. The term 'pain' imports some bodily suffering or corporeal infliction, while the terms 'penalty' and 'forfeiture' are used to signify an involuntary transfer or surrender of a sum of money or of property imposed by way of punishment for the commission of an offense against the law." *Anglea v. Commonwealth* (Va.) 10 Grat. 696, 700.

## PAINS AND PENALTIES.

See "Bill of Pains and Penalties."

## PAINTER.

A "painter" is defined to be one who represents the appearance of natural or other objects on a surface by the means of colors. There is a marked distinction between a painter and a photographer, though both be artists, as more dexterity is required in the former than the latter. *City of New Orleans v. Robira*, 8 South. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141.

## PAINTING.

Antique mythological paintings of great value, made of copper and enameled by a process not now understood, are within Tariff Act July 24, 1897, par. 454, Schedule N, § 1, c. 11, as paintings in oil or water color, the evidence appearing to show that although they were enameled the painting was done in water or lavender oil. *Amerman v. United States* (U. S.) 124 Fed. 298, 299.

### Painted fans.

"Paintings," as used in Tariff Act Oct. 1, 1890, par. 465, includes fans composed of silk and bone, upon which are executed artistic paintings in water colors of high value and merit, and which are displayed as ornaments, and not used as fans ordinarily are. *Tiffany v. United States* (U. S.) 66 Fed. 736, 737.

### Glass windows.

The term "paintings" does not include plain glass windows containing representations of saints and other Biblical subjects, and imported in a fragmentary state for the use of a convent, as used in Tariff Act Oct. 1, 1890, par. 677, exempting paintings from duty. While church windows are artistic in the sense of being beautiful, and require a high degree of artistic merit for their production, they are ordinarily classified in foreign exhibits as among the decorative and industrial rather than among the fine arts, and in the catalogues of manufacturers and dealers in plain glass no distinction is made

between such windows and other plain or painted glass windows. *United States v. Perry*, 13 Sup. Ct. 26, 28, 146 U. S. 71, 36 L. Ed. 858 (reversing *In re Perry* [U. S.] 47 Fed. 110, 111.)

#### Paintings on porcelain.

The term "paintings," not otherwise provided for in a tariff act fixing a duty on such paintings, includes pictures painted by hand on porcelain, which does not by itself constitute any article of chinaware. *Arthur v. Jacoby*, 103 U. S. 677, 678, 26 L. Ed. 454.

Artistic paintings in oil upon a plain slab of porcelain, intended and used mostly for ornamental purposes, and not susceptible to any other use, and whose valuable and distinctive feature is the painting and not the porcelain, are dutiable as "paintings in oil or water color," under paragraph 465 of the tariff act of 1890, and not as "porcelain ware painted," under paragraph 100. *In re Davis Collamore* (U. S.) 53 Fed. 1006.

#### Painted wood ceilings.

"Paintings in oil," in Tariff Act 1897, par. 454, includes ceilings painted on wood taken from a palace in Italy. *White v. United States* (U. S.) 113 Fed. 855.

### PAIR.

One pair of boots means two boots paired, matched, or suited to be used together, so that proof that defendant stole two boots, both for the right foot, does not support an indictment for the theft of one pair of boots. *State v. Harris* (Del.) 3 Har. 559.

The words "a pair of horses" will ordinarily be understood to mean a match pair, or at least a pair mated and used together. *Golden v. Cockrill*, 1 Kan. 259-266, 81 Am. Dec. 510.

By the provision of Code Civ. Proc. § 530, a debtor engaged in the business of agriculture is entitled to select and hold as exempt from execution "a pair of horses." Under this statute he may exercise his own discretion in the selection of such horses, and is not limited to any particular ones; he may select from any horses owned by him. It does not mean a team. *Conway v. Roberts*, 38 Neb. 456, 56 N. W. 980.

A "pair of shoes," as used in an indictment for larceny describing the property stolen as a "pair of shoes," will be understood to mean a covering for the human foot—footwear used by mankind; so that an indictment charging the theft of a "pair of shoes" is sufficient, though shoes are used to protect the hoofs of horses. *Palmer v. State*, 36 N. E. 130, 131, 136 Ind. 393.

### PALM OFF.

"To palm off" means to impose by fraud; to put off by inferior means. The language also imports that plaintiff must have been deceived and cheated by the representations, which he could not have been had he not relied upon them. *Hobart v. Young*, 21 Atl. 612, 613, 63 Vt. 363, 12 L. R. A. 693.

### PALMISTRY.

"Palmistry" is a crafty science—that is, one by which the simple minded are apt to be deceived; and was so used by one accused of practicing it when from the lines on the palm of the complaining witness he foretold the age at which she would marry. *State v. Kenilworth*, 54 Atl. 244, 245, 69 N. J. Law, 114.

### PALPABLE.

In a statute making the county superintendent of schools liable to removal by the county board for any "palpable" violation of law or omission of duty, the word "palpable" embraces the idea of an intentional and substantial failure to perform the duties imposed by law, partaking of the nature of a willful or gross neglect of the officer to attend to his duties. It would be a too restricted use of the word to give it the sense only of "easily perceived," "plain," or "obvious," as such a construction would make the officer liable to removal when he had omitted to perform any of the duties of the office, although his failure to perform the same may have occurred through accident, mistake, or some personal inability, arising from illness or other cause, for which he might not be in any degree responsible, which certainly could not have been contemplated by the Legislature as a cause for removing him. *People v. Mays*, 17 Ill. App. (17 Bradw.) 361, 366, 367.

### PAMPHLET.

In construing the statute prohibiting the mailing of obscene books, pamphlets, pictures, papers, writings, print, or other publication, etc., the United States Supreme Court in *United States v. Chase*, 10 Sup. Ct. 756, 135 U. S. 253, 34 L. Ed. 117, say: "In the statute under consideration the word 'pamphlet' is used as one of a group or class of words, 'book,' 'pamphlet,' 'picture,' 'paper,' 'writing,' 'print,' each of which is ordinarily and prima facie understood to be a publication, and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and defines each with the common quality indicated. It must, therefore, according to a

well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written." *United States v. Warner* (U. S.) 59 Fed 355, 356.

## PANEL

See "Challenge to the Panel"; "Regular Panel."

The statute entitled "jurors" provides that the panel of a grand jury shall consist of 23 persons, 16 of whom shall constitute a grand jury. Held, that the word "panel" is used in its commonly accepted sense. It is equivalent with list, catalogue, inventory, schedule, register. Blackstone defines it as a schedule containing the names of persons whom the sheriff returns to serve on trials. *Beasley v. People*, 89 Ill. 571, 575.

Cr. Prac. Act, § 337, provides that a challenge may be made to the panel on account of any bias of the officer summoning them which would be good ground of challenge to a juror. Held, that the word "panel" includes the juror's return on a special venire to fill out a deficiency after the regular panel has been exhausted. *People v. Coyo-do*, 40 Cal. 586, 592.

The "panel" is a list of jurors returned by a sheriff to serve at a particular court, or for the trial of a particular action. Pen. Code Cal. 1903, § 1057; Rev. Codes N. D. 1889, § 8144; Code Crim. Proc. S. D. 1903, § 319; Pen. Code Idaho 1901, § 5416; Rev. St. Utah 1898, §§ 3138, 4818; Rev. St. Okl. 1903, § 5454.

By the word "panel" is meant the whole body of grand jurors. Code Crim. Proc. Tex. 1895, art. 399.

## PANTOMIME

A species of theatrical entertainment, in which the whole action is represented by gesticulation, without the use of words, and is a dramatic composition, within the copyright laws. *Daly v. Palmer* (U. S.) 6 Fed. Cas. 1132, 1136.

## PANTS.

An indictment charging the larceny of a pair of pants was not misleading, and sufficiently described a thing which may be made the subject of larceny; for in common parlance the word "pants" has completely superseded the word "pantaloons," and is an appropriate designation of the same thing. *State v. Johnson*, 30 La. Ann. 904, 905.

## PAPER.

See "Accommodation Paper"; "Approved Bill or Paper"; "Commercial Paper"; "Commonwealth Paper"; "Corporate Paper."

In construing the statute prohibiting the mailing of obscene books, pamphlets, pictures, papers, writings, print, or other publication, etc., the United States Supreme Court, in *United States v. Chase*, 10 Sup. Ct. 756, 135 U. S. 255, 34 L. Ed. 117, say: "In the statute under consideration the word 'paper' is used as one of a group or class of words—'book, pamphlet, picture, paper, writing, print'—each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and defines each with the common quality indicated. It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written." *United States v. Warner* (U. S.) 59 Fed. 355, 356.

"Paper," as used in Rev. St. § 3893, providing that every obscene, etc., book, pamphlet, picture, paper, etc., or other publication, of an indecent character, shall be nonmailable matter, etc., comprehends anything that has on it what is obscene or lewd. *United States v. Gaylord* (U. S.) 17 Fed. 438, 441.

Several depositions attached together and filed are a single paper, and not each a paper, within the meaning of Rev. St. § 828, allowing a certain fee for filing and entering every declaration, plea, or other paper. *United States v. Barber*, 11 Sup. Ct. 749, 751, 140 U. S. 177, 35 L. Ed. 398.

Rev. St. § 2503, reducing the duties on all "paper and manufactures of paper," excepting unsized printing paper, books, and other printed matter, cannot be construed to include books. No man of literary culture would call a book "paper" or a "manufacture of paper," any more than he would designate a masterpiece of Raphael as "canvas" or a "manufacture of canvas." By a license of speech, it is true, he might say that a particular book was mere waste paper or rubbish, or that a particular picture was nothing but a piece of spoiled canvas, but, speaking seriously and in accordance with good usage, he would not make such an application of terms. *Pott v. Arthur*, 104 U. S. 735, 26 L. Ed. 909.

Rev. St. 1881, § 1997, making it criminal to deposit any obscene or indecent paper in the post office, was construed to include a letter. "The word 'paper,' in its ordinary

signification, may mean either a written or printed paper." Papers "may consist partly of writing and partly of print, or entirely of the one or the other." *Thomas v. State*, 2 N. E. 808, 810, 103 Ind. 419.

The term "paper," in a contract for the furnishing of apparatus to make paper, includes all the various qualities of the article thus denominated, including pasteboard, which is a paper of a coarse and inferior quality. *Patteson v. Garet*, 30 Ky. (7 J. J. Marsh.) 112-115.

The word "paper" means any flexible material upon which it is usual to write. *Rev. Codes N. D. 1899*, § 5120; *Civ. Code S. D. 1903*, § 2454; *Rev. St. Okl. 1903*, § 2793.

#### PAPER CURRENCY.

See "United States Paper Currency."

In a certificate of deposit containing a promise to pay a certain number of dollars, paper currency, the term "paper currency" was defined by the court to mean "the legal tender paper currency, which, under the United States laws and decisions, is money." *Frank v. Wessels*, 64 N. Y. 155, 158.

"Paper currency of the United States, commonly called greenbacks," designates notes or bills circulating by authority of the general government as money, and includes both United States treasury notes, and those issued for circulation by national banks. An indictment charging that accused took and carried away a certain number of dollars in "paper currency of the United States, commonly called greenbacks," is sufficient, without other averment of value, since the court judicially knows that such paper currency is of its face value. *Turner v. State*, 27 South. 272, 274, 124 Ala. 59.

#### PAPER HANGING MATERIAL.

16 Laws, c. 145, § 4, extending the scope of mechanics' liens to work and materials for plumbing, gas fitting, paper hanging, paving, etc., held not to include materials furnished for upholstering a hall. *McCartney v. Buck* (Del.) 12 Atl. 717, 719, 8 Houst. 34.

#### PAPER IN THE CASE.

A bill of exceptions, including a long-hand manuscript of the evidence, made a part of it, is, when filed, a "paper in the case." *Hull v. Louth*, 10 N. E. 270, 280, 109 Ind. 315, 58 Am. Rep. 405.

#### PAPER MONEY.

Throughout the resolutions of Congress and the acts of our Legislature, "paper money" and "bills of credit" are used as synony-

mous. *State v. Billis* (S. C.) 2 McCord, 12-17.

The common term "paper money" is, in a legal sense, quite as accurate as the term "coin money." *Klauber v. Biggerstaff*, 3 N. W. 357, 359, 47 Wis. 551, 32 Am. Rep. 773.

#### PAPER MILL.

A paper mill, insured as such against fire, and described as such in the policy, did not cease to be a paper mill when its use as such was discontinued, and a pair of millstones added for grinding grain, which were located in the place previously occupied by the rag cutter and duster, which were moved by the same gearing and by the power of the same water wheel, no other machinery being used for the grindstones, but all remained as it was, except the rag cutter and duster, which were dismantled, and all the other machinery might at any time have been employed in making paper, it was, to all intents and purposes, a paper mill ready for use. The character of the establishment was no more altered than if a grindstone had been attached by a band to the water wheel, and all the other machinery left at rest. *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 545, 35 Am. Dec. 92.

The term "paper mill," as used in all laws relative to the employment of labor, shall mean any premises in which the manufacture of paper is carried on. *Rev. Laws Mass. 1902*, p. 917, c. 106, § 8.

#### PAPERS.

See "Original Papers"; "Valuable Papers."

Within the meaning of Const. art. 1, § 8, providing that "all people shall be secure in persons, houses, papers, and possessions from unreasonable searches and seizures," the word "papers" must be taken to mean writings, not pieces of paper, as mere inanimate goods, but papers on which are written or printed words that may be shown in evidence as words of a suspected man; and the court held that an envelope merely containing a picture was not "papers" within the meaning of that term as used in the Constitution. *State v. Griswold*, 34 Atl. 1046, 1047, 67 Conn. 299, 33 L. R. A. 227.

A will by which the testatrix gave to a certain person "all my books and papers of every description" should be construed to include the Bible and other religious works, tracts, pamphlets, manuscripts, memoranda, etc., the account books of the deceased, and the promissory notes, bonds, certificates of stock, and other evidences of debt due to her, for in commercial usage, and to a very great extent in common parlance, all such securities as notes, bonds, certificates,

bills of exchange, drafts, etc., are included under the definition of "papers." *Perkins v. Mathes*, 49 N. H. 107, 110.

The term "papers," from which the amount of the judgment is to be ascertained by a simple calculation, where defendant defaults, under Code, § 2952, was held to refer to the writing or other evidence upon which the action was founded, and not to the pleadings in the cause. *Williams v. Inman*, 45 Tenn. (5 Cold.) 267, 269 (citing *Masonic Educational Ass'n v. Cook*, 40 Tenn. [3 Head] 313).

Under Code, § 2952, providing that a default judgment is final if the amount of the plaintiff's claim can be ascertained by a simple calculation from the papers, the term "papers," in a suit on a note, includes the note and protest thereof. *Williams v. Bank of Tennessee*, 41 Tenn. (1 Cold.) 43, 46.

#### In evidence.

"Papers," as used in Code, c. 131, § 12, providing that papers read in evidence, though not under seal, may be carried from the bar by the jury, means documentary evidence, and not depositions. "Depositions," in legal parlance, are not known as "papers." *State v. Cain*, 20 W. Va. 679, 707.

The phrase "papers which have been received in evidence," in Pen. Code, § 1137, authorizing juries to take with them all papers which have been received as evidence, does not include a diagram not claimed or purported to be an actual representation, but used only to illustrate the testimony of a witness. *People v. Cochran*, 61 Cal. 548-553.

Civ. Prac. Act, § 231, declares that, on the retiring of the jury for deliberation, they may take with them, among other things, all papers which have been received as evidence at the trial, etc. Held, that since the intention of the Legislature was to authorize the admission in evidence of that which may be upon papers, rather than of the papers themselves, the writing, diagram, mark, or spot which under the section would be admissible to the jury room if on paper, according to the liberal construction of the Code, must also be admissible if on bone, wood, cloth, stone, metal, or any other substance; and, having gotten thus far, the spirit of the section requires the admission of any exhibit standing within the same reason, whether it be blank paper, or blank anything else, moist or dry, solid or liquid; and therefore the section may be construed to authorize the court to introduce to the jury room an article of personal attire, such as a hat, shirt, etc. *Dr. Jack v. Territory*, 3 Pac. 832, 835, 2 Wash. T. 101.

"Papers," as used in Cr. Prac. Act, § 354, providing that a new trial shall be

granted when the jury receive in evidence papers or documents not authorized by the court, means written statements or documents, and not newspapers. *State v. Jackson*, 24 Pac. 213, 216, 9 Mont. 508.

Rev. St. § 868, providing that a subpoena duces tecum may be issued to compel the production of any "paper or writing or written instrument, or book or other document," should be construed to include only documentary evidence, and not to include patterns for a stove. *In re Shephard* (U. S.) 3 Fed. 12, 13.

"Paper," as used in Code, § 1105, authorizing a new trial when the jury has received any evidence, paper, document, or book not allowed by the court, to the prejudice of the substantial rights of the defendant, means a paper not in evidence, since it would be included in the term "evidence," as used in the statute, if it had been introduced in evidence. *Dr. Jack v. Territory*, 3 Pac. 832, 836, 2 Wash. T. 101.

#### PAPERS ON APPEAL.

The paper books and points and authorities are "papers on appeal" within Comp. St. c. 578, § 9, declaring that disbursement for printing papers on appeal may be recovered as costs, but long duplicate arguments are not. *Hart v. Marshall*, 4 Minn. 552 (Gil. 434).

#### PAPIER-MACHE.

Articles invoiced, known, and sold as "papier-maché" are dutiable as papier-maché. They cannot be relieved from payment of duty as such on the ground that every constituent of true papier-maché was not present in the composition of which they were made. *Wanamaker v. Cooper* (U. S.) 69 Fed. 465, 467.

#### PAR.

"Par" is the Latin word for "equal." It has been adopted in the English language, and continues to have the same meaning, and no other. Bills of exchange are at par, above par, or below par. Bills are at par when they are sold at their nominal amount for coin or its equivalent. *Castle v. Kapena*, 5 Haw. Rep. 27, 32.

The word "par" means equal, and to say that a bond is valued at par means that its value is equal to the face of the bonds. *Village of Ft. Edward v. Fish*, 50 N. E. 973, 974, 156 N. Y. 363.

"Par" is equal. The word is used to denote a state of equality or equal value. Bills of exchange, stocks, and the like, are at par when they sell at their nominal value;

above or below par, when they sell for more or less. Under such definition, the par value of a bond is not merely the principal sum due, but that sum with the accrued interest added. *Evans v. Tillman*, 17 S. E. 49, 53, 38 S. C. 238 (citing *Delafield v. Illinois* [N. Y.] 2 Hill, 159; *Appeal of Hogg*, 22 Pa. [10 Harris] 479).

Under a statute imposing a penalty on banks for failing to keep their notes at par, it is held that that term signifies a currency ordinarily equal to gold or silver for all purposes, financial and commercial. *Harrisburg Bank v. Commonwealth*, 26 Pa. (2 Casey) 451, 455.

"Par," within the meaning of the statute authorizing a city to subscribe to the stock of a railroad company, and to sell such stock as soon as can be at par, was construed to mean an amount equal to the amount subscribed. *Town Council of Town of Newark v. Elliott*, 5 Ohio St. 113-120.

"Par," as used in a note for so many dollars to be paid in currency that is at par, is to be construed, in the absence of evidence, to mean currency equal to gold. *Crim v. Sellars*, 37 Ga. 324, 326.

Where a note is payable in the notes of the chartered banks of Mississippi at par, it means that those notes are to be taken as at par; that is, without discount or premium. *Smith v. Elder* (Miss.) 7 Smedes & M. 507, 512.

The word "par," in the constitutional provision that until the bonds of the state shall be at par the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the state, except to supply a casual deficit, etc., means at par with gold and silver, or with the legal tender notes of the United States. It cannot mean at par with the work of the contractor, or at par with any piece of land or other property which the state may think proper to buy, because the value of these things is uncertain, and rests only in opinion and agreement. Such a construction would deprive the words "at par" of all definite meaning. *Galloway v. Jenkins*, 63 N. C. 147, 160.

#### PAR OF EXCHANGE.

The term "par of exchange" was a phrase formerly current among merchants and bankers, which meant the value of the pound sterling. *Commonwealth v. Haupt*, 22 Mass. (10 Allen) 38, 44.

"Par of exchange" is the value of money of one country in that of another, and it may be either real or nominal. *Blue Star S. S. Co. v. Keyser* (U. S.) 81 Fed. 507, 510.

Rev. St. U. S. 1873, § 3565 [U. S. Comp. St. 1901, p. 2376], provides that "in all payments by or through the treasury, where it becomes necessary to compute the value of the sovereign or pound sterling it shall be deemed equivalent to \$4.86 and  $6\frac{1}{2}$  mills, and this valuation shall be the par of exchange between Great Britain and the United States." By "par of exchange" is here meant the precise equivalent or value of the gold coins of the two nations—the relative melting value of each. *Murphy v. Kastner*, 24 Atl. 564, 566, 50 N. J. Eq. (5 Dick.) 220.

#### PAR VALUE.

As used in the statute authorizing commissioners to sell certain bonds or certificates of public stocks of the state at not less than par value, the term "par value" can mean nothing else than pound for pound or dollar for dollar. *Delafield v. Illinois* (N. Y.) 2 Hill, 159, 172.

The term "par value," as used to refer to the value of bonds, etc., means a value equal to the face of the bonds. *Village of Ft. Edward v. Fish*, 50 N. E. 973, 974, 156 N. Y. 363.

The state of Illinois authorized its Governor to issue and sell bonds in order to raise a certain amount of money, providing, however, that the bonds should not be sold for less than their par value. A loan was effected upon the promise that the money should be paid by installments and at deferred periods, but that interest should commence immediately upon the whole sum, and the bonds were issued and delivered to the lender. It was held that in selling the stock upon credit, and in agreeing that the interest thereon should commence running previous to the advance of the money, there was virtually a sale for less than the par value of the bonds. *Delafield v. Illinois* (N. Y.) 26 Wend. 192, 224; *Illinois v. Delafield* (N. Y.) 8 Paige, 527, 536.

Act Dec. 8, 1873, incorporating a railway company, and giving the company an authority to borrow money not exceeding in amount one-half of the "par value of the capital stock," means the amount of paid-up capital, only, and not the full amount of the authorized capital. *Commonwealth v. Lehigh Ave. Ry. Co.*, 18 Atl. 498, 499, 129 Pa. 405, 5 L. E. A. 367.

The term "par value" has such a well-known meaning not only in commercial and financial circles, but as applied to ordinary and everyday business affairs, that resort to the authorities for a definition would appear to be needless. It is sufficient to say that the authorities hold that, in determining par value, the interest accrued up to the time of fixing the value must be included with the



principal. *People v. Miller*, 82 N. Y. Supp. 621, 623, 84 App. Div. 168.

The par value of a treasury note or bank bill is the sum named on its face because the holder can demand and is entitled to receive that sum for it from the government, or the bank by which it was issued. The par value of a treasury note for \$1 is \$1, because that sum in coin can be had for it. *Commonwealth v. Lehigh Ave. Ry. Co.*, 18 Atl. 498, 500, 129 Pa. 405, 5 L. R. A. 367.

The charter of a certain railroad company provided that the company should have power to borrow money in any sum not exceeding one-half of the par value of the capital stock. The authorized stock of the corporation was \$1,000,000, but only 10 per cent. of this sum was ever paid in. Held that, for the purpose of determining the amount of money which might be borrowed, the capital stock must be measured, not by the nominal or authorized capital, but by the actual amount paid in, and that the expression "par value" did not change this rule. The par value of all the shares was the amount paid upon them—the value they represented. The construction making the words "par value" equivalent to "nominal value" overlooks the meaning of the word "value." The stock stands in the hands of the holders for so much and no more than the amount actually paid upon it, and its equivalent or par can only be ascertained by the value which it represents. *Commonwealth v. Lehigh Ave. Ry. Co.*, 18 Atl. 498, 499, 129 Pa. 405, 5 L. R. A. 367, 24 Wkly. Notes Cas. (Pa.) 530, 533.

## PARADOX.

A paradox is a proposition seemingly absurd, yet true in fact. An instance is that under the laws of Alabama, and under an indictment charging defendant with two distinct felonies, two verdicts rendered at different terms of the primary court, the first expressly finding him guilty of one of the felonies, the second expressly finding him guilty of the other, may, when accompanied by an unauthorized discharge of the second jury, amount to an acquittal, and operate as such. *Bell v. State*, 48 Ala. 684, 691, 17 Am. Rep. 40.

## PARAGRAPH.

The term "paragraph," as used in code pleading, means the entire or integral statement of a cause of action. It is the equivalent of "count" at common law. It may embrace one sentence or many sentences, but, whether one or many, it constitutes a statement of a single cause of action. *Bailey v. Mosher* (U. S.) 63 Fed. 488, 490, 11 C. C. A. 304.

"Paragraph," as defined by Webster, is a distinct part of a discourse or writing—any

section or subdivision of a writing or chapter which relates to a particular point, whether consisting of one or many sentences. This division is sometimes noted by the mark (1), but usually by beginning the first sentence of the new paragraph on a new line, and at more than the usual distance from the margin, and hence an instruction numbered 7 will be treated as a paragraph of that number. *McClellan v. Hein*, 77 N. W. 120, 123, 56 Neb. 600.

Paragraphs in a pleading are only convenient subdivisions of that larger and more comprehensive statement which the rules of good pleading require to embody the essential elements of fact which lead to a legal conclusion, sufficient for the purpose of the pleader. Paragraphs are rarely intended to be sufficient for the purpose of the statement of a cause of action on the ground of defense or reply. *Hill v. Fairhaven & W. R. Co.*, 52 Atl. 725, 726, 75 Conn. 177.

In Act Cong. Oct. 1, 1890, reducing the revenue and equalizing duties, providing that certain duties shall be levied and collected according to the rights respectively prescribed by "the schedules and paragraphs," the word "paragraphs" is synonymous with the word "sections." *Marine v. Packham* (U. S.) 52 Fed. 579, 581, 3 C. C. A. 210.

## PARALLEL

A provision in a paving ordinance that the surface of the concrete base on which the pavement is to rest shall be "parallel with the surface of the pavement" does not mean that such base shall be on a level with such surface, but means that the line of the surface of the concrete bed shall be parallel with a certain stated number of inches below the surface of the line of pavement when completed. *Cunningham v. City of Peoria*, 41 N. E. 1014, 1016, 157 Ill. 499.

### Parallel boundaries.

By mathematical definition, parallel lines are straight lines, but, in common speech about boundaries, the words are often used to represent lines which are not straight, but photographs of each other; and courts, in passing on questions of boundaries, often use them in the latter sense. The term is used for the want of a better, and not because it in all respects affects the use to which it is applied. It is so used to avoid circumlocution, and, while such use is not exactly correct, there is no difficulty in understanding the meaning or intention. *Fratt v. Woodward*, 32 Cal. 219, 230, 91 Am. Dec. 573.

### Parallel railroads.

"Parallel," as used in Const. Ill. art. 11, § 11, forbidding consolidation of parallel railroads, is not employed in its merely geographical sense. It does not mean two lines of

railway that are equidistant from each other. It means lines of railway having the same general direction, and therefore likely to come in competition with each other. *East St. Louis Connecting Ry. Co. v. Jarvis* (U. S.) 92 Fed. 735, 742, 34 C. C. A. 639.

"Parallel railroads," as used in Const. art. 15, § 6, providing that no railroad corporation shall consolidate with any other railroad corporation owning or having under its control a parallel or competing line, etc., means railroads running in one general direction, traversing the same section of country, and running within a few miles of one another throughout their respective routes, and does not include exact parallelism. *State v. Montana R. Co.*, 53 Pac. 623, 627, 21 Mont. 221, 45 L. R. A. 271.

The term "parallel line," in the clause of the Constitution forbidding any railroad corporation to in any way control any other corporation having in its control a parallel or competing line, is not limited in its operation to a railroad completely constructed, but includes a projected road surveyed, laid out, and in the process of construction. *Pennsylvania R. Co. v. Commonwealth* (Pa.) 7 Atl. 368, 373.

The term "parallel and competing roads," within the meaning of Const. Ky. 1891, § 201, prohibiting the consolidation of a railroad with a parallel or competing road, applies to two roads which connect two important cities, and are natural competitors for the traffic between such cities. *Louisville & N. R. Co. v. Kentucky*, 18 Sup. Ct. 714, 719, 161 U. S. 677, 40 L. Ed. 849.

#### Parallel street railroads.

To constitute the parallelism meant by Sess. Acts 1859-60, p. 516, providing that no street railroad should thereafter be constructed in the city of St. Louis within a certain distance of a parallel road, it is not necessary that every portion of the road being built shall be parallel with the road already constructed, nor is it necessary that the greater portion thereof should be so parallel, for that would be to make the solution of the question depend, not upon the extent to which the roads are in fact parallel, but upon the length of those portions of the road which are not parallel. Railroads so constructed that their general direction is substantially the same for the distance of nearly two miles, and for one-half a mile of that distance they are exactly parallel, are substantially parallel roads. *St. Louis R. Co. v. Northwestern St. L. Ry. Co.*, 69 Mo. 65, 71.

"Parallel," as used in Pub. St. c. 113, § 47, providing that commutation checks on street railways shall not entitle the holder to passage over the same road on which the check was issued, or a route parallel thereto, includes a road returning substantially to

the same point as the road over which the check was bought, although by a circuitous route. *Cronin v. Highland St. Ry. Co.*, 10 N. E. 833, 836, 144 Mass. 249.

#### Parallel telegraph line.

The word "parallel," as used in Code, § 1287, authorizing telegraph and telephone companies to erect lines along and parallel to railroads, cannot be taken in its primary and scientific meaning, as lines extending in the same direction, and in all parts equally distant, but, rather, is used in the sense of "conforming to," "having the same direction or tendency" with the railroad, in order to guard against any undue interference with or hindrance to the railroad company in the enjoyment of its property. If a telegraph company were not authorized to build its line along the railway's right of way, the building of the telegraph lines would be a matter of indifference to railroad companies, and the fact that they are mentioned in the statute leads one to the conclusion that they are entitled to build their lines over the rights of way of the railroad; and this construction is strengthened by section 1288, providing that a telegraph company may contract with any person or corporation or the owner of lands over which such line is proposed to be constructed. *Postal Tel. Cable Co. v. Farmville & P. R. Co.*, 32 S. E. 468, 470, 96 Va. 661.

Code, § 1287, providing that telegraph companies may construct their lines along and parallel to any railroad, does not authorize the condemnation of a right of way along and upon the right of way of a railroad company. The lexicographers' definition of "along" is "by the length of," as distinguished from "across," and the words "parallel to," as used without it, would bear a signification dependent on the context or subject-matter, either as extended in the same direction, or having the same direction or tendency, or like and similar; but "parallel," when used with the word "along," means to run the line lengthwise, alongside, but equidistant from, the railroad right of way. *Postal Tel. Co. v. Norfolk & W. R. Co.*, 14 S. E. 803, 805, 88 Va. 922.

#### PARAMOUNT.

The word "paramount," when used as descriptive of the rights which an electric car has in a street, means no more than that the right which such a car has in a street is only that other travelers shall turn off from its track in reasonable time to allow it to pass, but the car must be so managed as not to do any unreasonable injury to other travelers, and must be stopped if it appears that the other traveler is not turning out. *Laufer v. Bridgeport Traction Co.*, 37 Atl. 379, 382, 68 Conn. 475, 37 L. R. A. 533.

**PARAMOUNT TITLE.**

The words "paramount title," in the rule that a tenant can only plead an eviction by a paramount title as an excuse for the non-payment of rent, are used in a general, and not technical, sense, to distinguish an eviction by one having lawful authority to hold, as against the tenant, from an eviction by a mere trespasser. The rule applies only where a tenant is evicted by one having the right of possession. *Hoopes v. Meyer*, 1 Nev. 423, 444.

**PARANOIA.**

"Paranoia" is the technical name of the form of insanity commonly known as "monomania." *People v. Braun*, 53 N. E. 529, 531, 158 N. Y. 558.

"Paranoia" is the name given to a group of mental conceits, of which the most characteristic is a sense of injury or unjust persecution, and consequently justifiable resentment or redress. Persons subject to paranoia are under a network of fixed and systematic delusions, and have impulses they do not resist, which at times take a form injurious to others, if the delusions so prompt. *Winters v. State*, 41 Atl. 220, 222, 61 N. J. Law, 613.

"Paranoia" is a form of mental distress known as "delusional insanity," and a person inflicted with such mental disease has a delusion or delusions which dominate, but do not destroy, the mental capacity, and, though sane as to other subjects, on that of the delusion and its direct consequences the person is insane. *Flanagan v. State*, 30 S. E. 550, 551, 103 Ga. 619.

**PARAPHERNAL**

Code, art. 2383, provides that "all property which is not declared to be brought in marriage by the wife, or to be given to her in case of the marriage, or to belong to her at the time of the marriage, is paraphernal." This definition excludes donations given in case of the donor's intended marriage. *Cambre v. Grabert*, 33 La. Ann. 246, 247.

**PARAPHERNALIA.**

"Paraphernalia," as used in the Spanish law, "is all the estate and things, whether movable or immovable, which the wife retains separately, and which are not comprehended in the dowry." *Cutter v. Waddingham*, 22 Mo. 206, 255 (citing 1 M. & C. Partidas, 523).

At common law the paraphernalia of a wife was of two kinds—first, clothing, bedding, etc., suitable to her condition in life; and, second, her ornaments. *Sawyer v. Sawyer*, 28 Vt. 249, 251.

A wife's paraphernalia, which she is entitled to retain against the administrator of her husband, as exempt from the debts of the latter, comprise such apparel and ornaments as are suitable to her condition in life. A gold watch worth \$100, the gift of a husband to his wife, cannot be considered as among the paraphernalia of the wife, when the husband at the time of the gift was a man of limited means or small property, and afterwards died insolvent. *Vass v. Southall*, 26 N. C. 301, 303.

The paraphernalia of a wife at common law consisted of such jewels, articles of luxury, or of personal ornament and decoration, as were used by the wife, and suitable to her condition. Such property could be disposed of by the husband during his lifetime, but he could not alienate it at his death; and the right of the widow to that portion of the estate was absolute and exclusive except as to creditors. A watch worn by a wife constitutes a part of her paraphernalia. *Howard v. Menifee*, 5 Ark. 668, 671.

**PARCEL.**

See "Separate Tracts or Parcels."

As a bundle or package.

"Parcel" signifies a part of the whole, taken separately, and has for one of its meanings "a small bundle." An indictment charging the theft of a parcel of oats, is sufficiently certain. *State v. Brown*, 12 N. C. 137, 138, 17 Am. Dec. 562 (citing *Johns. Dict.*).

Twenty ears of wheat constitute a parcel, but the word is not equivalent to "cock, mow, or stack"; and an indictment for setting fire to a parcel of corn is too indefinite, within 9 Geo. I, c. 22, making it a felony to set fire to any house, or any cock, mow, or stack of corn. *Rex v. Judd*, 2 Term R. 255, 256.

"Parcel," as used in Rev. St. § 3437, providing that friction matches in parcels or packages containing 100 matches or less shall be stamped with a one cent stamp on each parcel or package, means a small package. The word "parcel" being the diminutive of the word "package," it means a bundle put up for transportation or commercial handling. The word "parcel" denotes a thing in form suitable for transportation or handling as an article of sale. A match box of capacity to hold less than 100 matches, which contains two sliding drawers, which are open on the top when drawn out, is but one parcel, inasmuch as each drawer is not of itself a parcel, in the mercantile sense. *United States v. Goldback* (U. S.) 25 Fed. Cas. 1342.

A basket of fish may be described as a parcel, within St. 39 Geo. III, c. 58, requiring a forfeiture from every porter, or other

person employed in the portorage or delivery of boxes, baskets, packages, and parcels, who shall take for the same a greater sum than the prices fixed. *Rex v. Douglass*, 1 Camp. 212, 213.

#### As a tract of land.

A "parcel of land" or "parcel of real property" means a contiguous quantity of land in possession of, or owned by, or recorded as the property of, the same claimant, person, or company. *State v. Jordan*, 17 South. 742, 745, 36 Fla. 1.

The words "piece" and "parcel," as used in Acts 1891 (Ex. Sess.) c. 26, § 17, providing that, where taxes are collected for the filing of the bill for the collection of taxes, a fee of \$1 to the attorney for each piece or parcel of land shall be paid by the owner, mean the same thing, and are used to designate that particular area of real estate which should be certified to the attorney as having been properly valued and taxed separate and apart from all other real estates. *State v. Baldwin University*, 87 S. W. 1, 2, 97 Tenn. (18 Pickle) 358.

As used in 2 Burns' Rev. St. 1894, § 4288, providing that unplatted lands shall be assessed for street improvement from the street line back 150 feet, and that when such land is subdivided or platted the land lying immediately upon such street, to the extent of 50 feet back therefrom, shall be primarily liable for the whole cost of the improvement, and, if insufficient therefor, then the second and other parcels in their order to the rear parcel of said 150 feet shall be liable in their order, "parcel," is synonymous with "lot," and does not refer to a strip of 50 feet. *City of Terre Haute v. Mack*, 38 N. E. 468, 470, 139 Ind. 99.

One of the many meanings of the term "parcel" is a number of things put up together. Where an auctioneer agreed to charge a fee of \$25 for each parcel sold, and a number of lots of land were put up and sold for a gross sum, such sale constituted a sale of a parcel, within the meaning of the agreement, and he was not entitled to a separate fee for each lot sold. *Miller v. Burke* (N. Y.) 6 Daly, 171, 174 (citing *Webst. Dict.*).

"Parcels," as used in an agreement to pay commissions for the sale of land, and, if the lands were sold in parcels, a part of the commission was to be paid as each parcel was sold, means portions, whether several or undivided. *Johnson v. Sirret*, 31 N. Y. Supp. 917, 918, 83 Hun, 317.

"Parcel," as used in Revision, § 781, directing the county treasurer "to make out a deed for each lot or parcel of land sold," at tax sales and in section 765 to "offer for sale separately each tract or parcel adver-

tised," properly applies to a quarter, half section, and section, and a tax deed for a section is valid. In popular parlance, 40's and 80's are designated as fractions of a section, while sections, though they are constituent parts of a township, are never spoken of as fractions of it; a section being the unit of government subdivisions of land. *Martin v. Cole*, 38 Iowa, 141, 146.

A part of an estate may be described as a parcel. 1 Com. Dig. "Abatement," H, 51, "Grant," E, 10. Where the land comprised within a plat is by lines and figures thereon divided into separate tracts, each of them may properly be termed a parcel or tract, within Act March 2, 1874, § 2, providing that the fee of a recorder of deeds for recording plats shall be 8 cents for each tract, parcel, or lot therein. *People v. Chase*, 70 Ill. App. 42, 44.

O., as broker for four persons, bought a piece of land, which at their request was conveyed to three of them as tenants in common; one holding a quarter for the remaining purchaser, M., who was at that time unable to pay his share. Three of the purchasers, including M., then made a joint contract with C. to pay him \$30 per acre on the sale of the land, or, if the same should be sold in parcels, to pay him proportionately. Subsequently, M. being still unable to pay his share, his undivided one-fourth interest in the land was conveyed to a stranger, who paid M.'s share of the purchase money, and stepped into his shoes. It was held that the conveyance of M.'s interest was not a sale of the parcel of the land, within the meaning of the contract, so as to entitle the broker to his commission. *O'Brien, J.*, dissented, contending that the word "parcel," as used in the contract, was elastic enough to comprehend the sale made; he saying that it was a very narrow and most inequitable construction of the contract to hold that a part or parcel of the land was not alienated, that the contract should have a reasonable construction, and that the court had no right to say arbitrarily that the parties did not intend by the sale of the parcel the transfer of an undivided share, unless it could be shown that the word "parcel" necessarily means something different than "their share," in common language. The word "parcel" has a very wide and varied meaning, which clearly embraces such an interest as was conveyed in this case. *Bouvier* defines a parcel as part of an estate, and it is quite certain that a part of an estate was conveyed in this case. In the *Century Dictionary* it is defined as follows: "A part, either taken separately, or belonging to the whole; a share; a portion; a constituent or integral part; an indefinite quantity or value; a separate or separable part." It is obvious that the right and interest conveyed in this case was a share or a portion or a sep-

arable or integral part or an indefinite quantity, and therefore a parcel, within the fair import of the term. *Johnson v. Sirret*, 46 N. E. 1035, 153 N. Y. 51.

### PARCEL OF MANSION HOUSE.

"Parcel," within the rule of the common law, which made it arson to burn a barn or outhouse which is a parcel of a mansion house, would not include a barn which is some 18 rods from the mansion house, and entirely disconnected and separated from the same by a highway. *State v. Stewart*, 6 Conn. 47, 48.

"Parcel," within the meaning of the rule of law which makes it burglary to break into a house which is a parcel of a mansion house, means a house which is somehow connected with or contributory to a mansion house, such as a kitchen, smokehouse, or other building which is usually considered a necessary appendage of a dwelling house. *Palmer v. State*, 47 Tenn. (7 Cold.) 82, 89.

### PARCEL SALE.

A parcel sale, as relating to the trade in grain, is of a definite quantity of grain placed in an ocean vessel with any other freight, to be delivered at a definite port, to which the vessel is bound by its charter. It is the ordinary sale transaction. *Heyworth v. Miller Grain & Elevator Co.*, 73 S. W. 498, 499, 174 Mo. 171.

### PARCENER.

The term "parceners" has a well-defined meaning at common law, and applies only to lands descended by inheritance. *Elliott's Estate v. Wilson*, 27 Mo. App. 218, 225, 226 (citing 2 Bl. Comm. 187).

### PARDON.

See "Conditional Pardon."

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. *George v. Lillard*, 51 S. W. 793, 794, 106 Ky. 820 (citing *United States v. Wilson*, 32 U. S. [7 Pet.] 150, 8 L. Ed. 640); *People v. Court of Sessions of Monroe*, 19 N. Y. Supp. 508, 510, 8 N. Y. Cr. R. 355; *State v. Peters*, 4 N. E. 81, 87, 43 Ohio St. 629; *Roberts v. State*, 51 N. Y. Supp. 691, 692, 30 App. Div. 106; *Territory v. Richardson*, 60 Pac. 244, 245, 9 Okl. 579, 49 L. R. A. 440; *In re Greathouse* (U. S.) 10 Fed. Cas. 1057, 1061; *People v. Cummings*, 88 Mich. 249, 265, 50 N. W. 310, 14 L. R. A. 285.

A pardon is a remission of guilt. *Carr v. State*, 19 Tex. App. 635, 663, 53 Am. Rep.

395 (citing 1 Bish. Cr. Law, § 898); *State v. Page*, 57 Pac. 514, 516, 60 Kan. 664; *Territory v. Richardson*, 60 Pac. 244, 245, 9 Okl. 579, 49 L. R. A. 440; *Miller v. State*, 49 N. E. 894, 899, 149 Ind. 310; *United States v. Cullerton* (U. S.) 25 Fed. Cas. 717, 720; *Moore v. State*, 43 N. J. Law (14 Vroom) 203, 241, 39 Am. Rep. 558; *Edwards v. Commonwealth*, 78 Va. 39, 41, 49 Am. Rep. 377.

"Pardon" is defined as an act of grace which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. *Moore v. State*, 43 N. J. Law (14 Vroom) 203, 241, 39 Am. Rep. 558.

A pardon is an act of mercy flowing from the fountain of bounty and grace. Its effect, when it is a full pardon, is to obliterate every stain which the law attached to the offender; to place him where he stood before he committed the pardoned offense, and to free him from the penalties and forfeitures to which the law had subjected his personal property; to acquit him of all penalties annexed to the offense for which he obtains his pardon. *United States v. Athens Armory*, 35 Ga. 344, 362, 24 Fed. Cas. 878, 884.

A pardon, as the term imports, is an act of mercy and favor, and generally supposes its object guilty. A remission, on the contrary, is an act of justice, and cannot be obtained until the entire innocence of the petitioner be established. *United States v. Morris* (U. S.) 26 Fed. Cas. 1336, 1346.

A pardon is an act of grace by which an offender is released from the consequences of his offense so far as such release is practicable and within the control of the pardoning power, or the officers under its direction. A pardon by the Governor is an act of sovereign grace, proceeding from the same source which makes conviction of crime a ground of exclusion from suffrage. The act of absolution is of as high derivation and character as the act of proscription. The pardon must be held to rehabilitate the person in all his rights as a citizen, and to deny to any officer of the state the right to impute to him the fact of his conviction. After the pardon he is as if he was never convicted. *Jones v. Alcorn County Registrars*, 56 Miss. 766, 769, 31 Am. Rep. 385 (citing *Knote v. United States*, 95 U. S. 149, 24 L. Ed. 442).

A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private official act of an executive magistrate, delivered to the individual for whose benefit it is intended. *Rich v. Chamberlain*, 104 Mich. 436, 441, 62 N. W. 584, 585, 27 L. R. A. 573 (citing Chief

Justice Marshall in *United States v. Wilson*, 32 U. S. [7 Pet.] 150, 8 L. Ed. 640).

Lord Coke says: "A pardon is a work of mercy, whereby the King either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical." According to Blackstone, the effect of a pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon; and not so much to restore his former as to give him a new credit and capacity. *United States v. Cullerton* (U. S.) 25 Fed. Cas. 717, 719. See, also, *Dominick v. Bowdoin*, 44 Ga. 357, 361.

Pardon is remission of guilt, amnesty, oblivion, or forgetfulness. The act of a board of managers, under the authority given them by a statute, in shortening the term prescribed by a sentence, and leaving the conviction of guilt unaffected, is not a pardon. *Miller v. State*, 49 N. E. 894, 899, 149 Ind. 607, 40 L. R. A. 109.

The effect of a pardon is to make the offender a new man, and to acquit him of all penalties and forfeitures. *Cook v. Middlesex County Freeholders*, 26 N. J. Law (2 Dutch.) 326, 328.

The pardon of a treason or felony, even after a conviction or attainder, so far clears the party from infamy that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but he may also be a good witness notwithstanding the attainder or conviction. *Hawk. P. C.* A pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and when the pardon is full it relieves the punishment and blots out the existence of the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching. If granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation: It does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment. *Edwards v. Commonwealth*, 78 Va. 39, 41, 49 Am. Rep. 377.

The effect of a pardon is prospective, and not retrospective. It removes the guilt and restores the party to a state of innocence; but it does not change the past, or annihilate the established fact that he was guilty of the offense. The offender is purged of his guilt, and therefore is an innocent man, but the past is not obliterated, or the

fact that he had committed the crime wiped out. *In re Spenser* (U. S.) 22 Fed. Cas. 921, 923.

A pardon does not have the retroactive effect of determining that the judgment was erroneous, or the imprisonment under it unlawful, nor does it give the prisoner a right to sue for damages. *Roberts v. State*, 51 N. Y. Supp. 691, 692, 30 App. Div. 106.

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It obliterates, in legal contemplation, the offense itself. In contemplation of law, it so far blots out the offense that afterwards it cannot be imputed to the offender to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him, to that extent, in his former position. *Knapp v. Thomas*, 39 Ohio St. 377, 395, 48 Am. Rep. 462.

"A pardon, in its nature, is wholly exculpatory of the convict's criminality, remits the penalty, and, as it were, renews the man, and rehabilitates him in the garb of innocence." *Young v. Young*, 61 Tex. 191, 193.

A pardon reaches both the punishment prescribed for the offense, and the guilt of the offender; and, when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching. If granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights, and makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation: It does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment. The power of the president of the United States to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, is unlimited, with the exception stated; and it extends to every offense known to the law, and may be exercised at any time after its commission—either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the president is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. Thus an act of Congress requiring all attorneys to take the oath that they have not engaged in rebellion against the United States, or aided or assisted its enemies, as a condition to the right to practice law in the Supreme Court of the United States, is beyond the power of Congress, as affecting an attorney who has engaged in rebellion, and been pardoned by the presi-

dent. *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 380, 18 L. Ed. 366.

The terms "pardon" and "reprieve" have been adopted into the Constitution of this state without defining or explaining them. The substance of the provisions of our Constitution relative to pardons and reprieves has been borrowed and adopted from the laws of England, and the construction or effect that is there given them was adopted with, and must be given to them here. The object sought to be accomplished by Cr. Code, § 214, providing "that whenever the Governor may deem it expedient and proper to reprieve any person under sentence of death, under any condition whatsoever, the condition on which such reprieve is granted shall be specified in the warrant, and the person accepting such conditional reprieve shall subscribe such acceptance on the warrant," etc., would, in my opinion, constitute a pardon, instead of a reprieve on condition. It would clearly have been so at common law. *Sterling v. Drake*, 29 Ohio St. 457, 460, 23 Am. Rep. 762.

The effect of a pardon is to release from confinement; to restore to the status of citizenship and to the enjoyment of civil rights. A power to pardon is something more than a power to parole or a power to release from servitude. Pardon is the remission of guilt; amnesty; oblivion or forgetfulness. *State v. Page*, 57 Pac. 514, 516, 60 Kan. 664.

The word "pardon" is generic, and includes every character of pardon. Amnesty is a general pardon granted to a class of persons by law or proclamation. The act in such case is as properly a pardon as if simply granted to an individual by deed. Indeed, it seems to be generally conceded in the United States that the word "pardon" includes amnesty. Thus Mr. Webster defines the latter word to be an act of oblivion; a general pardon of the offense of subjects against the government, or the proclamation of such pardon. So Worcester defines it as a general pardon granted to those guilty of some crime or offense. *Davies v. McKeeby*, 5 Nev. 369, 373. Pardon and amnesty are not precisely the same. A pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction. But amnesty is to those who may be guilty, and is usually granted by Parliament or the Legislature, and to whole classes before trial. Amnesty is the abolition or oblivion of an offense. Pardon is its forgiveness. *State ex rel. Anheuser Busch Brewing Ass'n v. Eby*, 71 S. W. 52, 61, 170 Mo. 497 (citing *State v. Blalock*, 61 N. C. 242, 247).

The pardoning power, whether exercised under the federal or state Constitution, is the same in its nature and execution as that exercised by the English crown in this coun-

try in colonial times. One of the consequences of the executive pardon is to remove from the offender the disability which followed the conviction of a felony. An offender may be pardoned after he has suffered the punishment attached to his crime. An executive act restoring a convicted criminal to the rights of citizenship is not a pardon, and does not remove the legal infamy. *People v. Bowen*, 43 Cal. 439, 442, 13 Am. Rep. 148.

A pardon by the president of the United States, reciting that J. B. was convicted of passing a counterfeit bank note, and concluding as follows, "I do hereby remit unto him, the said J. B., the remainder of the said sentence, and order him to be liberated on payment of costs," restored competency to J. B. as a witness, since one of the consequences resulting from the sentence was the disability of the party to be sworn as a witness, and when all the sentence was removed, together with the consequences of the sentence, the disability was removed. *Hoffman v. Coster (Pa.)* 2 Whart. 453, 461.

The word "pardon," as used in the Constitution, authorizing the executive to grant pardons, does not authorize the executive to commute punishment, or nullify it, except by a pardon of the crime. The executive can relieve from punishment in no other way. A pardon therefore reaches the crime, and, when this is pardoned, the punishment ceases by operation of law. The executive cannot impose a condition in a pardon to the effect that the convict shall leave the state and never return. *Commonwealth v. Hatfield*, 2 Pa. Law J. 37, 40.

A pardon is a grant, a deed. It does not and cannot convey that which the grantor never had. The power of the President to grant and pardon all offenses against the United States does not extend to him the authority to release or destroy the rights of private individuals. Therefore he is not authorized to pardon for disobedience of a mandamus ordering certain county officers to levy taxes to pay a judgment recovered against the county. *In re Nevitt (U. S.)* 117 Fed. 448, 460, 54 C. C. A. 622.

The word "pardon" is generic, and embraces every character of pardon, including amnesty, which is a general pardon granted to a class of persons by law or proclamation. The constitutional power of the President of the United States to pardon includes amnesty. *Davis v. McKeeby*, 5 Nev. 369, 373.

It is well settled that no technical words or terms are necessary to constitute a pardon, and in some of the ancient pardons a variety of language is to be found, such as "acquit," "pardon," "release," and "exonerate." In Pennsylvania the practice is to re-

mit the sentence, and this is equivalent to a pardon of the offense. And in South Carolina an instrument signed by President Monroe, ordering "that the prisoner be forthwith released from prison," was decided to be a full pardon, on the ground that it accomplished all the benefit to the prisoner that is practicable, and seemed to be entitled to every liberty of construction that might not contravene any well-settled adjudications. *Lee v. Murphy*, 22 Grat. (Va.) 789, 799, 12 Am. Rep. 563 (citing *Jones v. Harris* [S. C.] 1 Strob. 160; *Hoffman v. Coster* [Pa.] 2 Whart. 458).

#### **Amnesty distinguished.**

Amnesty is a general pardon granted to a class of persons by law or proclamation. It is a general pardon of the offense of subjects against the Governor, or the proclamation of such pardon. Amnesty is included within the word "pardon," which is generic, and includes every character of pardon. Therefore the power of the President of the United States to pardon includes the right to grant an amnesty. *Davies v. McKeeby*, 5 Nev. 369, 373.

A pardon is a remission of guilt. An amnesty is an act of oblivion or forgetfulness. *Ex parte Law*, 35 Ga. 285, 296, 15 Fed. Cas. 8, 7.

A pardon relieves an offender from the consequences of an offense of which he has been convicted, while amnesty obliterates an offense before conviction, and in such case he stands before the law precisely as though he had committed no offense. *United States v. Bassett*, 13 Pac. 237, 239, 5 Utah, 131.

A pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction, as distinguished from amnesty, which is granted to those who may be guilty. Amnesty is the abolition or oblivion of the offense. Pardon is its forgiveness. *State v. Blalock*, 61 N. C. 242, 247.

#### **Conditional pardon or parol.**

The word "pardon" includes remission of the offense, or of the penalties, forfeits, or sentences growing out of it, and may be a part or the whole of these things. Thus one may be pardoned of the imprisonment, and still be left to suffer the other penalties attached to the offense. In case of perjury this would still subject the convict to the disability of being a witness. The power conferred upon the executive by the Constitution to grant pardons includes the power of granting a conditional pardon. *People v. Potter*, 4 N. Y. Leg. Obs. 177, 179.

The word "pardon," in a constitutional grant to the executive of power to pardon, was construed to include a conditional discharge, as such discharge is a conditional

pardon. A pardon includes a parol. In re *Conditional Discharge of Convicts*, 51 Atl. 10, 14, 73 Vt. 414, 56 L. R. A. 658.

A parole of a convict who remains in the legal custody, and under the control of the prison board, and subject at any time to be taken back within the inclosure of the penitentiary—such board having full power to enforce such rules and regulations, and to retake and reimprison any convict so on parole—is not a pardon. The prisoner is not discharged, or his term of service shortened; he only being allowed to go outside the building and inclosures of the penitentiary, and remaining in the legal custody and under the control of the board of managers of the penitentiary. *State v. Peters*, 4 N. E. 81, 87, 43 Ohio St. 629.

#### **As requiring delivery.**

The pardoning power, as exercised under our form of government, both federal and state, is essentially the same in its nature and effect as that exercised by the representatives of the British crown in the parent country, from whence we derive our system of common-law jurisdiction. A pardon alike under both systems of government has always been considered a mere act of grace or governmental forgiveness of an offense, by which the penalty of the crime is legally remitted. The proposition is undeniable that a pardon, in order to be complete, must, in contemplation of law, be delivered and accepted. In *United States v. Wilson*, 32 U. S. (7 Pet.) 150, 8 L. Ed. 640, it was said by Chief Justice Marshall that a pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. *Ex parte Powell*, 73 Ala. 517, 519, 49 Am. Rep. 71.

A pardon may be revoked at any time before its delivery. In re *De Puy* (U. S.) 7 Fed. Cas. 506, 511.

#### **As affecting forfeited property.**

A pardon is an act of grace by which an offender is released from the consequences of his offense so far as such release is practicable and within the control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In the contemplation of the law it so far blots out the offense that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise. It does not give compensation for what has been done or suffered, nor does it impose on



the government any obligation to give it. The offense being established by legal proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offense, or which have been acquired by others while that judgment was in force. If, for example, by the judgment, a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Where, however, property condemned, or its proceeds, have not thus vested, but remain under the control of the executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner upon his full pardon. *Illinois Cent. R. Co. v. Bosworth*, 10 Sup. Ct. 231, 234, 133 U. S. 92, 33 L. Ed. 550.

**As affecting liability for professional misconduct.**

Though a pardon obliterates the offense against the public, and washes the offender white from the guilt that the criminal law saw in the act, it cannot take away the consequences of the act where private justice is principally concerned. If one had been indicted and convicted for arson, the pardon would not raise the building from its ashes, nor would it be a defense in a civil action. Consequently, where an attorney was convicted of forging the name of a third person to a note which he delivered to a client, and was afterwards pardoned for his offense against the criminal law, the pardon did not annul the act, or affect the right of the court to punish him for professional misconduct. *In re An Attorney*, 86 N. Y. 563, 564, 571, 574.

**As a release from fines imposed.**

The word "pardon" includes in itself the word "release," and it will therefore discharge an immediate debtor to the King, though it would not discharge process under which the King seized the goods of one who was a debtor to the King's debtor. *Sid. 265; 17 Vin. Abr. 24*. The effect of a pardon is to acquit the offender of all the penalties annexed to the conviction, and to give him a new credit and capacity. Where the King has nothing but a demand against the

offender for a fine or a sum of money, a pardon of the offense, although after sentence, is a release of all fines imposed as punishment for it, for the reason that the word "pardon" includes in it the word "release." *Cope v. Commonwealth*, 23 Pa. (4 Casey) 297.

**PARENT.**

The words "parents and children," in Act April 26, 1855, authorizing actions by parents or children for the wrongful death of the parents of the children or children of parents, are used to indicate the family relation in point of fact as the foundation of the right of action, without regard to age. The only condition to recovery in such case is the existence of the family relation and a reasonable expectation to the person bringing the action of pecuniary advantage taken away by the death of the deceased. *Pennsylvania R. Co. v. Adams*, 55 Pa. (5 P. F. Smith) 499, 502.

The word "parent" or "parents" may be held to mean one or both parents. *Bates' Ann. St. Ohio 1904*, § 548—38.

The use in the Penal Code of any word expressive of relationship, state, condition, office, or trust of any person, as "parent," "child," "ascendant," "descendant," "minor," "infant," "ward," "guardian," or the like, or of the relative pronouns "he" or "they," in reference thereto, includes both males and females. *Pen. Code Tex. 1895*, art. 22.

**Adopted parent.**

"Parents," as used in statutes relating to the descent and distribution of estates of adopted children, should be construed to mean "natural parents," and not to include the adopted parents. *Hole v. Robbins*, 10 N. W. 617, 619, 53 Wis. 514, 519.

**Ancestor.**

"In England when the word 'issue' is used as the correlative of 'parent,' it is held that the word 'parent' means 'father and mother.' We think that, as a matter of verbal construction, it would be as easy and natural to say that, where the words 'parent' and 'issue' are used in connection with each other, the word 'parent' means 'ancestor'; and in the construction of any instrument it is always necessary to look beyond the literal meaning of the words." *Jackson v. Jackson*, 26 N. E. 1112, 1113, 153 Mass. 374, 11 L. R. A. 305, 25 Am. St. Rep. 643.

**Father of bastard.**

Father distinguished, see "Father."

In Gen. St. c. 110, §§ 1-10, regulating the adoption of children, and requiring notice of the proceeding to be given to the parents, "parent" is used in its legal significance, and is intended to designate only the

lawful father or mother, and does not include the father of a bastard. Appeal of Gibson, 28 N. E. 296, 297, 154 Mass. 378.

"Parent," as used in a Pennsylvania statute to prevent the carrying away of and marrying young women without consent of their parents, etc., includes the putative or natural father. *Macklin v. Taylor* (Pa.) Add. 212.

#### **Grandparent.**

The definition of the word "parent," according to every lexicographer that we have had the opportunity to consult, is derived from "pario," to produce or bring forth, the regular participle of which would be "pariens"; but by some corruption it is usually written "parens," from which we have the word "parent" Anglicized, which is defined as "father or mother; he or she that produces young." This is the common understanding of the meaning of the term, and if it has ever been defined to embrace grandfather or grandmother we have not been able to meet with it. *Smith's Ex'r v. Smith*, 65 Ky. (2 Bush) 520, 525.

The ordinary sense of the word is "father" or "mother," and it will not be held to include a grandfather. *Silbey v. Perry*, 7 Ves. 522, 530.

#### **Mother.**

"Parent," as used in Act Cong. Jan. 20, 1813, providing that no person shall be enlisted or held in the service of the United States without the consent in writing of his parent, guardian, or master first obtained, should be construed to include the mother. *Commonwealth v. Callan* (Pa.) 6 Bin. 255, 256.

"Parent," as used in the act of Congress requiring that a minor could not be enlisted in the army without the consent of his parent, would include the mother, where the father was not living. *Ex parte Mason*, 5 N. C. 336, 337.

"Parent" means one who still possesses some right to the custody or control of a child, which he or she can relinquish, as used in Rev. St. § 2279, providing that, in case the parent of any child is a nonresident at the time it is proposed to adopt the child, the written consent of such parent shall be filed with the probate judge, so that where the father had relinquished by his actions all custody of the child the mother will be considered the parent. *Nugent v. Powell*, 33 Pac. 23, 30, 4 Wyo. 173, 20 L. R. A. 199, 62 Am. St. Rep. 17.

"Parent," as used in Code, § 2971, providing that a widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent, and that if the suit be brought by the widow or children, and

the former or one of the latter die pending the action, the same shall survive to the others, means mother, as well as father. *Atlanta & W. P. R. Co. v. Venable*, 65 Ga. 55, 56.

The term "parent," in St. 1875, c. 99, § 15, giving the right to the parent of a minor to maintain an action for the selling of intoxicating liquors to such minor, includes both the mother and the father, and the mother may maintain such action without proof that the minor has no father. *McNeill v. Collinson*, 130 Mass. 167, 169.

"Parent" means a father or mother, and under the express provision of the statute the word is made to include both males and females. A mother's written consent to the sale of intoxicating liquor to her minor child would absolve the seller from liability to the same extent as would the father's; and hence an indictment should negative the want of the written consent of the "parent," since the word includes both parents—male and female, father and mother. *Lantzner v. State*, 19 Tex. App. 320, 321.

The term "parent," in Code 1880, § 1510, creating a liability for wrongful death of persons leaving widow, children, husband, or father, and providing that the action may be brought in the name of the widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, has reference only to the father of the deceased person, as he is the only parent expressly mentioned in the statute, and therefore a mother cannot sue. *Amos v. Mobile & O. R. Co.*, 63 Miss. 509, 511.

#### **Person in loco parentis.**

The term "parent" includes a person standing in loco parentis, as used in Pen. Code, art. 490, providing that violence to the person does not amount to assault and battery when inflicted in the exercise of the right of correction given by the law to the parent over the child. *Snowden v. State*, 12 Tex. App. 105, 107, 41 Am. Rep. 667.

The word "parent" is understood in its strict sense, and does not extend to those who are sometimes said to stand in loco parentis, as used in a marriage act providing that an action may be maintained against a clergyman marrying a minor under the age of 21 years, unless a certificate in writing under the hand of the parent or parents, guardian or guardians, granting permission for such marriage, shall be filed. *Castner v. Egbert*, 12 N. J. Law (7 Hal.) 259, 260.

The strict legal signification of the term "parents" is the lawful father and mother of a child, but it may be questioned whether it does not mean more than this in the act of 1855, empowering the court to make a de-

cree of adoption with the consent of the parents of an infant, and whether the word ought not to be taken to mean those who stand in the relation of father and mother to the infant. *Furgeson v. Jones*, 20 Pac. 842, 847, 17 Or. 204, 3 L. R. A. 620, 11 Am. St. Rep. 808 (citing *Hurley v. O'Sullivan*, 137 Mass. 86).

#### Step-parent.

In the legal or ordinary acceptance of the term, "parent" does not include a step-father or stepmother, and a child has no right of action for the homicide of its step-father, under Civ. Code, providing that a widow, or, if no widow, a child or children, "may recover for the homicide of the husband or parent." *Marshall v. Macon Sash, Door & Lumber Co.*, 30 S. E. 571, 572, 103 Ga. 725, 41 L. R. A. 211, 68 Am. St. Rep. 140.

Rev. St. 1895, arts. 2575, 2576, 2577, 2579, 2581, provide that where the parents of a minor live together the father is the natural guardian, but where the parents do not live together their rights are equal, and the guardianship may be assigned to either, etc. Under this statute it is held that the term "parent" does not include a step-father or stepmother. *Heinemier v. Arlitt*, 67 S. W. 1038, 1040, 29 Tex. Civ. App. 140.

#### PARENTAL AUTHORITY.

"Parental authority" implies restraint, not imprisonment. *The Milwaukee Industrial School v. Milwaukee County Sup'rs*, 40 Wis. 328, 337, 22 Am. Rep. 702.

#### PARENTAL INFLUENCE.

"Parental influence" is not terror and coercion, but kindness and affection, which may bias the child's mind and induce the child to do that which may be imprudent, and which, if the child were properly protected, it would never do. *Appeal of Worrell*, 1 Atl. 380, 385, 110 Pa. 349 (citing *Turner v. Collins*, 7 Ch. App. 329).

#### PARENTIS.

See "In Loco Parentis."

#### PARENTHESIS.

"A parenthesis is defined to be an explanatory or qualifying clause, sentence, or paragraph, inserted in another sentence, or in course of a longer passage, without being grammatically connected with it. Cent. Dict. It is used to limit, qualify, or restrict the meaning of the sentence with which it is connected, and it may be designated by the use of commas, or by a dash, or by curved lines or brackets; but the use of curves or

of brackets unmistakably shows that the clause thus included was supposed by the author or by the scrivener to limit or restrict a general meaning of the language with which it is connected, or to be of importance in explaining the meaning." In re *Schilling* (U. S.) 53 Fed. 81, 83, 3 C. C. A. 440.

#### PARESIS.

The term "paresis" is used to designate the wasting away of the brain tissue, without softening. *Lins v. Lindhardt*, 29 S. W. 1025, 1028, 127 Mo. 271.

#### PARI DELICTO.

See "In Pari Delicto."

#### PARI MATERIA.

See "In Pari Materia."

#### PARIS GREEN.

"Paris green," as used in an indictment charging the offense of exposing a poisonous substance called "paris green," with intent that a certain animal belonging to another should take and eat the same, imports the poisonous nature of the substance exposed. *State v. Labounty*, 21 Atl. 730, 731, 63 Vt. 374.

#### PARIS MUTUAL.

"Paris mutual" is "also called 'French pool,' and is described to be a small machine containing the name of each horse to be run in the particular race, written or printed on the side, and printed numbers placed on the inside of a machine which can be seen through holes in it. It is used by the owner or person operating it, and by those engaged in betting on horse racing, in this way: The owner or operator sells the tickets for \$5 each. They bear numbers corresponding with the number given the horse on the machine, and by turning a crank or screw attached to the machine the bettors are shown at once the number of tickets sold on each horse, as each of said tickets is sold, so as to enable him to bet intelligently and safely, and lessen the chance of disaster to himself." *Commonwealth v. Simonds*, 79 Ky. 618, 619.

#### PARISH.

Webster defines the word "parish" as a district of certain limits which can be altered without legal enactment. *Chicago & N. W. Ry. Co. v. Town of Oconto*, 6 N. W. 607, 608, 50 Wis. 189, 36 Am. Rep. 840.

In France a parish was the ecclesiastical division of the territory—the spiritual, and in some particulars temporal, division; that is, the district in charge of a curate, and originally of the curati. The colonists of Louisiana became accustomed to similar divisions of territory in church matters. In the course of time it was used to indicate political divisions of the state. From the earliest days there were parishes in the territory—"paroisse" at first, and afterwards "parroquia," under Spanish rule; and when the state was admitted to the Union the French name was retained to indicate the civil divisions of the state. *Sherman v. Parish of Vermillion*, 51 La. Ann. 880, 882, 25 South. 538, 539.

"Parochia" or "parish" signifies, in a church sense, a competent number of Christians dwelling near together, and having one bishop, pastor, etc., or more, set over them. Therefore "parish," in this sense, is the same as a particular church or congregation. A whole diocese is one parish; it not exceeding in ancient times the bounds of a parish, or a small town, or a part of a town. *Baker v. Fales*, 16 Mass. 488, 499.

"A parish is one of the ecclesiastical subdivisions of the territory of England, and consists of that circuit of ground which is committed to the charge of one person, or vicar, or other minister having cure of souls therein, and the church therein is endowed with the tithes that arise within the circuit assigned." *Wilson v. State*, 34 Ohio St. 199, 201 (quoting 1 Bl. Comm. 111, 114).

In Pennsylvania the term "parish" has no special legal signification. It is used merely in its general sense. In English ecclesiastical law it has been used to designate the territory committed to the particular charge of a parson or priest. In the absence of a state church here, the status of a parish is rendered comparatively unimportant. If used in ecclesiastical divisions, it has just such importance and particular signification as may be given it under ecclesiastical regulations. *Tuigg v. Treacy*, 104 Pa. 493, 498, 499.

A parish is a corporation established solely for the purpose of maintaining public worship. *Inhabitants of Milford v. Godfrey*, 18 Mass. (1 Pick.) 91, 97.

A parish is understood to be the territorial jurisdiction of a secular priest, or a precinct, the inhabitants of which belong to the same church, or they may reside promiscuously, among people belonging to any church, and be resident in several villages. *Hebert v. Lavalley*, 27 Ill. (17 Peck) 448, 454, 455.

The parish, or county, is denominated in the books and known in the law and in the decisions as a quasi or involuntary corpora-

tion, possessing some corporate functions and attributes; but they are primarily political subdivisions of a state merely. *Fischer Land & Improvement Co. v. Bordelon*, 27 South. 59, 62, 52 La. Ann. 429.

#### As city.

St. Vict. 9 & 10, c. 68, § 1, declares that no person shall be removed, nor shall any warrant be granted for the removal of any pauper, from any parish in which he shall have resided for five years next before the application of the warrant. Held, that the word "parish" may be construed to mean city. *Regina v. Inhabitants of Forncett*, St. Mary, 12 Adol. & El. (N. S.) 160, 162.

#### County synonymous.

"Parish," as used in Rev. St. § 2011, providing that whenever two citizens of a city or town having more than 20,000 inhabitants, or ten citizens of a county or parish without reference to the number of inhabitants, may make known in writing to the judge of the Circuit Court of the United States for the Circuit wherein such city or town, county, or parish is situated, their desire to have the registration of voters of an election for a delegate in Congress, or the election of such representative, guarded and scrutinized, the judge shall open the Circuit Court at some convenient point in the Circuit for the appointment of supervisors, is synonymous with the word "county," and not with "town" or "township," which is the designation of a civil subdivision of a county. *In re Supervisors of Election* (U. S.) 28 Fed. 840, 841.

A parish, in Louisiana, is defined to be a civil division corresponding to a county in other states. *Attorney General v. City of Detroit Common Council*, 112 Mich. 145, 148, 70 N. W. 450, 37 L. R. A. 211 (quoting *Webst. Dict.*).

#### As coextensive with vill.

The laying of an indictment for maintaining a nuisance in a parish was sufficient. In the case of *King v. Blower*, Hill. 27 Geo. II, B. R., the court declared that it would take the vill and the parish to be coextensive, and they held that there were only two cases where it was necessary to lay a vill, which were upon the statute of additions and in appeal of death, under the statute of Gloucester, c. 9. *Rex v. White*, 1 Burrow, 333, 337.

#### As quasi corporation.

Towns, parishes, and proprietors of common lands who hold meetings and regulate their proceedings under divers provisions of statutes enacted upon those subjects are said to be quasi corporations. *Hayden v. Middlesex Turnpike Corp.*, 10 Mass. 397, 400, 6 Am. Dec. 143.

**PARISH CHURCH.**

The expression "parish church" has various significations. It is applied sometimes to a select body of Christians forming a local spiritual association, and sometimes to the building in which the public worship of the inhabitants is celebrated; but the true local notion of a parochial church is a consecrated place having attached to it the rights of burial and administration of the sacrament. *Town of Pawlet v. Clark*, 13 U. S. (9 Cranch) 292, 328, 3 L. Ed. 735.

**PARK.**

See "Public Park."

The original meaning of the word "park," in law, was a tract of inclosed land, stocked with wild beasts of the chase, enjoyed by the owner through royal grant or immemorial prescription. In this definition a "park" is distinguished from a "chase" in the fact that the latter is not inclosed. So it is held that an act entitled "An act to incorporate the B. Park Association," and containing therein provisions punishing the killing of deer within the bounds of the land owned by the association, is not unconstitutional as defective in title, inasmuch as the title of the act gives notice of the intention to maintain a park, and that word indicates a purpose to do those things, which are included in the broadest definition of a park, so that provisions preventing such acts as the killing of deer may reasonably be expected to form a part of the legislation providing for the maintaining of a park. *Commonwealth v. Hazen*, 20 Pa. Super. Ct. 487, 492, 493, 494.

The word "park," on a plat of land dedicated to the public, signifies a place open to every one, and it carries no idea of restriction to any part of the public, or to any specified number of persons. Restrictions as to time of entrance or behavior are conceivable, but that any class of people should be excluded is inconsistent with a park. *Price v. Inhabitants of City of Plainfield*, 40 N. J. Law (11 Vroom) 608, 613.

The word "park," written upon a block of land designated upon a map, carries with itself the idea of an open or inclosed tract of land for the comfort and enjoyment of the inhabitants of the city or town in which it is located, and is so defined by lexicographers. In England the word, when applied to an inclosed tract of land in the country, has a definite signification, and signifies that the lands inclosed are the private grounds of the proprietor. In this country, too, a man may inclose his own land and it may still be a park, or give that name to his place, without giving to the public any right to its use, for in such a case there would be no sem-

blance of dedication; but the meaning of the word is to be determined by the circumstances connected with its use. In any city the term "park" signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same, whether the word be used alone, or with some qualifying term, as "Central Park," "Hyde Park," etc. *Archer v. Salinas City*, 28 Pac. 839, 841, 93 Cal. 43, 16 L. R. A. 145; *Steel v. City of Portland*, 31 Pac. 479, 480, 23 Or. 178.

A park is variously defined to be a pleasure ground in or near a city, set apart for the recreation of the public; a piece of ground inclosed for purposes of pleasure, exercise, amusement, or ornament; a place for the resort of the public for recreation, air, and light; a place open for every one. *State ex rel. Attorney General v. Schweickardt*, 19 S. W. 47, 51, 109 Mo. 496 (citing *Perrin v. New York Cent. R. Co.*, 36 N. Y. 120; *Price v. Inhabitants of City of Plainfield*, 40 N. J. Law [11 Vroom] 613).

"Park," as used in this country, means a tract of land in or near a city or town, and devoted to purposes of amusement, pleasure, or exercise, and a public use is implied by the term, in the absence of language or surrounding facts implying the contrary; and when the word "park" is marked on a city plat it implies a dedication to the public. *Ehmen v. Village of Gothenburg*, 70 N. W. 237, 238, 50 Neb. 715.

A municipal park is a tract of land set apart and maintained for public use, and laid out and planted and ornamented in such a way as to afford pleasure to the eye, as well as opportunity for open air recreation. *Kleopfert v. City of Minneapolis*, 95 N. W. 908, 909, 90 Minn. 158.

In discussing the decision in *Wolbert v. City of Philadelphia*, 48 Pa. (12 Wright) 439, holding that "park" came within a provision relative to any public work erected or in progress of erection, the court said: "A park is made up in part of walks and roads, which are new constructions, and of ornamentation, with shrubbery and trees, which are set up in places in which they are planted, and of booths and summer houses, which are erected or built; and hence there is a sense in which to lay out and establish a public park may be held to be an erection or construction." *City Sewerage Utilization Co. v. Board of Health (Pa.)* 1 Leg. Gaz. 402, 403.

The term "park" or "square," as used in the act regulating the using of highways, etc., shall include any spaces under the control of park commissioners or a park board, or a special park department of a town or city having the power to make regulations relative to such places. *Pub. St. N. H.* 1901, p. 256, c. 93, § 2.

The terms "park" and "square," as used in the statutory provisions relating to the use of bicycles and tricycles, shall not include any spaces under the control of park commissioners, or of a park board, or a park department of a city or town having power to make regulations relative to such spaces. *Rev. Laws Mass. 1902, p. 531, c. 52, § 12.*

A municipal parkway is a street of special width, which is given a parklike appearance by planting its sides or center, or both, with grass, shade trees, and flowers. It is intended for recreation and for street purposes. In short, a parkway is essentially a boulevard, giving to the term its modern meaning. *Kleopfert v. City of Minneapolis, 95 N. W. 908, 909, 90 Minn. 158.*

A park is a piece of ground within a city or town, inclosed and kept for ornament and recreation. *Withnell v. Petzold, 17 Mo. App. 669, 674.*

#### **As a city purpose.**

See "City Purpose."

#### **As a construction.**

See "Construct—Construction."

#### **Dedication.**

The word "park," written on a block on a map of city property, indicates a public use, and conveyances made by the owner of the platted land by reference to such map operate conclusively as a dedication of the block. *Rhodes v. Town of Brightwood, 43 N. E. 942, 943, 145 Ind. 21; Archer v. Salinas City, 28 Pac. 839, 841, 93 Cal. 43, 16 L. R. A. 145; Steel v. City of Portland, 31 Pac. 479, 480, 23 Or. 176; Price v. Plainfield, 40 N. J. Law (11 Vroom) 608, 612; People v. Green (N. Y.) 52 How. Prac. 440, 445; Ehmen v. Village of Gothenburg, 70 N. W. 237, 238, 50 Neb. 715.*

The word "park," on a plat of a tract of land marking a certain territory as a "park," and adjoining territory as lots, which lots are sold by reference to the plat, operates as a valid dedication of the land designated as a park to the city; and this is true, even though following the word "park" are the words "now belonging to the person plotting the land." *City of Bayonne v. Ford, 43 N. J. Law (14 Vroom) 292, 293.*

The word "park," written on a map of city property, appears conclusively as a dedication. *Price v. Inhabitants of City of Plainfield, 40 N. J. Law (11 Vroom) 608, 613.*

#### **Common distinguished.**

"Park" is not synonymous with "common." "Park" is defined by Worcester as "a piece of land inclosed for public recreation or amusement"; by Century Dictionary as "a piece of ground, usually of considerable ex-

tent, set apart and maintained for public use, and laid out in such a way as to afford pleasure to the eye as well as opportunity for open-air recreation;" and by Webster as "a piece of ground within a city or town inclosed and kept for ornament and recreation." A legal definition of a common is "an uninclosed piece of land set apart for public municipal purposes in many cities and villages of the United States." *Goode v. City of St. Louis, 20 S. W. 1048, 1051, 113 Mo. 257.*

#### **Streets distinguished.**

A park is a place of rest or recreation. It formerly denoted a private inclosure to restrain game; but it has acquired a much wider significance, departing from its original use, and is now ordinarily understood to mean, when applied to ground in a town or city, a tract of land set apart for ornament or to afford the benefit of air, exercise, or amusement. "Public parks," in the strictest sense of the term, cannot be said to be in any proper sense parts of a street. Streets and parks, while they are both devoted to the uses of the public, are set apart for widely different purposes; a street being a place of passage, while a park is a place of rest or recreation. *Bennett v. Selbert, 35 N. E. 35, 38, 10 Ind. App. 369.*

"A park," says Fancher, J., in *People v. Green (N. Y.) 52 How. Prac. 440, 445*, "is a piece of ground adapted and set aside for purposes of ornament, exercise, and amusement. It is not a street or road, though carriages may pass through it." *Blair v. Granger (R. I.) 51 Atl. 1042, 1043.*

#### **Erection of buildings on.**

In its ordinary and usual significance the word "park" imports a plot of ground in a city or town set apart for ornament; a place which the residents of the municipality may frequent for pleasure and exercise or amusement. It is, besides, conducive to health, furnishing to the citizens of crowded cities a place where they may breathe the pure air, untainted by smoke and noxious gases, so that the erection of a courthouse would be inconsistent with the dedication of land as a park. *McIntyre v. El Paso County Com'rs, 61 Pac. 237, 240, 15 Colo. App. 78.*

A park is a place to be kept open and ornamented for public uses, which may include anything conducive to the public pleasure, amusement, recreation, or health; and the building thereon of a public schoolhouse is inconsistent with such use and may be enjoined by the donor. *Rowzee v. Pierce, 23 South. 307, 309, 75 Miss. 846, 40 L. R. A. 402, 65 Am. St. Rep. 625.*

### **PARLIAMENTARY LAW.**

"Parliamentary law," as generally understood, means the rules and usages of Par-

liament or of deliberative bodies. *Webst. Int. Dict.* The recognized usages of Parliament and legislative assemblies by which their procedure is regulated. *Bouv. Law Dict.* A rule of parliamentary law is a rule created and adopted by the legislative or deliberative body it is intended to govern. *Landes v. State*, 67 N. E. 189, 193, 190 Ind. 479.

## PARLIAMENTARY WILL

In the case of advancements, which we have seen only extend to what is undisposed of by will, the law steps in and makes what Lord Raymond calls a "parliamentary will." *Arthur v. Arthur* (N. Y.) 10 Barb. 925.

## PAROL

"'Parol,' or, more properly, 'parole,'" says *Bouvier*, "is a French word, which means literally 'word' or 'speech.' It is used to distinguish contracts which are made verbally, or in writing not under seal, from those which are under seal." *Yarborough v. West*, 10 Ga. 471, 473 (quoting *Bouv. Law Dict.*).

### PAROL AGREEMENT.

All contracts are by law distinguished into agreements by specialty and agreements by parol. If they be merely written, and not specialties, then they are parol. *Jones v. Holliday*, 11 Tex. 412, 415, 62 Am. Dec. 487.

"Parol agreements," within *St. Me. Feb. 19, 1839*, creating a lien in cases where work or labor are performed or materials are furnished by virtue of a written or parol agreement, includes all parol agreements, whether express or implied. *Read v. Hull of a New Brig* (U. S.) 20 Fed. Cas. 354.

### PAROL CONTRACT.

A contract not entirely in writing is a parol contract. *Louisville, N. A. & C. Ry. Co. v. Reynolds*, 118 Ind. 170, 173, 20 N. E. 711.

### PAROL LEASE.

A parol lease is an agreement made verbally, not in writing, between the parties. In the common acceptance of the term, a parol gift of slaves would receive the same construction as a parol lease of land. *Yarborough v. West*, 10 Ga. 471, 473 (quoting *Bouv. Law Dict.*).

### PAROL LICENSE.

*Mr. Freeman*, in his note to *Lawrence v. Springer*, 24 Atl. 933, 49 N. J. Eq. 289, 31

*Am. St. Rep.* 713, 715, says: "A parol license is founded in personal confidence, and is defined to be an authority given to do some act or a series of acts on the land of another without passing any interest in the land. It is a complete answer and defense to a claim of adverse possession set up by the licensee, and is not assignable. At common law a parol license, to be exercised upon the land of another, creating an interest in the land, is within the statute of frauds, and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license or expended money in reliance thereon." The entry on the land of another and the expenditure of large sums of money in constructing a ditch, by a person having a mere personal license to enter on the land and construct and operate the ditch, will not estop the landowner or his successor from revoking the license, though the former knew when he granted the license that the licensee would make the improvements. *Hicks v. Swift Creek Mill Co.*, 31 South. 947, 949, 133 Ala. 411, 57 L. R. A. 720, 91 Am. St. Rep. 38.

## PAROLE.

Of convict as commutation of punishment, see "Commute—Commutation."

## PARSON.

"Parson," as used in the ninety-first of the canons of 1603, providing that the parish clerk was to be appointed "by the parson or vicar, or, where there is no parson or vicar, by the minister of that place for the time being," describes the functionary, whatever title he may bear, who for the time being has the cure of the parish as principal. *Pinder v. Barr*, 4 El. & Bl. 105, 115, 28 Eng. Law & Eq. 235, 239.

## PARSONAGE.

The ecclesiastical meaning of the word "parsonage" was "glebe (or land) and house" belonging to a parish appropriated to the maintenance of the incumbent or settled pastor of a church; but its modern general signification is in the sense of its being the residence of a parson, and it may be with land or without it. *Wells' Estate v. Congregational Church*, 21 Atl. 270, 271, 63 Vt. 116.

A parsonage house owned by a religious society stands upon a different footing than the church. There is no right of use in common in such parsonage house. It is not a sacred building, like a church edifice, but is, properly speaking, an endowment or source of pecuniary revenue to aid in support of the worship in the church proper. Its use is not spiritual, but temporal. Though it is ordinarily used as a residence for the pastor.

there is nothing in its character or ownership to prevent its being used for other purposes, as circumstances may render it profitable or beneficial. It follows that the only right, legal or equitable, which any individual can have in such parsonage house, must be acquired either by a lease or grant from its legal or equitable owner, or from the enjoyment in common with other members of the society of the benefit of the pecuniary income derived from its occupation. The parsonage house is also called a "manse." *Everett v. Trustees of First Presbyterian Church*, 32 Atl. 747, 748, 53 N. J. Eq. (8 Dick.) 500.

"A parsonage is but a house in which a minister of the gospel resides, and has no more relation to public worship than the clothes he wears or the horse he rides." A church cannot receive a devise of property for a parsonage under a statutory provision authorizing it to hold a certain amount of land for purposes of public worship. *Reeves v. Reeves*, 73 Tenn. (5 Lea) 644-647.

A parsonage is not used for public worship, but is simply the residence of the pastor, who conducts public worship in another building devoted exclusively to that object. Where the buildings belong to a religious corporation, stand near each other, and on the same parcel of land, one being used for a church and the other for a parsonage, the latter is not exempt from taxation under the statute providing that every building for public worship shall be exempt from taxation. *People v. Collison*, 6 N. Y. Supp. 711, 712, 22 Abb. N. C. 5.

A parsonage is not a place for religious worship, within Const. art. 7, § 2, declaring that the Legislature may exempt "places of religious worship" from taxation. *Wardens of St. Mark's Church v. City of Brunswick*, 8 S. E. 561, 562, 78 Ga. 541.

#### PARSONAGE LANDS.

Parsonage lands are those of which a clergyman is seised in right of the town and by virtue of his office. *Howard v. Witham*, 2 Me. (2 Greenl.) 390, 393.

#### PART.

See "In Part"; "North Part"; "On the Part of."

Any part, see "Any."

"A part [Latin "pars"] is defined to be one of the portions, equal or unequal, into which anything is divided or regarded as divided; a piece; a fragment; division; a member; a constituent—and is synonymous with section." *City of Cairo v. Bross*, 9 Ill. App. (9 Bradw.) 406, 407.

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The word "part" may mean section; share; division. *Hand v. Hoffman*, 8 N. J. Law (3 Halst.) 71, 79.

Rev. St. 337, providing that the inheritance of a son under certain conditions shall go to the father of the said person so seised of the inheritance, unless it came to the person so seised "on the part of his mother" by descent, means "from the line, the ancestors, the blood of the mother, as well as from the mother herself." *Bante v. Demarest*, 24 N. J. Law (4 Zab.) 431, 432.

#### As different pieces.

The term "part," in a deed conveying a tract of land, saving and excepting a small part of said tract, upon which rolling mill improvements now stand, has reference to quantity, as less than the whole, and, properly construed, is not to be taken as meaning necessarily that the part excepted is in one piece or parcel. This is the usual and ordinary signification of the word. As, when we say a part of Maryland is sandy, we are not to be understood that the sandy portion is to be found in one integral piece or parcel of the state's surface. *Carroll's Lessee v. Granite Mfg. Co.*, 11 Md. 399, 409.

#### As half.

As used in a devise to testator's grandson of 350 acres of land, being the upper part of a tract of 700 acres, "part" was used as synonymous with "half." *Williams v. Lane*, 4 N. C. 246, 247, 6 Am. Dec. 561.

The word "part," in a will in which testator devised all the balance of his property to his sister for her life, and directed at her death that a part of it go to S., is to be construed as synonymous with "moieties," and in the absence of anything to indicate an unequal division it will be held to mean half of such property. *Appeal of Lewis*, 89 Pa. 509, 513.

The "westerly part of a street" means the westerly half of such street, as used in a notice by a city for the alteration of a street. *Jones v. City of Portland*, 57 Me. 42, 46.

A conveyance of the "west part N. E. ¼ N. W. ¼ 20 acres," meant the west half of the 40-acre subdivision. *Soukup v. Union Inv. Co.*, 51 N. W. 167, 168, 84 Iowa, 448, 35 Am. St. Rep. 317.

#### As interest.

A petitioner declared that he had succeeded to "a certain part" of the real estate left by said decedent by deed from S. It did not appear that any estate was left by decedent, except that described in the petition. Held, that the words quoted should be construed as meaning a certain interest in the property; the petition nowhere disclosing



that petitioner claimed that his succession was to the entire interest in the property. In re Grider's Estate, 22 Pac. 908, 910, 81 Cal. 571.

#### **As piece of machinery.**

"Parts," as used in a contract of an agent of a sewing machine company to purchase from the company all parts and attachments, means portions or pieces of machinery, such as may be used for repairs. Wheeler & Wilson Mfg. Co. v. Lyon (U. S.) 71 Fed. 374, 378.

#### **As portion or share.**

Where the testator bequeathed the residue of his estate, to be divided between a son and two daughters, the son to have a half part and the daughters the remainder, the word "part" means "share," and the son therefore takes one-sixth. Fulford v. Hancock, 45 N. C. 55.

The several words, "share," "part," and "portion," are very frequently used as synonymous. When applied to property acquired from one's ancestor, the word "portion" is the most comprehensive that can be used. It is broad enough to include, and is intended to cover, all the property or estate thus received. "Portion" is defined in Bouv. Law Dict. 350, to be that part of a parent's estate, or of the estate of one standing in the place of a parent, which is given to a child. Appeal of Lewis, 108 Pa. 133, 136.

As used in a will devising certain lands to testator's widow and children, at the death of the wife, and in case of the death of either of the children without a lawful heir begotten of his or her body, then "his or her part" should be equally divided among the survivors, "part" is broad enough in its obvious signification to cover everything bestowed on each child by the will, and must be so understood. Zollicoffer v. Zollicoffer, 20 N. C. 574, 575, 576.

#### **As undivided part.**

The term "part," in a statute providing that, if the verdict in ejectment be a part of the premises described in such declaration, which verdict shall particularly specify such part, may as appropriately be applied to an undivided as a divided part. Vrooman v. Weed (N. Y.) 2 Barb. 330-333.

#### **Part of bill or statute.**

"Part," as used in Const. art. 4, § 16, granting to the government power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items of appropriation shall be void, is used interchangeably in the same sense with the word "item," which means the particulars, the details, the distinct and severable

parts, of the appropriation. Commonwealth v. Barnett, 48 Atl. 976, 978, 199 Pa. 161, 55 L. R. A. 882.

The term "part," in a statute providing that all laws and parts of laws not inconsistent with certain other laws, shall be preserved, means a substantive member having such individual features that it can be treated as a distinct entity, and which might be imparted into the new law without marring its harmony or uniformity. Thus, where the statutory provision was in a general law providing a list of trades which should be licensed, and the repeal was of special charters given to license, tax, and regulate certain trades, to import one subject of taxation from the special charter and add it to the subjects embraced in the general law would not be warranted by the exception. City of Cairo v. Bross, 9 Ill. App. (9 Bradw.) 406, 407.

#### **Parts of a day.**

In a contract of employment for so much per day, and "proportionately thereto for parts of a day," such phrase does not include overtime. It refers evidently, not to something more than a day, but to something less; that is, to a part of a whole day. What was clearly meant was that plaintiff was to be paid so much for a whole day, and that, if he worked any part of a day, he was to receive only such part or portion of his day's wages as the time he worked bore to a whole day. The intention was that under certain circumstances the plaintiff might receive less than \$5 per day, but there is no promise that he shall in any event be paid more. Gray v. Hall, 66 N. Y. Supp. 500, 501, 32 Misc. Rep. 683.

#### **Part of a district.**

The phrase "part of a district" does not mean a mere house or farm or tenement, but some recognized or new-formed division of property. Dorling v. Local Board of Health, 5 El. & Bl. 471, 486.

#### **Parts of a dollar.**

In Act Cong. 1793, declaring that "foreign silver coin shall pass current as money within the United States and be legal tender at the rates therein fixed: The Spanish milled dollar at the rate of 100 cents for each dollar. The actual weight whereof shall not be less than 17 pennyweights and 7 grains, and in proportion for parts of a dollar"—the "parts of a dollar" here adopted mean the same denomination in subdivision as established in domestic coin. United States v. Gardner, 35 U. S. (10 Pet.) 618, 622, 9 L. Ed. 556.

#### **Part of goods sold.**

Samples, if delivered as part of the bulk, are "a part of the goods sold," within the

meaning of the statute of frauds. *Talver v. West*, 1 Holt, 178.

#### Part of the realty.

A stove, fitted, adapted, and designed for the use of the house built on a tract of land, passes by a conveyance of the land as part of the realty, in the absence of an agreement between the parties to the contrary. It is competent for the owner to sell the stove as personal property. A tree still standing is a part of the realty, and belongs to the owner of the soil on which it grew; but if he sells it for a valuable consideration, the purchaser may cut and carry it away, and the sale is a license for him to enter and to do so. A fence is a part of the realty, but it may be sold or reserved as personalty. *Folsom v. Moore*, 19 Me. (1 App.) 252, 254.

#### Part of a stream.

The word "part," as used in a deed describing the premises as a certain part of a stream of water, and mentioning the two termini of the part, passes a right to use the whole water which flows between those termini. *Bullen v. Runnels*, 2 N. H. 255, 567, 9 Am. Dec. 55.

#### Part of a street.

Under the power to order the improvement of a street, or part of a street, the city council might order the improvement of one side. That is certainly a part of the street. *State v. City of Portage*, 12 Wis. 562, 566.

#### Part of a town.

"Part," as used in Laws 1895, c. 73, authorizing the use of voting machines, providing that, when adopted by a town, they shall be used at all elections in such town or in any part thereof, applies only to organized divisions of the town, and not to certain tracts of territory in the town which is unorganized. In re *Taylor*, 44 N. E. 790, 792, 150 N. Y. 242.

#### Part of trees.

The words "part of trees," as used in an act relating to diseased fruit trees, refers to black knot and pear blight only, and not to trees affected with yellows. 3 P. & L. Dig. 608, § 8.

#### Part of United Kingdom.

"Part," as used in St. 45 Geo. III, c. 92, § 3, enforcing the appearance of persons served with subpoena in one part of the United Kingdom to give evidence in another, means England, Scotland, and Ireland. *Rex v. Brownell*, 1 Adol. & El. 598.

#### PART DELIVERY.

See "Delivery in Part."

#### PART OWNERS.

The term "part owners," as used in Gen. St. c. 123, §§ 87, 88, in reference to the attachment of personal property belonging to two or more persons in a suit against one or more of the part owners thereof, is a term of common use in the law to denote a class of persons, distinct from partners, who own property jointly, but in a different manner and by a different tenure. The term does not aptly describe partners. *Breck v. Blair*, 129 Mass. 127, 128.

#### PART PAYMENT.

"Part payment," within the meaning of Code Civ. Proc. § 22, which provides that in any cause founded on contract, when any part of the principal or interest shall have been paid, an action may be brought in such case within the period prescribed for the same after such payment, means a voluntary payment made by the debtor himself or by some one authorized by him to make the payment, and does not include a payment made on a debtor's note by the sale of his property on execution or on any legal process whatever. *Moffitt v. Carr*, 67 N. W. 150, 152, 48 Neb. 403, 58 Am. St. Rep. 696.

In *Brislin v. Farmer*, 16 Minn. 215 (Gil. 187), it was remarked: "There is no doubt that a part payment, without words or acts to indicate its character, would not be construed as carrying with it an acknowledgment that more was due; i. e., it would not be evidence from which a jury would be warranted in inferring a new promise." A careful reading of the opinion of the court will make it evident that the words "part payment" are used as the equivalent of the words "payment of a part," and that the meaning of the court is that the payment of a part of a larger subsisting debt, as a part thereof, if unaccompanied by facts or circumstances of a contrary or inconsistent tendency, may be evidence from which a new promise can probably be inferred. *Young v. Perkins*, 12 N. W. 515, 516, 29 Minn. 173.

Payment of interest on a note by the maker, and indorsement thereof on the note by the holder is a "part payment," so as to take the note out of the statute of limitations. *Yesler v. Koslowski*, 8 Pac. 493, 2 Wash. T. 407.

The word "payment," as used in a statute providing that a part payment removes the bar of limitations, is used in its liberal and general sense. In an action on a note, it appeared that it was made in 1883, with the understanding that, if the amount named in it exceeded the true indebtedness of the maker, it should be made right; that in 1890 it was found that the amount was too large, and the difference was by direction of the

maker indorsed on the note as a payment as of the date of the note. Held, that such indorsement was in effect a payment at the time it was made in 1890, and removed the note from the bar of limitations. *Bouton v. Hill*, 88 N. Y. Supp. 498, 501, 4 App. Div. 251.

### PART PERFORMANCE.

The act of part performance of a verbal agreement for service must be such that it would be a fraud on the party performing for the other party to refuse to perform his part as agreed between them. *Svanburg v. Fosseen*, 78 N. W. 4, 8, 75 Minn. 350, 43 L. R. A. 427, 74 Am. St. Rep. 490.

In order to justify a decree of specific performance of a verbal agreement for the sale of real estate, the acts of part performance relied on to escape the operation of the statute of frauds must be clearly, definitely, and satisfactorily shown, and it must appear that such facts were done with reference to and in pursuance of the contract. Continued possession by a tenant is not such a part performance of a verbal contract for the purchase of land as to take the case out of the statute of frauds. *Lewis v. North*, 87 N. W. 312, 314, 62 Neb. 552.

The principle on which courts enforce oral agreements within the statute of frauds on the ground of part performance is that, when one of the parties has been induced to alter his situation on the faith of the oral agreement to such an extent that a refusal to enforce it would result, not merely in the denial of the rights which the agreement was intended to confer, but in the infliction of an unjust and unconscientious injury and loss to him, the other party will be held estopped by force of his acts from setting up the statute; but the acts constituting such part performance must have been in reliance on and in pursuance of the oral agreement, and must be related to and connected with it, though such acts are not confined to doing what the contract stipulates. *Brown v. Hoag*, 35 Minn. 373, 376, 29 N. W. 135.

### PART THEREOF.

Within the meaning of the statute which makes it the duty of the auditor to transfer for taxation in the name of the owner lands, town lots, and parts thereof which have been conveyed, a building, whenever it is a permanent improvement, is "land," for the purpose of taxation, and the words "part thereof" may apply to the improvement, as well as to the lot on which it stands, and may consist of a part of the building by metes and bounds, or definite description of a separate part, or of an individual aliquot part of the whole, provided the conveyance

in terms conveys the ownership in the estate which is liable to be assessed. And it is immaterial whether the building be divided by such conveyance by vertical lines or horizontal lines. On a conveyance of the second story of a building, it is the duty of the auditor to transfer such part of the building to the new owner. *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

### PART WITH.

In a covenant in a lease not to let, sell, assign, transfer, set over, or otherwise part with the premises or the lease, the words "otherwise part with" mean to assign, to part with the possession of; and the covenant was not broken by a deposit of the lease as security for goods supplied to the house. *Pitt v. Hogg*, 4 Dowl. & R. 226, 228.

In a devise of an estate to B., but, in case B. shall depart this life without leaving any issue and shall not have disposed and parted with his interest, then the same shall go to the use of C., the words "parted with" are used in opposition to the more generally used word "disposed," and mean parting with the estate by the devisee by a conveyance that was to have its complete effect and operation in his lifetime. *Stevenson v. Glover*, 1 Man. G. & S. 448, 459.

### PARTLY.

An act of incorporation authorizing the purchase of any railroad partly or wholly completed does not apply to a private railroad built from iron to mine works, wherefrom the rails have been removed by an order of court. *Appeal of McCandless*, 70 Pa. (20 P. F. Smith) 210.

Tariff Act Oct. 1, 1890, prescribing a certain duty on "partly made cotton wearing apparel," does not include cotton hemstitched lawns, imported in pieces of from 28 to 30 yards in length and 45 inches wide, turned over and sewed down on one side of the fabric, the body of the goods being a homogeneous cotton cloth containing from 150 to 200 threads to the square inch, counting the warp and filling, but open-work patterns and figures, made by drawing out threads, appearing continuously on certain parts of the goods; the merchandise being chiefly used for women's and girl's dresses, skirts, and aprons, the broad hem constituting a part of such garments when made up, but the material being also sold for sash curtains. It is dutiable as "manufactures of cotton," under another section of the act. *In re Mills* (U. S.) 56 Fed. 820, 821.

### PARTAKER.

In a will providing that M. shall be partaker of my whole estate, both real and per-

sonal, and, again, that the issue, male or female, from the body of my daughter M., shall be next partaker, by the use of the word "partaker" the testator meant the same as though he had used the word "taker," and the will constituted a dispossession of the whole estate, subject to the conditions therein named. *Emans v. Emans*, 8 N. J. Law (2 Penning.) 967, 971, 972.

"Partaker" implies activity of one who has a part or interest in any action, matter, or thing; and where the sheet of a sail on a ship parted, injuring one of the crew, the owners of the vessel were not in that sense partakers in the cause of the injury to the same. *Quinlan v. Pew* (U. S.) 56 Fed. 111, 117, 5 C. C. A. 438.

## PARTIAL

Of, pertaining to, or affecting, a part only; not general or universal; not total or entire. *Webst. Dict.*

### PARTIAL ACCOUNT.

A partial or annual account of an administrator is only a judgment *de bene esse*, often rendered *ex parte*, and only *prima facie* correct. On final settlement it may be opened to correct errors due to fraud or mistake, although the error was not excepted to or appealed from when the partial account was rendered. *Marshall v. Coleman*, 58 N. E. 628, 632, 187 Ill. 556.

The term "partial accounts," in the orphans' court, implies *ipso facto* that nothing is settled by it but these matters constituting the items or accounts in the statement itself. *Shriver v. Garrison*, 30 W. Va. 456, 469, 4 S. E. 660, 668 (citing Appeal of Leslie, 63 Pa. [13 P. F. Smith] 355).

### PARTIAL ASSIGNMENT.

A partial assignment for the benefit of creditors is one which omits some substantial portion of a debtor's property, and cannot be made to rest upon a mere colorable omission. An assignment which does not assign all the debtor's property, but substantially all, so that for the purpose of continuing his business or paying his debts or future subsistence he might just about as well include the part omitted, is not a partial assignment. If the property omitted was insignificant in amount with reference to the whole, or if it was mainly beyond the reach of process, or exempt from process, or of such a character as not readily to be made available either to the creditors or to the debtor, and the great mass of the debtor's available property, which constituted the basis of his business operations, and which could alone form any reliance to himself for support or

to his creditors for payment, was in the deed, the deed should not be regarded as a partial assignment. Short of this, an assignment, being in terms partial, should be considered as a partial assignment, and not made in bad faith toward the statute of 1843, which provides that all general assignments made by debtors for the benefit of creditors shall be null and void as against the debtors of such creditors. *Mussey v. Noyes*, 26 Vt. 462, 474.

### PARTIAL AVERAGE.

Partial or particular average arises where expenses are incurred for the benefit of only the ship or freight or cargo, and not all of them combined, in which case only the thing benefited is liable for the expense. For instance, if there should be a capture of a neutral ship, solely on account of a cargo which is owned by different persons, who are shippers, and no proceedings are had against the ship, but against the cargo only, the expenses occasioned thereby will be apportioned upon the owners of the cargo, and are only a partial loss thereof, and not a general average; for such expenses are not for the benefit of the ship or freight, which, therefore, do not contribute thereto. *Peters v. Warren Ins. Co.* (U. S.) 19 Fed. Cas. 370, 371.

### PARTIAL DEFENSE.

A partial defense is a defense which only tends to mitigate plaintiff's damages. *Carter v. Eighth Ward Bank*, 67 N. Y. Supp. 300, 303, 33 Misc. Rep. 128.

### PARTIAL EVIDENCE.

Partial evidence is that which goes to establish a detached fact in a series tending to the fact in dispute. It may be received, subject to be rejected, as incompetent, unless connected with the fact in dispute by proof of other facts. For example, on an issue of title to real property, evidence of the continued possession of a remote occupant is partial; for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute. *Code Civ. Proc. Cal.* 1903, § 1834; *Ann. Codes & Sta. Or.* 1901, § 687.

### PARTIAL INSANITY.

"Partial insanity" is used to designate the condition of a man who is mad as to a particular subject, but sane as to all other subjects. In that species of madness it is plain that he is a responsible agent, if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, though he may have been laboring under a moral obliquity of perception, as much so as if he were morally laboring under an obliquity of vision. A man whose mind squints, unless impelled

to crime by this very mental obliquity, is as much amenable as one whose eye squints. *Commonwealth v. Mosler*, 4 Pa. (4 Barr) 264, 266; *Commonwealth v. Wireback*, 42 Atl. 542, 545, 190 Pa. 138, 70 Am. St. Rep. 625, 43 Wkly. Notes Cas. 506, 509; *Commonwealth v. Barner*, 49 Atl. 60, 64, 199 Pa. 335.

"Partial insanity" means, not some intermediate stage in the development of mental derangement, but disturbance at some particular point, not involving the mind at any other point. A person thus affected is said to be under the influence of a delusion. A will made under the influence of such delusion is the result of the peculiar form of insanity generally spoken of as "partial insanity." Partial insanity, according to Dr. Hammond, is a derangement of one or more faculties of the mind, which prevents freedom of action. *Trich's Ex'r v. Trich*, 30 Atl. 1053, 1056, 165 Pa. 586, 44 Am. St. Rep. 679.

"Experience and observation show that in almost all the cases involving insanity, where it is sufficiently apparent that disease has attacked the mind in some form and to some extent, it has not wholly obliterated the will, the conscience, and mental power, but has left its victim in some degree of ability in some or all these qualities. It may destroy, or it may only impair and becloud, the whole mind, or it may destroy, or only impair, the functions of one or more faculties of the mind. There seem to be cases where, as Erskine said in *Hadfield's Case*, reason is not driven from her seat, but where distraction sits down upon it along with her, trembling upon it, and frightens her from her propriety. The term "partial insanity" has been applied to such cases by writers and judges from Lord Hale to Chief Justice Shaw, where, as has been said, the mind may be clouded and weakened, but not incapable of remembering, reasoning, and judging; and it is here that the difficulty of the subject begins, and that confusion and contradiction in the authorities make their appearance. No one can say where twilight ends or begins, but there is ample distinction between night and day. *State v. Jones*, 50 N. H. 369, 383, 9 Am. Rep. 242.

Lord Hale says: "There is a partial insanity of mind and a total insanity. In the first, as it respects particular things or persons, or in respect to degrees, which is the condition with very many, especially melancholy, persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason." Partial insanity is frequently designated by the name "monomania." *Appeal of Dunham*, 27 Conn. 192, 205.

#### PARTIAL LAW.

A "partial law" is a law which embraces within its provisions only a portion of those persons who exist in the same state and

are surrounded by like circumstances. *Hatcher v. State*, 80 Tenn. (12 Lea) 363, 371.

#### PARTIAL LOSS.

"Partial loss," properly so called, is a total loss of a part of the interest insured. *American Ins. Co. v. Griswold* (N. Y.) 14 Wend. 399, 472.

A partial loss of an insured vessel arises where an injury results to the vessel from the peril insured against, but where the loss is neither actually or constructively total. *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50, 65.

The term "partial loss," as employed in an insurance policy, is to be understood in its natural and usual sense, subject to such modifications of its ordinary import as may be necessary to the ascertainment of the actual understanding and intent of the parties, and where plaintiff's loss was about \$3,900, some \$70 being saved from the wreck, the loss was not partial. *Singleton v. Boone County Home Mut. Ins. Co.*, 45 Mo 250, 254.

In an insurance policy covering a vessel and cargo, a provision that the underwriters are not liable for any partial loss upon vessel or freight under 5 per cent., excepting a general average, means by "partial loss" a damage sustained by the ship or cargo which falls upon the respective owners of the property so damaged, and, when happening from any peril insured against by the policy, the owners are to be indemnified by the underwriters, unless in cases of trifling demands within the exception; and where a vessel and cargo were injured by a peril insured against, the underwriters were not liable for partial loss occasioned by damage to the vessel of less than 5 per cent., but were liable to the owners for the amount of their contribution to the general average. *Padelford v. Boardman*, 4 Mass. 548, 549, 551.

A partial loss of freight is occasioned by the loss of the ship, after a part of the voyage is performed, which makes it necessary to hire another ship to carry on the cargo to the port of destination in order to earn freight; and when freight pro rata is earned this is a case of partial loss. Where a part of a voyage has been performed, and the master sends on the goods by another ship, at a price less than the whole freight, then freight pro rata is earned, and the loss is only a partial one. Where a steamboat, whose freight list is insured against a total loss merely, meets with a disaster upon the contemplated trip, and cannot be repaired in a reasonable time, so as to transport the cargo, and the master is unable to send the cargo forward to its place of destination for a sum less than the original freight, there is a total, and not a partial, loss within the meaning of the policy. *Willard v. Millers' &*

Manufacturers' Ins. Co., 30 Mo. 35, 38, 40 (citing Phil. Ins. § 1440).

Every loss which is not total is partial. Rev. Codes N. D. 1899, § 4566; Civ. Code S. D. 1903, § 1912.

### PARTIAL RESTRAINT.

A "partial restraint," in the law relative to contracts in restraint of trade, is that which is restricted in its operation in respect to place; and this may be made in express terms, or it may result from a construction of the contract, when viewed in the light of the environments and circumstances surrounding the contracting parties. An agreement not to engage in a certain business in a stated place or within a reasonable limited territory is not invalid because of a failure to specify any limitation of time as to its duration; and hence a contract where a physician, in consideration of the purchase of his practice in a certain city, agreed not to practice therein, was not against public policy. *McCurry v. Gibson*, 18 South. 806, 807, 108 Ala. 451, 54 Am. St. Rep. 177.

### PARTIAL VERDICT.

A verdict which finds only one or two out of many facts, which are all necessary to constitute the offense, and saying nothing of the residue, is not a "partial verdict," in the technical sense of those words. *United States v. Watkins* (U. S.) 28 Fed. Cas. 419, 421.

A partial verdict is one by which the jury in a criminal case acquit the defendant as to part of the accusation and find him guilty of the residue; and where the jury simply find defendant guilty under "the first and third counts" it is a complete, certain, and valid verdict, and if they add, "We disagree as to the second count," the additional words do not qualify the previous meaning, and are therefore to be regarded as surplusage, and the verdict is valid. *State v. McGee*, 33 S. E. 353, 355, 55 S. C. 247, 74 Am. St. Rep. 741.

### PARTICEPS CRIMINIS.

One who assists another in any manner in carrying out a fraudulent purpose is a "particeps criminis." It is utterly immaterial what means he resorts to. If he invokes and adopts them to aid in the perpetration of a fraud, he forfeits thereby the countenance of the law, and is a joint tortfeasor. *Alberger v. White*, 23 S. W. 92, 96, 117 Mo. 347.

### PARTICIPATE.

The word "participate" is derived from two Latin words, "pars," meaning part, and

"capio," meaning to take; and hence it means to take part, to share in common with others. *Reardon v. State*, 4 Tex. App. 602, 611.

Expert evidence that the word "participate" has a technical significance or meaning in the business of life insurance, and when used in connection with a premium or policy means a sharing of any and all profits accruing to the company or class to which the individual or policy belongs, held admissible. *Fry v. Provident Sav. Life Assur. Soc. of New York* (Tenn.) 38 S. W. 116, 126.

### PARTICIPATING POLICY.

Expert evidence to show that the words "participating policy" mean the same as "participating premiums" held admissible. *Fry v. Provident Sav. Life Assur. Soc. of New York* (Tenn.) 38 S. W. 116, 126.

### PARTICIPATING PREMIUMS.

Expert testimony to show that the term "participating premiums," when used in connection with life insurance, means to share in all profits arising from the premiums paid by insured and by all others belonging to his class, and in all profits arising from the payment or derived from such payment of premiums, held admissible. *Fry v. Provident Sav. Life Assur. Soc. of New York* (Tenn.) 38 S. W. 116, 126.

### PARTICIPATION.

Participation in a crime does not include mere consent, where no aid is given and no encouragement rendered. *State v. Orrick*, 17 S. W. 176, 178, 106 Mo. 111.

### PARTICULAR.

A will directed that testator's children agree among themselves to sell, on such time or for cash, as they may think best, the residue of all his property. No executor was named in the will. By the codicil testator appointed an executor, and desired him "to execute such will in every particular as therein I have set forth and expressed." In construing this clause, the court held that the power of sale vested in testator's children was revoked, and such power given to the executor named in the codicil, the sale of the property being an essential particular of the will to be executed, and that the executor could not execute the will in every particular without performing that duty. *McKenzie v. Roleson*, 28 Ark. 102, 109.

The authority given the board of public works by the charter of the city of Grand Rapids to determine the "particular kind and quality of materials to be used," when the council decides that any public work is a

necessary improvement, has reference to detail, and not to the general character of the work. The use of the word "particular" in that connection is significant, and the evident intention of the Legislature was to empower the board to provide details where the same were necessary. When the council ordered a pavement of streets with gravel and cobble stones, the board could not refuse to do the work because it deemed such materials unsuitable. *Common Council of City of Grand Rapids v. Board of Public Works*, 87 Mich. 113, 120, 49 N. W. 481, 483.

In comparing Code Proc. § 383, subd. 2, requiring that the statement in writing made by a defendant on a confession of judgment, "if it be for money due or to become due, must state concisely the facts out of which it arose and must show that the sum confessed therefor is justly due or to become due," and Act 1818, requiring "a particular statement and specification of the nature and consideration of the debt or demand," the court said: "The word 'particular,' according to Webster, signifies 'a minute detail of things singly enumerated.' His definition of 'specification' is, among others, 'a written statement containing a minute description or enumeration of particulars.' The word 'concise' is defined 'brief; short; containing few words, or the principal matters only.' And the requirement in the first section that the statement 'state concisely the facts out of which the indebtedness arose' is not equivalent to requiring that 'a particular statement and specification of the nature and consideration of the debt be made.'" *Curtis v. Corbitt* (N. Y.) 25 How. Prac. 58, 62, 63.

#### PARTICULAR ACCOUNT.

A provision in a fire policy that insured should deliver to the insurer a "particular account of the loss or damage" only required the insured to furnish a statement as particular and full as he can make under the circumstances. *Bumstead v. Dividend Mut. Ins. Co.*, 12 N. Y. (2 Kern.) 81, 94.

#### PARTICULAR AGENT.

A "particular agent" is one authorized to do one or two particular things. *Ruby v. Talbott*, 21 Pac. 72, 77, 5 N. M. 251, 3 L. R. A. 724.

#### PARTICULAR AVERAGE.

See "Free from Average unless General."

Upon a policy of insurance on flax valued at so much and warranted "free from particular average," if the vessel be wrecked, and the assured do not abandon, but labor to save, the cargo, and in fact save a part (one-sixteenth), though much damaged, they are entitled to recover as for a total loss of

that part which was in fact totally lost, but not for the rest, which was saved to them in specie, though deteriorated. *Davy v. Milford*, 15 East, 559.

The expression "free of particular average," unless the vessel be stranded, etc., as used in marine insurance policies, means that if a loss occurred during the adventure, although from a cause not related in any way to the stranding of the ship, the insurers were liable upon the general language of the policy. *London Assur. v. Companhia De Moagens Do Barreiro*, 17 Sup. Ct. 785, 790, 167 U. S. 149, 42 L. Ed. 113. It is equivalent to the phrase "free from any claim for damage for partial loss." *Devitt v. Providence Washington Ins. Co.*, 70 N. Y. Supp. 654, 656, 61 App. Div. 390.

The words "free from particular average," in a marine policy on a cargo free from particular average, "are understood to mean free from particular loss, and are equivalent to free of average, or free of average except generally." *Wallerstein v. Columbian Ins. Co.*, 26 N. Y. Super. Ct. (3 Rob.) 528, 536.

The phrase "free from particular average," in a marine policy on cargo free from particular average, means that the assurer shall be accountable only for a total loss of the property insured. *Chadsey v. Guion*, 97 N. Y. 333, 336; *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204, 216, 4 Am. Rep. 664; *Devitt v. Providence-Washington Ins. Co.*, 70 N. Y. Supp. 654, 656, 61 App. Div. 390; *Wallerstein v. Columbian Ins. Co.*, 26 N. Y. Super. Ct. (3 Rob.) 528, 536; *Hernandez v. Sun Mut. Ins. Co.* (U. S.) 12 Fed. Cas. 34, 35.

"Particular average" is the loss or damage, short of total, falling directly on a particular property. *Bargett v. Orient Mut. Ins. Co.*, 16 N. Y. Super. Ct. (3 Bosw.) 385, 395.

"Particular average," as used in a marine policy warranting the insurer free from particular average, means partial loss, and is equivalent to a policy against total loss only. Thus, if goods of one kind in one ship are insured by one description and valuation against total loss only, the total loss of some of them, though in separate packages, is only a partial loss of the entire subject of insurance, and gives no right to recover against the insurer as for a total loss of that part. *Pierce v. Columbian Ins. Co.*, 96 Mass. (14 Allen) 320, 321.

#### PARTICULAR CAUSE OF CHALLENGE

Particular causes of challenge are of two kinds: (1) For such a bias as, when the existence of the facts is ascertained, does in judgment of law disqualify the juror, and which is known in this Code as "implied bias"; (2) for the existence of a state

of mind on the part of the juror, in reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion, that such juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this Code as "actual bias." But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias to any person otherwise legally qualified, if he declare on oath that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict. Crim. Code N. Y. 1903, § 376.

#### PARTICULAR CUSTOMS.

Particular customs are such as prevail in some county, city, town, parish, or place. Their existence is to be determined by the jury on proof, and in this they differ from general customs, which are to be determined by the court. *Bodfish v. Fox*, 23 Me. (10 Shep.) 90, 95, 39 Am. Dec. 611.

#### PARTICULAR ESTATE.

A particular estate is an estate for life or for years. This is called a "particular estate," for the reason that it is only a small part or portion of the inheritance. *Bunting v. Speck*, 21 Pac. 288, 289, 41 Kan. 424, 3 L. R. A. 690.

#### PARTICULAR LENGTHS.

Where, in an action on a logging contract, which required the contractor to place the logs on skids at the mill, keeping those of particular lengths by themselves, it was shown that the logs were cut into 13 different lengths, but that lumber was generally sawed and classed into two general classes, that of general lengths and of special lengths, the contract required only the separation of logs into these two classes, and not the separation of logs of precisely the same lengths. *Maltby v. Plummer*, 40 N. W. 3, 8, 71 Mich. 578.

#### PARTICULAR LIEN.

A particular lien is the right to retain the property of another on account of labor bestowed or money expended on the same property. *Crommelin v. New York & H. R. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 77, 80.

A particular lien exists when the claim arises in respect to the very property retained. It differs from a general lien, which exists when the debt results from a general balance of account. *Butcher's Union Slaughter House & Live Stock Landing Co., v. Crescent City Live Stock Landing & Slaughter House Co.*, 6 South. 508, 511, 41 La. Ann. 355.

A particular lien of a factor is confined to the debt for a specific article, as we see in ordinary sales for cash, and is distinguished from a general lien, which is a right the factor has to hold all the goods of his principal which come into and remain in his hands as such factor until the general balance—that is to say, all debts which have arisen and become payable in the course of his business as factor—have been paid. *Brooks v. Bryce* (N. Y.) 21 Wend. 14, 16, 17.

#### PARTICULAR MALICE.

"Particular malice" is ill will; grudge; a desire to be revenged on a particular person. *Brooks v. Jones*, 33 N. C. 260, 261; *State v. Long*, 23 S. E. 431, 117 N. C. 791.

#### PARTICULAR PARTNERSHIP.

A "particular partnership" is defined as one where the parties have united to share the benefits of a single individual transaction or enterprise. Two persons who buy land for immediate sale, purely as a speculation, on an agreement for a division of the profits, constitute a particular partnership. *Spencer v. Jones* (Tex.) 47 S. W. 665.

A partnership doing a commission business as factors in the city of New Orleans is not a particular partnership. *Ward v. Brandt* (La.) 11 Mart. (O. S.) 331, 13 Am. Dec. 352.

#### PARTICULAR POWER.

By "particular power" is meant that the donee is restricted to some objects designated in the deed creating the power. *Thompson v. Garwood* (Pa.) 3 Whart. 287, 305, 31 Am. Dec. 502.

#### PARTICULAR PROPOSITION.

Two universal propositions—and it is immaterial whether their universality be metaphysical, physical, or moral—whose subjects are taken according to their entire extension, because the propositions are universal, can never be equivalent to a particular proposition. If one be the contrary of the other, they may be mutually nullified; but they cannot, by being used together, result in a particular proposition. *Drennen v. Banks*, 30 Atl. 655, 657, 80 Md. 310.



**PARTICULAR QUESTION OF FACT.**

The phrase "particular questions of fact," as used in the statute providing that in all cases, when requested by either party, the court shall require the jury, if it return a general verdict, to find specially upon particular questions of fact to be stated in writing, means something less than an issue in the case. The particular facts should be pertinent to and involved in the issue, and such as are impliedly covered by the general verdict. The purpose of such special findings is to test the correctness of the general verdict. *McCullough v. Martin*, 39 N. E. 905, 906, 12 Ind. App. 165; *Gale v. Priddy*, 64 N. E. 437, 66 Ohio St. 400. The phrase does not mean a conclusion drawn from all the evidence submitted to the jury, but means something less than the whole issue. *Salem-Bedford Stone Co. v. Hilt*, 59 N. E. 97, 99, 26 Ind. App. 543.

The question as to how general or how particular the questions of fact to be submitted to the jury in any particular case should be rests very largely in the sound judicial discretion of the trial court; but, of course, such questions of fact should be sufficiently particular, so that they might fairly be denominated "particular questions of fact," within the statute. The jury, in giving answers to particular questions of fact, may sometimes be required to state the facts themselves, to the extent of giving amounts, dates, weights, sizes, speed or velocity, time, distance, etc. *Foster v. Turner*, 1 Pac. 145, 147, 31 Kan. 58.

**PARTICULAR RECITAL.**

A particular recital states some fact definitely. Particular and definite recitals are conclusive evidence of the material facts stated. A recital which states that a mortgage is a lien on the premises conveyed by the deed is what the law defines a "particular recital." *Kellogg v. Dennis*, 77 N. Y. Supp. 172, 175, 38 Misc. Rep. 82.

**PARTICULAR SERVICES.**

The term "particular services," as used in the constitutional provision that no man's particular services shall be demanded without just compensation being made therefor, means "peculiar services," not the ordinary or general services of an individual. "It is not an easy matter," says the court, "to draw the distinction between particular and ordinary services in every instance. Still some general rules may be given to mark the line. It seems clear that ordinary services, such as may be required of all citizens or officials by general or valid special laws, are not particular services. For example, a physician cannot be required to give his time and services and skill in making an examination to qualify him to speak as an

expert witness. If, however, the same physician may have already made an examination, or come into the possession of facts material to be disclosed to attain justice and administer the law, he may be required to testify to them as any other witness may be." In Indiana the constitutional provision is: "No man's particular services shall be demanded without just compensation." In *Israel v. State*, 8 Ind. 467, it was held that the services of witnesses in criminal suits were not particular services, within the meaning of the provision, but were general services, such as every individual was bound to render when called upon for the public welfare, as well as his own individual good. It has been held that services of a witness in a criminal prosecution, services of a lawyer in defending the same, service on a jury, etc., are not particular services. *State v. Henley*, 41 S. W. 352, 355, 98 Tenn. 665, 39 L. R. A. 126 (citing *Daly v. Multnomah County*, 14 Or. 20, 12 Pac. 11; *Buchman v. State*, 59 Ind. 12, 26 Am. Rep. 75; *Dills v. State*, 59 Ind. 18; *Washington v. City of Nashville*, 31 Tenn. [1 Swan] 180; *Wright v. State*, 50 Tenn. [3 Helsk.] 256; *House v. Whitis*, 64 Tenn. [5 Baxt.] 692; *Neely v. State*, 63 Tenn. [4 Baxt.] 174).

**PARTICULAR STATE.**

Act Cong. 1790, providing a punishment for crimes committed out of the jurisdiction of any particular state, means out of the jurisdiction of any particular state of the Union. *United States v. Pirates*, 18 U. S. (5 Wheat.) 184, 200, 5 L. Ed. 64.

**PARTICULARS.**

See "Bill of Particulars"; "Full Particulars."

A statement that one has not heard the particulars of a transaction is contradicted by showing that he had heard the details. The words "particulars" and "details" are in fact synonymous, and in ordinary parlance convey the same meaning. *Baltimore City Pass. Ry. Co. v. Knee*, 84 Atl. 252, 254, 83 Md. 77.

**PARTIES.**

See "Party."

**PARTITION.**

A partition is a separation between joint owners or tenants in common of their respective interests in land, and setting apart such interests, so that they may enjoy and possess the same in severalty. *Meacham v. Meacham*, 19 S. W. 757, 758, 91 Tenn. (7 Pickle) 532.

The word "partition," in its legal sense, means the act or proceeding through which

two or more co-owners cause the thing to be partitioned to be divided into as many shares as there are owners, and which vest in each of such persons a specific part, with the right to possess it, free from a like right in other persons, who before partition had an equal right to possess. *Hudgins v. Sansom*, 10 S. W. 104, 105, 72 Tex. 229.

The object of partition is a division of an estate between the legal owners of it, regardless of equitable claims. *Longley v. Longley*, 42 Atl. 798, 799, 92 Me. 395.

Partition simply permits each owner to enjoy his or her share in severalty, instead of in common; and hence partition of land will not be delayed until the establishment on an accounting in a pending suit in equity of the amount of a possible lien in favor of one of the co-owners upon the shares of the others. *Pomeroy v. Pomeroy*, 37 Atl. 754, 757, 55 N. J. Eq. 568.

Partition implies an interest in different persons in the property to be divided. *Brady v. McCosker* (N. Y.) 1 Comst. 214, 222.

The right of compulsory partition in the case of coparceners was the gift of the common law, but in the case of joint tenants and tenants in common it was first given by statute. The common law, having established this right in favor of coparceners because of the relationship being created by it, and not by an act or choice of their own, as in the case of joint tenants and tenants in common, thought it reasonable that it should endure no longer than the parties should be pleased with it, but at the same time deemed it expedient, as well as just, that they should not be placed in a worse condition by the partition than if they had continued to enjoy their respective interests in the land or property without a division. Therefore, after the partition a warranty was annexed by the common law to each part, so that, if any one should be impleaded, she might vouch her sisters, or those who had been her coparceners at the time of the partition, or their heirs, and by this means also have their aid to deraign the warranty paramount, if any existed, annexed to the purchase of their ancestors. *Weiser v. Weiser* (Pa.) 5 Watts, 279, 280, 30 Am. Dec. 313.

The "writ of partition" is considered as an adversary suit, in which the title may be contested. *Brownell v. Bradley*, 16 Vt. 105, 107, 42 Am. Dec. 498.

#### **Distribution distinguished.**

Distribution neither gives a new title to property nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession and the extent of their respective interests; while partition, in most if not all of its aspects, is an adversary proceeding, in which a remedial

right to the transfer of the property is asserted, and resulting in a decree which either *ex proprio vigore* or as executed, accomplishes such transfer. *Robinson v. Fair*, 9 Sup. Ct. 30, 34, 128 U. S. 53, 32 L. Ed. 415.

In Sess. Laws 1882, p. 202, § 1, providing that the court may, during the settlement of an estate, order a partition where any person dies owning real estate or any interest therein, the term "partition" does not apply to an ordinary case of distributing the goods among the heirs entitled thereto; but a partition in the ordinary legal sense is meant, and its purpose is to separate the interest of the estate from a common ownership with other persons who are strangers to the estate. *Appeal of Staple*, 52 Conn. 421, 424.

A decree on final distribution in a probate court is a "partition," within the meaning of Gen. St. 1878, c. 56, § 1, providing that, before partition of an estate, an allowance shall be made for children under seven years of age. *Wood v. Myrick*, 16 Minn. 494, 499 (Gil. 447, 451).

#### **As an equitable action.**

Partition was cognizable either at law or in equity before the adoption of the Constitution. It is, and has been for centuries, a well-recognized branch of equity jurisprudence. When, therefore, a statutory proceeding for partition cannot be heard in a United States court on the law side, without affording a jury trial and thereby doing violence to the forms of procedure provided in the state statute, it seems to us to be the duty of the court to decline to take jurisdiction of it as a court of law, and to direct that it be brought in equity, where no jury need be had, and where every remedy provided by the statute may be amply administered. *Klever v. Seawall* (U. S.) 65 Fed. 393, 396, 12 O. C. A. 661.

#### **As a matter of right.**

Partition in equity, where there are no legal objections to the complainant's title, is a matter of right, and not discretionary within the court; and where all the conditions prerequisite to a partition exist, any hardship incidental to the exercise of such right arising out of the particular circumstance of a given case cannot prevent the complainant from enforcing it. It is well settled that the difficulty of making a partition and the inconvenience resulting to the other tenants furnished no sufficient reason for not making a division. *Updike v. Adams*, 48 Atl. 384, 385, 22 R. I. 432.

#### **Partition at law and in equity distinguished.**

Partition at law and in equity are different things. The first operates by judg-

ment in a court of law, and delivering up possession in pursuance of it, which concludes all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties, and if the party be not competent to execute the conveyance the partition cannot be effectually had. *Gay v. Parpart*, 1 Sup. Ct. 458, 468, 106 U. S. 679, 27 L. Ed. 256.

#### **As a proceeding in rem.**

Proceedings in partition or to quiet title are not strictly proceedings in rem, for they are not taken directly against property; but they are regarded, so far as they affect property, as proceedings in rem sub modo, in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction, and constructive service may be substituted. *Meyer v. Kuhn* (U. S.) 65 Fed. 705, 712, 13 C. C. A. 298.

#### **As purchase sale or transfer.**

See "Judicial Sale"; "Purchase"; "Sale"; "Transfer."

#### **As equivalent to livery of seisin.**

The act of partition, accompanied by an open possession in severalty, is an act of notoriety equivalent to livery of seisin at common law, and is notice to the world. *Woodhull v. Longstreet*, 18 N. J. Law (3 Har.) 405, 421.

#### **As suit.**

See "Suit (Noun)."

#### **As affecting title.**

A decree in partition does not create any new title. It is not necessarily the province of a proceeding for a partition to establish or quiet title, but simply to make division of the land. While it is true that in partition proceedings title may be put in issue and determined under proper pleadings, yet, if this is not done, the title, as between the parties to the proceedings, is left where it was. *Fordice v. Lloyd*, 60 N. E. 387, 389, 27 Ind. App. 414.

Partition makes no degree. It only adjusts the rights of the parties to the possession. Each does not take the allotment by purchase, but is as much seised of it by descent from the common ancestor as of the undivided share before partition. The deed of partition destroys the unity of possession, and henceforward each holds his share in severalty, but such deed confers no new title or additional estate in the land. In *Yancey v. Radford*, 86 Va. 638, 10 S. E. 972, the court says: "It has been often said that partition between coparceners neither amounts to nor requires an actual conveyance. It is less

than a grant. Its operation is not to pass land by a fresh investiture of the seisin, for coparceners are supposed to be already in possession of the whole lands." *Whitsett v. Wamack*, 59 S. W. 961, 963, 159 Mo. 14, 81 Am. St. Rep. 339.

#### **PARTITION FENCE.**

A lawful partition fence is any structure, hedge, or ditch in the nature of a fence, used for the purpose of inclosure, such as a good husbandman generally keeps, and as shall on the testimony of skillful men appear to be sufficient. *Enders v. McDonald*, 31 N. E. 1056, 1057, 5 Ind. App. 297.

A "partition fence," as used in Code 1873, § 1495, providing that, when one uses his land otherwise than in common, he can be compelled to contribute to the erection of partition fences, means a fence on the land between two proprietors, where there is no road, alley, or something else which would prevent the erection of such fence, so that, where neither the plaintiff nor the defendant were using their premises in common, neither could be compelled to join in the erection of a partition fence on the line between their lands. *Hewitt v. Jewell*, 59 Iowa, 37, 38, 12 N. W. 738, 739.

Under a statute relating to "partition fences" it is held that a fence of one smooth wire and two barbed wires, or of five smooth wires, constitutes a legal partition fence. *Oxborough v. Boesser*, 30 Minn. 1, 3, 13 N. W. 906.

#### **PARTITION OF SUCCESSION.**

The "partition of succession" is the division of the effects of which the succession is composed among all the coheirs according to their respective rights. *Civ. Code La.* 1900, art. 1293.

#### **PARTITION WALL.**

By usage the words "party wall" and "partition wall" have come to mean a solid wall. *Bonney v. Greenwood*, 52 Atl. 788, 790, 96 Me. 335.

#### **PARTITIONS.**

In a building contract, making the second payment come due when the building was ready for lathing, roof on, and partitions set, the term "partitions" did not include coal partitions in the cellar, but which were not in themselves partitions of the building, but mere subdivisions of the cellar to make coal boxes for different tenants. *Tibbitts v. Phipps*, 51 N. Y. Supp. 934, 955, 30 App. Div. 274.

**PARTNER.**

See "Copartner"; "Dormant Partner"; "Equal Partner"; "Liquidating Partner"; "Nominal Partner"; "Ostensible Partner."

As acting in fiduciary capacity, see "Fiduciary Capacity or Character."

As agent, see "Agent."

As general agent, see "General Agency or Agent."

As trustee, see "Trustee."

Surviving partner as personal representative, see "Personal Representative."

**PARTNERSHIP.**

See "Copartnership"; "General Partnership"; "Limited Partnership"; "Mining Partnership"; "Nontrading Partnership"; "Particular Partnership"; "Secret Partnership"; "Special Partnership"; "Trading Partnership"; "Universal Partnership."

As contract, see "Contract."

A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429, 431; *Richardson v. Carlton*, 80 N. W. 532, 534, 109 Iowa, 515; *Winter v. Pipher*, 64 N. W. 663, 664, 96 Iowa, 17; *Wheeler v. Lack*, 61 Pac. 849, 850, 37 Or. 238; *Kelley v. Bourne*, 16 Pac. 40, 43, 15 Or. 476; *Cogswell v. Wilson*, 4 Pac. 1130, 1132, 11 Or. 371; *Danforth v. Hertel* (Del.) 49 Atl. 168, 169, 3 Pennewill, 57; *Omaha & Grant Smelting & Refining Co. v. Rucker*, 40 Pac. 853, 854, 6 Colo. App. 334; *Goldsmith v. Eichold*, 10 South. 80, 81, 94 Ala. 116, 33 Am. St. Rep. 97; *Vall v. Winterstein*, 94 Mich. 230, 233, 53 N. W. 932, 18 L. R. A. 515, 34 Am. St. Rep. 334; *Artman v. Ferguson*, 40 N. W. 907, 908, 73 Mich. 146, 2 L. R. A. 343, 16 Am. St. Rep. 572; *Hirbour v. Reeding*, 3 Mont. 15, 25.

A partnership is a voluntary contract between two or more persons for joining together the money, goods, labor, and skill of either or all of them upon an agreement that the gain or loss shall be divided proportionably between them. *Macomber v. Parker*, 30 Mass. (13 Pick.) 175, 181; *Howze v. Patterson*, 53 Ala. 205, 207, 25 Am. Rep. 607; *McClung v. Hughes* (Va.) 5 Rand. 453, 459; *Bucknam v. Barnum*, 15 Conn. 67, 71. And having for its object the advancement and protection of fair and open trade. *McMahon v. McClernan*, 10 W. Va. 419, 461; *Beecham v. Dodd* (Del.) 3 Har. 485.

Judge Story defines a partnership to be a voluntary contract between two or more competent persons to place their money, ef-

fects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. *Carter v. McClure*, 38 S. W. 585, 586, 98 Tenn. 109, 36 L. R. A. 282, 60 Am. St. Rep. 842; *Bigelow v. Elliott* (U. S.) 3 Fed. Cas. 349, 351; *In re Gibb's Estate*, 27 Atl. 383, 384, 157 Pa. 59, 22 L. R. A. 276, 33 Wkly. Notes Cas. 120, 122; *Eshbach v. Slonaker*, 1 Pa. Dist. R. 32, 33; *Potter v. Morris & Cummings Dredging Co.*, 46 Atl. 537, 538, 59 N. J. Eq. 422; *Wild v. Davenport*, 7 Atl. 295, 296, 48 N. J. Law (19 Vroom) 129, 57 Am. Rep. 552; *Strader v. White*, 2 Neb. 348, 362; *Kelley v. Bourne*, 16 Pac. 40, 43, 15 Or. 476; *Woods v. Ward*, 37 S. E. 520, 525, 48 W. Va. 652; *Setzer v. Beale*, 19 W. Va. 274, 287; *Parchen v. Anderson*, 5 Pac. 588, 593, 599, 5 Mont. 438, 51 Am. Rep. 65; *Bishop v. Everett*, 6 Haw. 157, 158; *Owners of Waihee Plantation v. Kalapu*, 3 Haw. 760, 761; *Allen v. Davis*, 13 Ark. (8 Eng.) 28, 31.

Parsons defines a partnership to be a combination of two or more persons of capital or labor or skill for the purpose of business for their common benefit. *Evans v. Warner*, 47 N. Y. Supp. 16, 19, 20 App. Div. 230; *Kelley v. Bourne*, 16 Pac. 40, 43, 15 Or. 476; *Eshbach v. Slonaker*, 1 Pa. Dist. R. 32, 33.

A partnership exists when two or more persons combine their property, labor, and skill, or one or more of them, in the transaction of business. *Johnson v. J. J. Douglass Co.*, 58 Pac. 743, 745, 8 Okl. 594.

Lindl. Copartn. § 12, says an agreement to share profits and losses may be said to be the type of a partnership contract. *Bishop v. Everett*, 6 Haw. 157, 158; *Owners of Waihee Plantation v. Kalapu*, 3 Haw. 760, 761.

A partnership is a combination by two or more persons of capital, or labor, or skill, or some or all of these, for the purpose of business for their common benefit. *Morse v. Pacific Ry. Co.*, 61 N. E. 104, 106, 191 Ill. 356.

A contract of partnership is where parties join together their money, goods, labor, or skill for the purpose of trade or gain, and where there is a community of profits. *Ward v. Thompson*, 63 U. S. (22 How.) 330, 331, 16 L. Ed. 249.

A partnership exists when two or more persons contribute their property or services to be employed jointly in some enterprise or business, the profit or loss of which is to be shared among them in some fixed proportion. *Farmers' Ins. Co. v. Ross*, 29 Ohio St. 429, 431.

A partnership is the voluntary association of two or more persons in sharing the profits and bearing the losses of a general

trade or a specific adventure. *O'Donohue v. Bruce* (U. S.) 92 Fed. 858, 860, 33 O. C. A. 52.

A partnership is a joint understanding to share in the profit and loss. *Eastman v. Clark*, 53 N. H. 276, 311, 16 Am. Rep. 192 (citing *Saville v. Robertson*, 4 Durn. & E. 720, 727, 728).

A partnership is an association of persons united in a common object, business, or pursuit. *Osborne v. Holland* (Tex.) 1 White & W. Civ. Cas. Ct. App. §§ 1087, 1088.

There seems to be an agreement of authorities that, where persons associate themselves together to carry on a joint business for their common benefit, to which each one contributes either property or services, and the profits arising therefrom are to be shared between them, the essential elements of a contract of partnership are made out. *McMurtre v. Guiler*, 67 N. E. 358, 183 Mass. 451 (citing *Ryder v. Wilcox*, 103 Mass. 24; *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835).

A partnership is a voluntary contract between two or more persons for joining together their money, goods, or labor, etc., upon some agreement respecting them. *Post v. Kimberly* (N. Y.) 9 Johns. 470, 488.

A partnership is a contract relation subsisting between persons who have combined their property, labor, or skill in an enterprise or business as principals for the purpose of joint profit. *Van Housen v. Copeland*, 54 N. E. 169, 172, 180 Ill. 74.

A partnership has been defined to be "a contract in which two or more persons agree to put in something in common with a view of dividing the benefits which result from it." *Strader v. White*, 2 Neb. 348, 362 (cited in *Flower v. Barnekoff*, 25 Pac. 370, 373, 20 Or. 132).

A partnership is an agreement entered into by two or more persons to unite their labor, skill, money, and property, or either or all of them, in a lawful enterprise for their mutual account. *Willis v. Crawford*, 38 Or. 522, 63 Pac. 985, 987, 64 Pac. 866, 53 L. R. A. 904 (cited in *Hanthorn v. Quinn*, 69 Pac. 817, 819, 42 Or. 1).

A partnership is defined as a voluntary contract between two or more persons agreeing to put their money, effects, labor, and skill, or either or all, in some lawful enterprise or business with a view of dividing the profits or sharing the losses which result therefrom. *Flower v. Barnekoff*, 25 Pac. 370, 373, 20 Or. 132, 11 L. R. A. 149 (cited in *Hanthorn v. Quinn*, 69 Pac. 817, 819, 42 Or. 1).

A partnership is the combination by two or more persons of capital, or labor, or skill for their common benefit, and is usually con-

stituted, as between the parties themselves, by an agreement between them to share the profits and losses of their joint undertaking, whether it have reference to a trade or business or merely to some particular venture. *Stone v. Boone*, 24 Kan. 337, 340.

A partnership is a voluntary association by which, in all the affairs connected with the business, authority is impliedly given to every member to dispose of the partnership property as if it were his own personal effects. *Holmes v. Gilman*, 19 N. Y. Supp. 151, 153, 64 Hun, 227.

A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services and having a community of interest in the profits. It is, in effect, a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for the other. *Karrick v. Hannaman*, 18 Sup. Ct. 135, 138, 168 U. S. 328, 42 L. Ed. 484.

Partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them. Civ. Code Cal. 1903, § 2395; *Krasky v. Wollpert*, 66 Pac. 309, 134 Cal. 338; Rev. Codes N. D. 1899, § 4370; Civ. Code S. D. 1903, § 1723; Civ. Code Mont. 1895, § 3180; *Grigsby v. Day*, 70 N. W. 881, 883, 9 S. D. 585.

Partnership is a synallagmatic and commutative contract made between two or more persons for the mutual participation in the profits which may accrue from property, credit, skill, or industry furnished in determined proportions by the parties. Civ. Code La. 1900, art. 2801.

A partnership, while often called a contract, is rather a relation, a status, somewhat as marriage is a relation or status. *Haggett v. Hurley*, 40 Atl. 561, 562, 91 Me. 542, 41 L. R. A. 362 (citing *Parsons on Partnership*, § 101).

Where one person advances funds and another furnishes his personal services and skill in carrying on a trade or operation, the parties to share in the proceeds, this constitutes a partnership. *Bearce v. Washburn*, 43 Me. 564, 565.

A partnership is not necessarily an entire merger of the individual, his labor, energy, or estate in the firm. The extent of the merger is determined by the agreement entered into, and the purpose the partners have in view. *Goldsmith v. Eichold*, 10 South. 80, 81, 94 Ala. 116, 33 Am. St. Rep. 97.

The essential elements of a partnership are a common stock, an intention to prosecute unitedly one or more branches of industry, and authority and power, mutually

interchanged or specially delegated, to manage and control the common stock for the common benefit. The last-named feature may be regarded as the leading characteristic of a partnership. *Rose v. Isard*, 7 S. C. (7 Rich.) 442, 467.

The essential characteristics of a partnership seem to be the joint ownership of property, and authority of each partner to bind the other partners by his acts with reference to the partnership property and also to impose upon the other partnership liability. *Hoaglin v. C. M. Henderson & Co.*, 94 N. W. 247, 249, 119 Iowa, 720, 61 L. R. A. 756, 97 Am. St. Rep. 335.

Partnerships are of different kinds. Some are general, and others are limited to a particular transaction. One essential element of a partnership is a community of interest in the whole subject-matter. Another element is that on a dissolution of a partnership by the death of one of the partners the survivor becomes entitled to retain and dispose of the partnership assets for the purpose of distributing the remaining fund. A similar participation of profit and loss does not necessarily constitute a partnership. *Dwinel v. Stone*, 30 Me. (17 Shep.) 384, 385.

#### As an artificial person.

A partnership is considered in law as an artificial person or being, distinct from the individuals composing it, and is treated as such in law and in equity. *Hollingshead v. Curtis*, 14 N. J. Law (2 J. S. Green) 402, 410.

Partnership is defined as being a contract creating a distinct person from those who compose it. A moral being; a civil person. Partners, under our law, are not tenants in common. *Stothart v. William T. Hardie & Co.*, 34 South. 740, 742, 110 La. 666.

#### Association.

A partnership is an association with certain incidents recognized by law for the convenient transaction of legitimate trade and business. It cannot, therefore, be formed for an illegal purpose, or one contrary to public policy. *Jackson v. Akron Brick Ass'n*, 41 N. E. 257, 258, 53 Ohio St. 303.

An association in which the conditions of membership are the payment of an entry fee and of pro rata assessments, but which does no business involving profit or loss, is not a partnership. *Burt v. Lathrop*, 17 N. W. 716, 52 Mich. 106.

An unincorporated association of individuals formed for a public purpose, who received money from the public as a gift, is not a partnership as between themselves, whatever may be its relation as to third persons; but where the association is for private and individual profit or pleasure, with

no public object, it is a copartnership, and where the association is for private emoluments or for benevolence, confined exclusively to the association, and in which none others participate, it is, as between the members, a partnership. *Thomas v. Ellmaker* (Pa.) 1 Pars. Eq. Cas. 98.

While the mere calling an association a partnership cannot make it such when there are none of the essential elements of the partnership present, yet where there is a joint undertaking, a union of labor or a union of capital and labor, or where some of the essential elements of a partnership are present, and not one party, but both, distinctly agree among themselves to become partners, there is no reason why the law should not take them at their word, even though that agreement falls short of the facts from which the law would otherwise have inferred a partnership. *Huggins v. Huggins*, 43 S. E. 759, 760, 117 Ga. 151 (citing *Beecher v. Bush*, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465).

An association which does business under an unsuccessful attempt to incorporate is a partnership composed not only of the directors, but of all the subscribers to the articles. *Coleman v. Coleman*, 78 Ind. 344, 346.

A "voluntary association," unincorporated, formed for social and charitable purposes, and not for trade or profit, is not a partnership entitling the members thereof to a proportionate share of the association's property on withdrawal. *Local Union No. 1, Textile Workers v. Barrett*, 36 Atl. 5, 6, 19 R. I. 663.

A partnership includes an association of separate owners of several steamboats into a joint concern to run their boats and collect and receive the earnings in a common fund, out of which expenses of all the boats are to be paid. *The Swallow* (U. S.) 23 Fed. Cas. 491, 492.

An agreement forming an association stated that it was formed for the mutual benefit and profit of the parties; that the business should be buying, selling, renting, leasing, and mortgaging real estate, and that each of the parties thereto should have a specified interest therein. Held, that the legal effect of the agreement was to constitute the parties partners. *Kelley v. Bourne*, 16 Pac. 40, 43, 15 Or. 476.

#### Community of interest in property.

A mere joint ownership in property does not constitute a partnership. *State Bank v. O. S. Kelley Co.*, 66 N. W. 619, 620, 47 Neb. 678.

A community of interest in land does not make men partners, nor does a mere community of interest in personal property.

There must be some joint adventure, and an agreement to share in the profits and losses of the undertaking. *Porter v. McClure* (N. Y.) 15 Wend. 187, 192.

Mere joint ownership in a patent does not constitute a partnership. *Boeklen v. Hardenbergh*, 60 N. Y. 8, 9.

The proprietors of a vessel are ordinarily considered as part owners in the nature of tenants in common, and not as partners. *Williams v. Sheppard*, 13 N. J. Law (1 J. S. Green) 76, 78.

The relation of partnership arises out of contract between the parties, while a joint ownership in property may be created where there are no contractile relations. *Hackett v. Multnomah Ry. Co.*, 6 Pac. 659, 662, 663, 12 Or. 124, 53 Am. Rep. 327.

Two persons buying shares of stock, where each own one-half of it, are tenants in common, rather than partners, since it is purely an investment, and not an engagement in a business venture, which is the element of a partnership. *Morse v. Pacific Ry. Co.* (Ill.) 61 N. E. 104, 106, 191 Ill. 356.

The joint ownership of real estate does not create a partnership therein. A special contract in writing is necessary for that purpose. *Benton v. Roberts*, 4 La. Ann. 216, 218.

Partnership and community are not to be confounded. The first is based in the contract of the parties, which thus creates the community. The last may exist independently of any contract whatsoever. *Pickereil v. Fisk*, 11 La. Ann. 277, 278.

Joint purchasers, without an agreement of partnership, are not entitled to the remedies, nor subject to the responsibilities, of partners. *Brady v. Colhoun* (Pa.) 1 Pen. & W. 140, 147.

Joint ownership of a vessel does not create a partnership, nor are the interests of all the joint owners barred by a sale on execution against part. *Hopkins v. Forsyth*, 14 Pa. (2 Harris) 34, 38, 53 Am. Dec. 513.

A joint interest in the partnership property or a joint interest in the profits and losses of the business constitutes a partnership as to third persons. *Brandon v. Conner*, 45 S. E. 371, 372, 117 Ga. 759, 63 L. R. A. 260.

A joint interest in the partnership property, or a joint interest in profits and losses of the business, constitutes a partnership as to third persons. The common interest in profits alone does not. *Civ. Code Ga.* 1895, § 2629.

**As a company.**

See "Company."

#### **As determined by intent of parties.**

To determine whether the relations between partners constitutes a partnership, their intention in forming it governs. *Hughes v. Ewing*, 62 S. W. 465, 474, 162 Mo. 261.

Whether a partnership is created by a contract depends on the intention of the parties. Where no question of estoppel is involved, persons cannot be held to be partners despite their intention not to form that relation. Sharing the profits of a business is not conclusive evidence of the existence of a partnership. A contract by the terms of which the owner transfers to another the exclusive use and control of property and is to receive as rent therefor a portion of the profits arising from such use, is not a partnership contract. *Garrett v. Republican Pub. Co.*, 85 N. W. 537, 538, 61 Neb. 541; *Omaha & Grant Smelting & Refining Co. v. Rucker*, 40 Pac. 853, 854, 6 Colo. App. 334.

In 1 *Bates, Partnership*, § 17, it is said: "To determine whether the relation between persons constitutes a partnership, their intention in forming it governs. \* \* \* The declarations of the parties themselves on the subject, if not inconsistent with the other terms of the contract, will control. \* \* \* The intention of the parties will be determined from the effect on the whole contract, regardless of any special expressions." In a note to *Colly. Partn.* (6th Ed.) p. 33, § 19, it is said: "Whether persons are partners or not is a question of intention, to be decided by the citation of the whole agreement into which they have entered, and ought not to be made a portion of one or two only of the clauses in it." *Hughes v. Ewing*, 62 S. W. 465, 474, 162 Mo. 261.

The question of whether or not a partnership exists is not always dependent upon the personal arrangement or understanding of the parties. Where men so act as to induce an honest belief in the public mind that they are partners, and when they deliberately hold themselves out to the world as partners, and obtain credit thereby, the law will often imply that they are partners, and hold them accountable as such. *Johnson v. J. J. Douglass Co.*, 58 Pac. 743, 745, 8 Okl. 594.

#### **Equality of contribution.**

A partnership may well exist with a right to an equal participation in the profits, although the parties may contribute the funds or stock in unequal proportions. *Caldwell v. Leiber* (N. Y.) 7 Paige, 483, 494.

#### **Executed agreement essential.**

To constitute a partnership, there must be a valid agreement to enter into a partnership, and this contract must be executed. Unless something is done, or unless the agreement operates in present, the contract is executory only. *Sabel v. Sayannah Rail*

& Equipment Co., 33 South. 663, 664, 135 Ala. 380.

A partnership is a contract imposing certain liabilities upon its members, but a mere agreement to constitute a partnership in future does not make the contracting parties liable as partners. *Atkins v. Hunt*, 14 N. H. 205, 208, 209.

#### Formal requisites of agreement.

In the state of Montana no written articles are necessary to constitute a copartnership to be entered into immediately. *Hirbour v. Reeding*, 3 Mont. 15, 25.

#### As head of family.

See "Head of a Family."

#### Joint-stock company.

A partnership association commonly but inaccurately called a "joint-stock company" is the creation of the statutes, and, while it is assimilated in some respects to a corporation, it is nevertheless essentially a partnership. *Carter v. Producers' Oil Co.*, 50 Atl. 167, 168, 200 Pa. 579.

Joint-stock companies are generally treated as, and have all the attributes of, a common partnership, yet a mere joint ownership or community of interest in property does not necessarily constitute a partnership, though the income from it is divided. *Consolidated Canal Co. v. Peters* (Ariz.) 46 Pac. 74, 76.

These associations formed for business purposes were at common law, and as a general rule still are, considered merely as partnerships, and their rights and liabilities are in the main governed by the same rules and principles which regulate commercial partnerships. *Adams Exp. Co. v. Schofield*, 64 S. W. 903, 904, 111 Ky. 832.

#### Joint-stock company distinguished.

See "Joint-Stock Company."

#### As a legal entity.

A partnership is a distinct legal entity, and as such is the real party in interest in an action to recover a claim for goods sold and delivered. It alone must seek the remedy. *Sullivan v. Nicoulin*, 84 N. W. 978, 980, 113 Iowa, 76.

A partnership is a legal entity, formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits. *Pennville Natural Gas & Oil Co. v. Thomas*, 51 N. E. 351, 352, 21 Ind. App. 1.

A "partnership" is a legal entity, known and recognized by the law, and for judicial purposes it may be considered as having a residence in every county in which it does business, though neither partner resides in

such county. *Fitzgerald v. Grimmell*, 64 Iowa, 261, 20 N. W. 179. Under Code Iowa, § 2585, providing that when a corporation, company, or individual has an office or agency in any county for the transaction of business any suits connected with such office or agency may be brought in such county, an attachment may be sued out against a partnership in any county in which it does business, on the ground that it is about to permanently remove therefrom, though none of the partners reside in such county. *Ruthven v. Beckwith*, 51 N. W. 153, 154, 84 Iowa, 715.

A partnership is a separate legal entity from the individual members composing it. *Clarke v. Laird*, 60 Mo. App. 289. Therefore where one agrees to indemnify a partnership, he does not become liable for loss to an individual member of the firm. *Kelley v. London Guarantee & Accident Co.*, 71 S. W. 711, 97 Mo. App. 623.

A partnership is not a legal entity, having a domicile, although for the purposes of taxation and for other purposes it may be treated by statutes as having a locality. *Faulkner v. Hyman*, 6 N. E. 846, 848, 142 Mass. 53.

A copartnership is a distinct entity, entirely separate from that of any of its members, and we know of no reason why it may not assign its property for the payment of its debts, without including the individual property of the different partners. *Armstrong v. Hurst*, 39 S. C. 498, 504, 18 S. E. 150, 153 (*Trumbo v. Hamel*, 29 S. C. 520, 8 S. E. 83).

#### Nature of business.

There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce or to dealings in personal property. Hence two or more persons may become partners in buying and selling land. *Hirbour v. Reeding*, 3 Mont. 15, 25.

#### Open board of brokers.

The Open Board of Brokers in the city of New York is not a copartnership, not being engaged in any business, and not devoting its funds to the prosecution of any undertaking to produce profit or gain for its members. There are no profits to be divided among the members, nor are there losses to be borne. *White v. Brownell* (N. Y.) 3 Abb. Prac. (N. S.) 318, 325.

#### As ordinary partnership.

The term "partnership," as used in a rule that corporations are not impliedly authorized to enter into partnership with other companies or with other individuals, is used in its general sense, and is qualified in most authorities by the word "ordinary." Clearly, that character of partnership is



meant where the element of mutual agency is present whatever else may be lacking, for it is against that element that the rule is mainly directed. *Markowitz v. Greenwall Theatrical Circuit Co. (Tex.)* 75 S. W. 74, 77.

#### Sharing profits.

The tendency of the more modern authorities is towards the doctrine that the sharing of profits is evidence that he who shares them is a partner, but not conclusive evidence; the true test being whether there is such a participation in or sharing of the profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business. The intention of the parties must control. The relation of partners is formed by contract, or by the acts of the parties which amount to a contract. If there is no partnership *inter se*, there can be none as to third parties, unless a party by his acts has put himself in such a position that he is estopped from denying that he is a partner. *Parchen v. Anderson*, 5 Pac. 588, 590, 5 Mont. 438, 51 Am. Rep. 65; *Johnson v. Rothschilds*, 41 S. W. 996, 997, 63 Ark. 518.

It is clear that the old rule that to share the profits as profits made one a partner is overthrown. It seems to be true that the real test is that there must be a community of interest, a joining as principals in carrying on a business for their joint profit. *Hughes v. Ewing*, 62 S. W. 465, 474, 162 Mo. 261.

An agreement between two or more persons to divide the profits resulting from the transaction of a business venture in which they have a common interest was once regarded as affording an accurate test of partnership, but such standard is not now deemed conclusive evidence of the existence of such relation. *Willis v. Crawford*, 63 Pac. 985, 987, 38 Or. 522, 53 L. R. A. 904.

In the absence of a partnership in fact, merely sharing in profits does not create one as to third persons who have not been legitimately led to believe that such relation existed. *Colwell v. Britton*, 26 N. W. 538, 59 Mich. 350; *Kelly v. Gaines*, 24 Mo. App. 506, 512; *Parchen v. Anderson*, 5 Pac. 588, 590, 5 Mont. 438, 51 Am. Rep. 65.

The test of partnership is a community of profit, a specific interest in the profits as profits in contradistinction to a stipulated portion of the profits as a compensation for services. *Demuth v. Sternheimer (N. Y.)* 1 City Ct. R. 443, 446.

In order to constitute a partnership, each person must have an interest in the profits as a principal trader. A mere reception of a portion of the profits is insufficient. *Campbell v. Dent*, 54 Mo. 325, 334; *Beudel v. Hettrick*, 35 N. Y. Super. Ct. (3 Jones & S.) 405, 410.

A right to a share of the profits, as such, is essential to constitute a person a partner. *Griffen v. Cooper*, 50 Ill. App. 257, 260; *Hallet v. Desban*, 14 La. Ann. 529; *Heimstreet v. Howland (N. Y.)* 5 Denio, 68, 70.

To constitute a partnership there must be an agreement to share not only in the profits of a joint venture, but in the losses as well. *McBride v. Ricketts*, 67 N. W. 410, 411, 98 Iowa, 539; *Martin v. Same*, Id.

An agreement between two persons to share in the profits of an adventure or concern does not necessarily constitute them copartners in respect to the concern or adventure from which the profits arise. *Rice v. Austin*, 17 Mass. 197, 205, 206.

An agreement to share in the profits of a business does not necessarily constitute a partnership. *Meserve v. Andrews*, 104 Mass. 360, 362.

An agreement between two persons to share the profits of a business is, *inter se*, prima facie proof only that they are partners. *Kootz v. Tuvlan*, 24 S. E. 776, 777, 118 N. C. 393.

An agreement between several persons to apportion, when recovered, the reward offered for the apprehension of a fugitive from justice, does not constitute a partnership in the legal sense of the term. *Dawson v. Gurley*, 22 Ark. 381, 383.

The foundation of a partnership is a contract express or implied, and it results from the acts of the parties, and not from the act of the law. Merely showing that one has received profits from a business conducted by an association, without showing whether it is a partnership or not, does not render him liable as a partner. In *re Gibbs' Estate*, 33 Wkly. Notes Cas. 120, 122, 27 Atl. 383, 157 Pa. 59, 22 L. R. A. 276.

Defendant authorized plaintiff to solicit loans for him, the commissions being divided between them, and a second mortgage to defendant being taken to secure such commissions. Each application for a loan, when accepted by defendant, was returned with a separate letter of instructions and the sum necessary to make the loan, and when it was made all papers were sent to defendant. The parties lived in different states, had no partnership name, and each carried on other business. Held, that as between themselves there was no partnership. *Grigsby v. Day*, 70 N. W. 881, 883, 9 S. D. 585.

Where two persons agree to join forces and cultivate a corn crop and divide the product, it is a partnership. *Allen v. Davis*, 13 Ark. (8 Eng.) 28, 31.

#### Same—As compensation for services.

A laborer, who receives as compensation for his services a share of the net profits

of his employer's business, but has no other interest in the capital or profits, is not a partner with his employer, as between themselves. *Bigelow v. Elliot* (U. S.) 3 Fed. Cas. 349, 353; *In re Pierson* (U. S.) 19 Fed. Cas. 661, 665; *Reed v. Murphy* (Iowa) 2 G. Greene, 574; *Heran v. Hall*, 40 Ky. (1 B. Mon.) 159, 35 Am. Dec. 178; *Miller v. Chandler*, 29 La. Ann. 88, 92; *Chaffraix v. Price*, 29 La. Ann. 176, 181; *Bull v. Schuberth*, 2 Md. 38, 56; *Atherton v. Tilton*, 44 N. H. 452, 456; *Hargrave v. Conroy*, 19 N. J. Eq. (4 C. E. Green) 231, 233; *Brockway v. Bur-nap* (N. Y.) 16 Barb. 309, 310; *Smith v. Bodine*, 74 N. Y. 30, 33; *De Cordova v. Pow-ter*, 8 N. Y. St. Rep. 431, 432; *Edwards v. Dooley*, 13 N. Y. St. Rep. 596, 602; *Delise v. Palladino*, 37 N. Y. Supp. 705, 706, 16 Misc. Rep. 74; *Edwards v. Tracy*, 62 Pa. (12 P. F. Smith) 374, 381; *Bell v. Hare*, 59 Tenn. (12 Heisk.) 615, 617; *Sodiker v. Applegate*, 24 W. Va. 411, 413, 49 Am. Rep. 252.

A party who, without any interest in the property, is, by agreement, to receive as compensation for his services, and only as compensation therefor, a certain proportion of the profits, and is neither held out to the world as a partner nor through the negligence of the owner, permitted to hold him-self out as partner, is not a partner either as to the owner or third persons. *Le Fevre v. Castagnio*, 5 Colo. 564, 571; *Loomis v. Man-hall*, 12 Conn. 69, 77, 30 Am. Dec. 596; *Pond v. Cummins*, 50 Conn. 372, 375; *Burton v. Goodspeed*, 69 Ill. 237, 243; *Shepard v. Pratt*, 16 Kan. 209, 213; *Hallet v. Desban*, 14 La. Ann. 529; *Commonwealth v. Bennett*, 118 Mass. 443, 453; *Ogden v. Astor*, 6 N. Y. Super. Ct. (4 Sandf.) 311, 321; *Conklin v. Barton* (N. Y.) 43 Barb. 435, 438; *Beudel v. Het-trick*, 45 How. Prac. 198, 204, 35 Super. Ct. (3 Jones & S.) 405.

A stipulation that the compensation for the services of a person as a clerk shall be proportioned to the profits of the concern, without giving him a specific lien on such profits, does not constitute such person a partner. *Lee v. Wimberly*, 15 South. 444, 447, 102 Ala. 539; *Goode v. McCartney*, 10 Tex. 193, 195; *Cothran v. Marmaduke*, 60 Tex. 370, 372.

Where a merchant employs a person in his business, and agrees to pay him a stated salary, and, in addition, a certain percentage of the profits of the business, the contract does not constitute such merchant and the person so employed copartners, as a matter of law. *Stockman v. Michell*, 67 N. W. 336, 109 Mich. 348.

Where a person enters into a contract with another by which the latter is to re-ceive a certain salary and a percentage of the profits, while the former is to own the entire capital, no partnership exists. *Breman*

*Sav. Bank v. Branch-Crookes Saw Co.*, 16 S. W. 209, 213, 104 Mo. 425.

To constitute a partnership there must be an interest in the profits as appears, and such profits must be shared as the result of the adventure or enterprise in which both are interested, and not simply as a measure of compensation. *Cogswell v. Wilson*, 4 Pac. 1130, 1132, 11 Or. 371.

Community of profits is the true criteri-on whereby to determine whether or not an agreement for the carrying on of business constitutes a partnership. But if one re-ceive as compensation for his services or as rent such a portion of the profits as a mea-sure of the amount of his salary or as a mode of payment, he will not on that account be considered a partner. *Bigelow v. Elliot* (U. S.) 3 Fed. Cas. 349, 351.

Equal shares in the profits do not always make the persons thus sharing partners. This court has decided that one may share in a profit without being a partner. *Collom v. Bruning*, 49 La. Ann. 1257, 22 South. 744. The relation of partners is not necessarily es-tablished between an employer and employé who stipulates that the employé will receive a proportion of the profits in lieu of salary. A servant sharing in a profit instead of wages is not a partner. *Leonard v. Sparks*, 33 South. 594, 596, 109 La. 543.

Where one has a contract to do work for another, and enters into an agreement with a third party that the latter shall do the work, and that they shall divide, such agree-ment constitutes a partnership between them, making them equal partners, entitled to share equally in the profits. *Rogers v. Waltz* (Pa.) 12 Montg. Co. Law Rep'r, 160, 161.

An agreement between merchants to set up a store, and for one to superintend the business and to receive one-third of the prof-its realized (he putting in no stock), consti-tutes a partnership, and a loss sustained by fire is mutual. *Simpson v. Feltz* (S. C.) 1 McCord, Eq. 213, 218, 16 Am. Dec. 602.

"The specific interest in profits which is to make a person a partner must be a proprietary interest existing before the divi-sion of them into shares. The test of a part-nership is a community of profit, a specified interest in the profits in contradistinction to the stipulated operation of the profits as a compensation for services. An agreement by which one party agrees to pay all expenses in an ice-harvesting venture, sell the ice, and after deducting expenses pay one-fourth of the net profits to the other, who is to put in his time and furnish the necessary materi-als for doing the work, does not constitute a partnership between them." *Merchants' Nat. Bank v. Barnes*, 52 N. Y. Supp. 786, 789, 32 App. Div. 92.

**Same—As consideration for sale of property.**

A broker bought goods with the money of two persons on an agreement that he would sell again and that the three would share the profits. Held, that he was neither a partner nor a joint owner of the goods. *Hanna v. Flint*, 14 Cal. 73, 75.

An agreement by several persons to unite in procuring a sale of property, each one to receive a specified part of the commission earned, does not constitute a partnership. *Mason v. Sieglitz*, 44 Pac. 588, 590, 22 Colo. 320.

A declaration of trust whereby the owner of land agrees to share the net profits of selling the land with certain persons does not give them an interest in the land itself, but constitutes all the parties copartners as to the profits. *Roby v. Colehour*, 25 N. E. 777, 778, 135 Ill. 300.

**Same—As interest on loans or advances.**

A loan to a person engaged in trade, on condition of a rate of interest in proportion to profits or a share of the profits, does not necessarily constitute the lender a partner. *In re Ward* (U. S.) 29 Fed. Cas. 158, 159.

A loan of money for one year at the usual rate of interest, with a further provision that if there be a net profit in the business for which the loan was made in excess of a certain amount, the lender shall receive a specified per cent. of such excess, does not alone make the lender a partner in such business. *Meehan v. Valentine* (U. S.) 29 Fed. 276, 280.

It is a well-settled fact that when a party is only interested in the profits of a business as a means of compensation for money advanced he is not a partner. The receiving of a part of the profits of a commercial partnership in lieu of or in addition to interest, by way of compensation, for a loan of money, does not make the lender a partner with the borrower. *Stevens v. McKibbin*, 68 Fed. 406, 411, 15 C. C. A. 498.

The loan of money to be invested in trade, the lender to have one-half the net profits therefor, is not a partnership. *Culley v. Edwards*, 44 Ark. 423, 429, 51 Am. Rep. 614.

Where a person advances money to the owners of a vessel and cargo, who promise to pay him a share of the proceeds of the voyage in proportion to the sum advanced by him, he does not thereby become a partner. *Gallop v. Newman*, 24 Mass. (7 Pick.) 282, 286.

Where a person contributes a sum to the use and business of a partnership, on condition that he is to receive a part of the profits

of the business, he is a partner as to third persons dealing with the firm. *Leggett v. Henneberger* (N. Y.) 1 Thomp. & C. 418, 419.

Where one lends money to another "expressly for use in" a certain business, "and for no other use whatsoever," and that other is to make regular statements of the condition of the business, the two dividing equally the yearly net profits, they are partners. *Hackett v. Stanley* (N. Y.) 14 Daly, 210, 218.

A partnership is created where several persons subscribe a certain sum each to establish a co-operative store, to be conducted under a firm name by the principal subscriber and three directors elected by the subscribers, profits being divided in proportion to the amounts subscribed, and stock certificates being issued to the subscribers, but there being no incorporation. *Carter v. McClure*, 38 S. W. 585, 586, 98 Tenn. 109, 36 L. R. A. 282, 60 Am. St. Rep. 842.

**Same—As rent.**

Community of profit is the true criterion whereby to determine whether any agreement for the carrying on of business constitutes a partnership; but, if one receives as rent a stated portion of the profits, he will not on that account be liable as a partner. *Bigelow v. Elliott* (U. S.) 3 Fed. Cas. 349, 353.

Where the owner of a vessel contributed it to be put into a line for freight and passengers, and another person contributed the good will of an established line, together with his care, skill, and experience, he to have the general management of the business and the selection of the officer and crew, but the receiving and disposing agent to be appointed by the owners and be under their control, the receipts of the steamer to be applied to pay expenses, insurance, a certain sum to the owners, a certain sum to the hirer, and the balance of the profits to be equally divided, there was a contract of partnership. *Ward v. Thompson*, 63 U. S. (22 How.) 330, 333, 16 L. Ed. 249.

A contract that the lessor of a hotel should receive one-tenth of the gross receipts for rent does not create a partnership as to third persons. *McDonnell v. Battle House Co.*, 67 Ala. 90, 91, 42 Am. Rep. 99.

A contract by which one having no interest in land agrees to work it for a share of the crops does not constitute a partnership between him and the owner of the land. *Romero v. Dalton*, 11 Pac. 863, 864, 2 Ariz. 210.

An agreement between the owner of a lot of mules and a railroad contractor that the contractor is to use the mules and pay the owner for their hire half of what he makes out of the work on which the mules are used does not constitute a contract of

partnership. *Emberson v. McKenna* (Tex.) 16 S. W. 419.

A contract between a tenant and a landlord, by which the latter is to furnish land and stock with which the former is to make a crop, does not constitute them partners. *Holloway v. Brinkley*, 42 Ga. 226, 228; *Smith v. Summerlin*, 48 Ga. 425, 430.

A contract by which a number of railroad companies "lease" their roads and other property to one company for 99 years, the latter company agreeing to operate and maintain the lines and pay to each of the other companies a certain proportion of 93 per cent. of the net profits from such operation, is a contract of partnership, and not a lease. *Galveston, H. & S. A. Ry. Co. v. Davis*, 23 S. W. 301, 304, 4 Tex. Civ. App. 468.

A mere agreement to share in the profits and losses of an enterprise does not of itself create a partnership. Thus, where defendant leases fishery grounds to plaintiff, who agrees to establish and operate a fishery, advancing all money necessary therefor, and to pay defendant half the net proceeds as rental, and it is agreed that each shall bear half the cost of the improvements and of maintaining and operating the fishery, a partnership is not created. *Hanthorn v. Quinn*, 69 Pac. 817, 819, 42 Or. 1.

Though one is to receive from another, by way of rent, a portion of the profits of a farm and tavern, the agreement does not constitute them partners as between themselves, and therefore one may sue the other at law on the agreement. *Perrine v. Hankinson*, 11 N. J. Law (6 Halst.) 181, 184.

It is the law of New York that a right to a share in the profits in compensation of services rendered to the partnership does not involve a liability for the partnership engagement, and so of a loan of money to the partnership for a part of the profits. Thus, where a person hires a chattel to another, and agrees to accept a share of its earnings in the business in which it is employed in consideration thereof, he cannot be held liable on a note to which he is not a party, executed by the bailee, on the ground of a partnership arising from his partnership in the profits of the bailee's business. *W. D. Wilson Printing Ink Co. v. Bowker*, 15 N. Y. Supp. 293, 204, 27 Abb. N. C. 153.

#### Same—In addition to interest.

Where a person loans a merchant money, for which he is to receive, at a specified rate, interest, and in addition thereto a certain per cent. of the net profits of the business, he becomes a partner at common law. *Wessels v. Weiss*, 31 Atl. 247, 248, 166 Pa. 490, 36 Wkly. Notes Cas. 111.

The mere loaning of money to a partnership for a definite period, under an agreement

that the debtor shall receive interest and also one-tenth of the excess in yearly profits over \$10,000, which agreement is renewed for several successive years, does not make the lender liable as a partner. *Meehan v. Valentine*, 12 Sup. Ct. 972, 975, 145 U. S. 611, 36 L. Ed. 835 (affirming [U. S.] 29 Fed. 276).

A. contracted with B. to invest money, which B. was to advance him for the purpose, in certain lands as an adventure, and to repay the money, with legal interest, and to divide with B. equally the profits of the speculation. Held, that this was a contract for the loan of money, and did not constitute the parties partners inter sese. *Smith's Ex'r v. Garth*, 32 Ala. 368, 374.

A contract that A. shall furnish money, and B. obtain title to the land purchased in his own name, and manage it for a commission on sales for their mutual benefit; that when enough land has been sold to repay A. his advances, with interest, the residue in land or money shall belong, 60 per cent. to A. and 40 to B., does not create a partnership. *Blair v. Shaeffer* (U. S.) 33 Fed. 218, 223.

An agreement between two persons for the joint purchase of land for improvement and sale, the money to be advanced by one who was to be repaid principal and interest, with two-thirds of the profits, and the loss to be borne equally, constitutes a partnership, and not simply a cover for usury under guise of a partnership. *Plunkett v. Dillon*, 3 Del. Ch. 496, 507.

Where, under a contract, one party was to furnish money and the other was to buy cattle for market, the party furnishing the money to have his capital returned, with 5 per cent. interest, together with one-half the profits, it did not constitute a partnership. *Adams v. Funk*, 53 Ill. 219, 222, 223.

Where one loans money to another to be used in a business enterprise, and the borrower agrees to pay legal interest thereon and one-third of the profits in addition, the lender thereby becomes a partner as to a creditor of the borrower, whose debt arose after a loan was made in the course of the business. *Dilley v. Abright*, 48 S. W. 548, 549, 19 Tex. Civ. App. 487.

#### Same—In addition to rent.

Where a contract provides that one of the parties shall contribute the use of a theater building, and is to pay certain expenses incident to the use thereof, and the other party shall contribute his time and skill in the management of the business, and pay a fixed sum per month for lighting and heating the building, a fixed sum for rent, and the "lessor" is to receive "as additional rent one-half of the net annual profits accruing from the business of the theater," and

each party is to pay one-half of the losses of the business, this contract constitutes them partners, notwithstanding that it uses the terms "lessor" and "lessee." *Leavitt v. Windsor Land & Investment Co. (U. S.)* 54 Fed. 439, 442, 443, 4 C. C. A. 425.

A lease of a hotel for a certain sum per year and such additional contingent sum as shall equal one-half of the profits does not render the lessor liable to third persons as a partner of the lessee in the hotel business. *Dake v. Butler*, 28 N. Y. Supp. 134, 136, 7 Misc. Rep. 302.

**Same—In addition to salary or compensation.**

An agreement signed by W. and M. recited that the undersigned had formed a partnership for the transaction of business, "M. to be guarantied \$2,000 per annum, same to be and to come out of his half of the profits; but, should the one-half profits not amount to \$2,000 in the year, he shall not be held for any deficiency in the salary account." Held, that it was a copartnership agreement, and that the supposition of M. that it guarantied him a salary of \$2,000 a year, and half the profits above that sum, but that he should not be liable as partner for any losses, was a mistake of law, for which he was not entitled to relief. *Woolworth v. McPherson (U. S.)* 55 Fed. 558-560.

A contract reciting that in consideration of a salary of a certain amount per annum paid by the party of the first part (a firm) to the party of the second part, and a further consideration of a certain share in the net profits of the business of the firm, the party of the second part agreed to devote his time to their business as engineer, is a contract of employment, not of partnership. *Porter v. Curtis*, 65 N. W. 824, 96 Iowa, 539.

A clerk who, besides his salary, is to share in the profits of a firm, is not as to it a partner. So, when sued for moneys of the firm he has collected, he cannot except that he must be sued as a partner for a settlement. *St. Victor v. Daubert*, 9 La. 314, 317, 29 Am. Dec. 447.

A contract for a stipulated sum per month, "and one-half the profits," for services to be rendered, does not constitute a contract of copartnership. *Holbrook v. O'Berne*, 9 N. W. 291, 56 Iowa, 324.

**Same—In single transaction.**

A single special venture, entered into by two persons on joint account, to purchase a tract of land and hold it for sale at a profit, each agreeing to pay one-half the purchase price and expenses, does not create a partnership in respect to the land, but merely makes them tenants in common. *Clark v. Sidway*, 12 Sup. Ct. 327, 330, 142 U. S. 682, 35 L. Ed. 1157.

A joint purchase, with a view to a joint sale and a communion of profit and loss, though for a single transaction, will constitute a partnership. *In re Warren (U. S.)* 29 Fed. Cas. 266, 268.

A partnership may exist in a single shipment, or adventure; and persons owning merchandise in common, who ship it on joint account and risk for sale, are copartners in the adventure. 260 Hogsheads of Molasses (U. S.) 24 Fed. Cas. 445, 447.

There may be a partnership, although one single transaction only is contemplated between the parties. *Kayser v. Mongham*, 6 Pac. 803, 805, 8 Colo. 232.

The fact that two or more persons are joined in a single adventure, in which the profits are to be divided equally, does not constitute them copartners in such a sense as will oust a court of law of its jurisdiction in respect thereto. *Hurley v. Walton*, 63 Ill. 260, 262.

An agreement between two persons to enter into a single transaction of purchase for the purpose of profit does not create a partnership, so as to prevent one from suing the other in assumpsit to recover the fruits of their purchase. *Galbreath v. Moore (Pa.)* 2 Watts, 86.

The intention of the parties in forming a particular relation governs in determining whether they are partners or not. Where two persons agree jointly to secure an option on a tract of land for the purpose of jointly selling it, and sharing in the profits of the transaction, they are partners, as between themselves, as to that transaction, and owe to each other the rights and duties of that relation, although the option may be taken in the name of one only of the parties. *Flower v. Barnekoff*, 25 Pac. 370, 373, 20 Or. 132, 11 L. R. A. 149.

**Same—Or option of receiving profit as interest.**

One who lends money to a merchant to enable the latter to carry on his business, and has the option to share the profits if successful, and, if not, to receive back the amount, with interest, is not a partner, where he has not elected to share in the profits. *Moore v. Walton (U. S.)* 17 Fed. Cas. 708, 709.

One furnished to another money, for which he was to receive, at his option, 30 per cent. per annum or one-third the net profits; the money to be repaid at all events. Held, that the parties were not partners, especially where they did not so consider themselves and the lender had not elected to take the profits. *Williams v. Soutter*, 7 Iowa (7 Clarke) 435, 445.

**Sharing profits, but not losses.**

An agreement between two firms to divide equally their net profits, their business, however, "to be conducted entirely separate," neither one to contribute to the expenses or losses of the other, does not constitute the two firms partners *inter sese*. *Mayrant v. Marston*, 67 Ala. 453, 457.

If parties agree to share profits they are partners as to such profits, although they do not agree to share in the losses. *Robbins v. Laswell*, 27 Ill. (17 Peck) 365, 369.

A contract under which two persons are to share the profits of a business, but which fails to provide for a sharing of the losses, does not constitute a partnership *inter se*. *Winter v. Pipher*, 64 N. W. 663, 664, 96 Iowa, 17.

An agreement whereby one party is to furnish the capital necessary to carry on the business, is to share equally in the profits, and, in case of loss, is guaranteed the return of his investment does not constitute the parties partners, hence the rule of interest on overdrafts under partnership agreements does not apply. *Orvis v. Curtiss*, 33 N. Y. Supp. 589, 591, 12 Misc. Rep. 434.

Sharing in the profits, though not in the losses, of a business, will render one liable as a partner as to third persons. *Sager v. Tupper*, 38 Mich. 258, 265.

**Sharing both profits and losses.**

The true test of a partnership is that there must be a community of interest in the profits and losses. Where there is neither of these elements, there can be no partnership. *Howze v. Patterson*, 53 Ala. 205, 207, 25 Am. Rep. 607; *Jones v. Call*, 93 N. C. 170, 182; *Chapman v. Lipscomb*, 18 S. C. 222, 233.

A contract creates a partnership when it provides for a sharing of profits and losses in a business, and imposes the duty of accounting between the parties. *Priest v. Chouteau*, 12 Mo. App. 252, 256, affirmed 85 Mo. 398, 55 Am. Rep. 373; *Brown v. Cook*, 3 N. H. 64, 65; *Belknap v. Wendell*, 21 N. H. (1 Fost.) 175, 184.

A mere participation in profits and losses of a business does not necessarily constitute a partnership as to third persons. *Clifton v. Howard*, 1 S. W. 26, 27, 89 Mo. 192, 58 Am. Rep. 97.

An agreement by which two persons undertake to do a joint business, to be carried on in the name of one of them, the profits and losses to be divided between them, makes them partners as to third persons. *Galway v. Nordlinger*, 4 N. Y. Supp. 649, 650, 51 Hun, 639 (judgment affirmed *Galway v. Same*, 121 N. Y. 699, 24 N. E. 1100).

Participation in the profits and losses affords the best test of an intention to form a partnership, but there must be a share of losses. *Winter v. Pipher*, 64 N. W. 663, 664, 96 Iowa, 17.

A partnership is nothing more than a community of interest between two or more persons, and a sharing of a profit and loss either in relation to a general trade or a specific venture. To constitute a partnership in a particular purchase, as in a single concern, there must be either a joint undertaking to pay or an agreement to share in the profit and loss. *Cumpston v. McNair* (N. Y.) 1 Wend. 457, 463.

Where all the parties to an agreement shared in the conduct and risks of the business, and the ultimate division was to be of the profits as such, it constituted partnership. *Smith v. Putnam*, 82 N. W. 1077, 1079, 107 Wis. 155.

There must be an agreement to participate in the losses as well as the profits of the concern. This communion of profit and loss is what is essential to constitute a complete partnership as well between the parties as in respect to strangers who deal with them. *Beecham v. Dodd* (Del.) 3 Har. 485.

Two mercantile firms mutually agreed each to put out contracts for sale and delivery of produce at a future date, the profits of such adventures and losses to be equally divided between the firms. Held, that one firm was liable as a partner on a contract made and signed by the other firm. *Smith v. Wright* (N. Y.) 1 Abb. Prac. 243.

A participation in the profits of the business, as such, involving also a common liability for losses, unless this be excluded by evidence to the contrary, as in the exceptional cases in which the profits are looked to as a means only of ascertaining the compensation which under the contract is to be paid for the services of an employé, or some other specific obligation, seems to be the well-settled rule for determining the existence of a copartnership in the relation of its members to those who may deal with it and become members. *Mauney v. Colt*, 86 N. C. 463. The prominent feature in such an association is a common liability for losses and a common participation in the results or profits, as profits, ascertained after payment of expenses incurred in prosecuting the joint business. *Day v. Stevens*, 88 N. C. 83, 86, 43 Am. Rep. 732.

**Sharing losses only.**

Where several persons engage in an enterprise, one of them agreeing to assist by advancing money, and to share in the losses, if any, but not to receive any part of the profits, which are to be divided among the

others exclusively, although such one is not to be deemed a partner as between the others and himself, nevertheless, if he holds himself out, or allows himself to be held out, as a partner to a third person, who, under the belief that he is such enters into a contract with them, he is liable on such contract. *Moss v. Jerome*, 23 N. Y. Super. Ct. (10 Bosw.) 220, 225.

#### **Sharing gross receipts.**

An agreement between two persons that each shall furnish a horse to do certain work, and one do the work, and the other pay all the expenses, and divide the earnings equally, constitutes a partnership. *Gilbank v. Stephenson*, 31 Wis. 592, 596.

A written agreement between the owner of land and another, described therein as a "contract," to farm such land, the latter to receive a certain share of the produce, is not a lease, but a contract creating a partnership for carrying on the farm. *Bailey v. Ferguson*, 39 Ill. App. 91.

An agreement between two parties to farm on shares, one of whom is to expend a certain sum in the farming operations, does not constitute a partnership, though one of the parties spoke of it as such. *Rose v. Busher*, 80 Md. 225, 30 Atl. 637.

A contract between agricultural laborers and their employer by which they share in the products of the farm and in the expense of conducting it, does not constitute a partnership between them. *Randle v. State*, 49 Ala. 24.

That one is to furnish land and the other materials for making bricks,—the bricks, when made, to be divided equally,—and there is no agreement as to profits and losses, does not constitute an agreement of partnership. *La Mont v. Fullam*, 133 Mass. 583.

A contract whereby one party is to furnish a certain number of laborers to work in a brickyard, and to receive therefor one-half of the bricks made, and to have the option of purchasing a fixed number at a stated price, the other party to make the brick and defray all other expenses, does not constitute a partnership. *Chapman v. Lipscomb*, 18 S. O. 222, 223.

#### **Voluntary unincorporated association.**

A "voluntary unincorporated association," composed of a great number of persons whose interests are evidenced by certificates of stock, and which transacts its business and manages its affairs through named trustees with prescribed powers, is uniformly held to be a partnership, subject to be sued as such, and governed by the laws fixing partnership responsibility. 1

*Cook, Stock & S.* § 508. They are distinguishable from "partnerships," as that term is ordinarily used, only in the respect that the death or withdrawal of one or more members does not effect a dissolution, and stock can be bought and sold without affecting the integrity of the concern. *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 72 S. W. 875, 878, 31 Tex. Civ. App. 375.

#### **PARTNERSHIP DEBT.**

A partnership debt is a joint debt, and not joint and several, and an action upon it must be joint. *Whitfield v. Hovey*, 30 S. C. 117, 120, 8 S. E. 840, 842.

#### **PARTNERSHIP INTEREST.**

A partnership interest is one owned by several persons in partnership, for partnership purposes. Civ. Code Cal. 1903, § 684; Civ. Code Mont. 1895, § 1106; Rev. Codes N. D. 1899, § 3284; Civ. Code S. D. 1903, § 200.

#### **PARTNERSHIP PROPERTY.**

The property of a partnership consists of all that is contributed to the common stock at the formation of the partnership and all that is subsequently acquired thereby. Rev. Codes N. D. 1899, § 4373; Civ. Code S. D. 1903, § 1728.

#### **PARTRIDGE.**

Partridges are considered game birds within the law making it a misdemeanor to hunt any game on the Sabbath Day. *Gunn v. State*, 15 S. E. 458, 459, 89 Ga. 341.

#### **PARTY.**

See "Accommodated Party"; "Charter Party"; "Competent Party"; "Immediate Parties"; "Injured Party"; "Political Party."

Any party, see "Any."

Other party, see "Other."

Party "means as naturally a body composed of several individuals as a body sole and individually, and no more. It everywhere implies unity, but is properly used to signify a unit composed of many parts as an individual or one incapable of division, actual or speculative, if such a one can be." As used in a municipal ordinance, which provides that an estimate for a corporation contract shall be verified by the oath of the party making the same, the term is only satisfied in case of an estimate made by a partnership by the oath of each partner. *People v. Croton Aqueduct Board* (N. Y.) 5 Abb. Prac. 316, 319.

In school articles signed by several employers, providing that "either party" may discontinue the school at the end of any quarter, the term "either party" means the teacher or a majority of the employers. *Bird v. Thornburgh*, 40 Ky. (1 B. Mon.) 4, 5.

#### Contract of sale.

The word "party" in 2 Rev. St. p. 135, §§ 8, 9, making void every contract for the sale of lands unless subscribed by the party to whom the sale is to be made, means all the vendors when more than one are included in the contract of sale. *Snyder v. Neefuss* (N. Y.) 53 Barb. 63, 66.

Sess. Acts 1856-57, p. 669, providing that in all suits under this act the "parties" to the contract shall be made parties, means not only those persons who as contracting parties made the contract, but includes all those persons to and from whom a liability arising out of contract existed; that is, those sustaining the relation of debtor and creditor towards each other, without regard to how that relation was established. An assignee is a party to a contract by substitution, but none the less a party. *Goff v. Papin*, 34 Mo. 177, 180.

In the statute of frauds requiring a note or memorandum to be made in writing, and to be prescribed by the parties to be charged thereby, the term "parties" does not necessarily include, nor can it be construed to include, all the parties to the contract. It is, on the contrary, limited and restricted by qualifying words to such only of those parties as are to be bound and held chargeable and legally responsible on the contract, or on account of a liability created by or resulting from it. *Justice v. Lang*, 42 N. Y. 493, 501, 1 Am. Rep. 576.

The statute of frauds requiring a note or memorandum in writing of contracts for the sale of goods, etc., for the price of \$50 or more to be subscribed by the "parties" to be charged therewith, is not to be construed as requiring the memorandum to be signed by both parties, but it is sufficient if it be signed by the one against whom it is sought to be enforced. *Moran v. Martz*, 13 Minn. 191, 193 (Gil. 180, 182).

#### Contract of labor.

Within the provisions of a statute relating to enticement of laborers, providing how the contract of labor shall be entered into, to wit, duly entered into between the "parties" before one or more witnesses, whether such contract be verbal or in writing, the word "parties" means the person contracting to serve and the person to be served; so that, where a parent entered into a contract with another contracting the service of his minor child, such child was not one of the parties to the contract, so as to render

a person liable for enticing him from his service. *State v. Aye*, 41 S. E. 519, 520, 63 S. C. 458.

#### Deed.

A deed was made "between William McKnight and Nancy, his wife, of the first part, and James Hardenbergh, and Eliza, his wife, of the second part," and "grants, bargains, and sells" to the said "party of the second part, his heirs and assigns," the lands, etc., in controversy. Held, that the term "party" embraces both grantees, and is used for that purpose with strict grammatical accuracy; and the word "his" is as definite in its reference to only one of them. More formally expressed, this grant would read, "To the said James Hardenbergh and Eliza, his wife, and to the heirs and assigns of the said James Hardenbergh." *Hardenbergh v. Hardenbergh*, 10 N. J. Law (5 Halst.) 42, 48, 18 Am. Dec. 371.

#### Note.

The word "parties," as used in an indorsement on the back of a note, as follows: "Both parties agreed" that it shall be left in the possession of another, means the maker of the note and the payee. *Hensley v. Tuttle*, 46 N. E. 594, 595, 17 Ind. App. 253.

The word "parties," as used in Act March 11, 1861, § 16, providing that the holder of any note or bill of exchange may institute one suit against the whole or any number of the parties liable to such holder, but the holder shall not at any time institute more than one suit on such note or bill, means, as applied to joint notes or bills, all the makers as one party and all the indorsers as another, and therefore a suit and judgment on such joint note or bill against one maker or one indorser constitutes a bar to any other suit against any other maker or indorser. *Archer v. Helman*, 21 Ind. 29, 31.

#### PARTY (In Practice).

See "Adverse Party"; "Another Party"; "Co-party"; "Defeated Party"; "Defect of Parties"; "Indispensable Party"; "Necessary Parties"; "New Parties"; "Nominal Party"; "Opposite Party"; "Original Party"; "Prevailing Party"; "Proper Party"; "Real Party in Interest"; "Same Parties"; "Successful Party."

*Prochein ami* as, see "Prochein Ami."

A party to an action or suit is one who is directly interested in the subject-matter in issue; who has a right to make a defense, control the proceedings, or appeal from the judgment. *United States v. Henderlong* (U. S.) 102 Fed. 2, 4; *In re Duchess of Kingston*, 20 Howell, St. Tr. 538; *Hunt v. Haven*, 52 N. H. 162, 169; *Robbins v. City of Chi-*



cago, 71 U. S. (4 Wall.) 657, 672, 18 L. Ed. 427; *Green v. Bogue*, 15 Sup. Ct. 975, 985, 158 U. S. 478, 39 L. Ed. 1061; *Theller v. Hershey* (U. S.) 89 Fed. 575, 576; *Cullen v. Woolverton*, 47 Atl. 626, 627, 65 N. J. Law, 279; *Hodde v. Susan*, 58 Tex. 389, 393; *Haney v. Brown* (Tex.) 46 S. W. 55, 57; *Bealor v. Hahn*, 19 Atl. 74, 76, 132 Pa. 242; *Walker v. City of Philadelphia*, 45 Atl. 657, 195 Pa. 168, 78 Am. St. Rep. 801; *State ex rel. Kane v. Johnson* (Mo.) 25 S. W. 855, 857 (citing *Greenl. Ev.* 535); *City of Springfield v. Plummer*, 89 Mo. App. 515, 531; *Boles v. Smith*, 37 Tenn. (5 Sneed) 105, 107; *Wheeler v. Towns*, 43 N. H. 56, 57.

Though, technically speaking, persons to whose use a suit is pending are not plaintiffs, yet in common parlance they might with propriety be both said to be parties, where such use appears in the suit. *Jameson v. Kelly*, 4 Ky. (1 Bibb) 479, 480.

A party is ordinarily one who has or claims an interest in the subject of an action or proceeding instituted to afford some relief to the one who sets the law in motion against another person or persons. Interest or the claim of interest is the test as to the right to be a party to legal proceedings almost without exception. *Hughes v. Jones*, 22 N. E. 446, 448, 116 N. Y. 67, 5 L. R. A. 637, 15 Am. St. Rep. 386.

A corporation may be a party as well as a natural person. *South Carolina R. Co. v. McDonald*, 5 Ga. 531, 535; *Citizens' St. R. Co. v. Shepherd* (Ind.) 59 N. E. 349, 352; *Id.*, 62 N. E. 300, 303, 29 Ind. App. 412.

The word "party" in a statute providing that under certain circumstances the court should give judgment for either party as the very right of the matter should seem to require, meant either plaintiff or defendant, and included all the persons belonging to the particular class, and did not mean that a judgment which was entire might be reversed as to one defendant and affirmed as to the other. *Sheldon v. Quinlen* (N. Y.) 5 Hill, 441, 443.

Under the amendment to the Constitution of 1857, providing that the Legislature shall not authorize any county, city, borough, etc., by virtue of a vote of its citizens or otherwise, to become a stockholder in any company, or to obtain money for or to loan its credit to any corporation, association, institution, or party, money paid to save a community from a draft is not obtained for a party, but is a direct appropriation for a public purpose, and raising money by the ordinary powers of borrowing and taxation, for a common purpose, affecting the interests, happiness, and welfare of a community, is not obtaining money or loaning credit to any party, within the terms of the amendment. The payment of bounties to volun-

teers to enable a borough to fill its quota under a call for troops and an anticipated draft is a legal payment as for a purpose of a municipal and public nature, and is not prohibited by the amendment. *Speer v. School Directors of Borough of Blairsville*, 50 Pa. (14 Wright) 150, 164.

The words "person" and "party," and other word or words importing the singular number, shall be held to include firms, companies, associations, and corporations. *Civ. Code S. C.* 1902, § 265; *Bates' Ann. St. Ohio* 1904, § 2730.

#### Classification.

The Supreme Court of the United States divides parties in equity suits into three different classes: (1) Formal parties, who have no interest in the controversy between the immediate litigants, but have such an interest in the subject-matter as may be conveniently settled in the suit, and thereby prevent further litigation; (2) necessary parties, who have an interest in the controversy but whose interests are separable from those of the parties before the court and will not be directly affected by a decree which does complete and full justice between them; (3) indispensable parties, who not only have an interest in the subject-matter of the controversy but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Hicklin v. Marco* (U. S.) 56 Fed. 549, 552, 6 C. C. A. 10.

#### Attorney included.

The word "party" in a statute directing a thing to be done does not include an attorney, where, from the nature of the thing to be done, or the peculiar phraseology of the statute, it is manifest that the Legislature intended the act should be done in person. Yet a party may do by his attorney whatever he himself is authorized or required to do in the prosecution of a suit, unless restrained by statute. *Ludlam v. Broderick*, 15 N. J. Law (3 J. S. Green) 269, 270, 272.

An attorney in an attachment suit is no party to a suit, there being only two parties, the plaintiff and defendant. *Mantz v. Hendley* (Va.) 2 Hen. & M. 308, 317.

#### Abatement of suit.

The term "parties," as used in *Code Civ. Proc.* § 680, subd. 3, providing for a demurrer to a complaint when there is another action pending between the same parties for the same cause, includes privies. *Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co.*, 72 Pac. 865, 866, 28 Mont. 451 (citing *Holloway v. Holloway*, 103 Mo.

274, 15 S. W. 536; *Crane v. Larsen*, 15 Or. 345, 15 Pac. 326).

#### Action for causing death.

The word "party," as used in the statute giving a right of action for causing the death of a person where the party killed would have been entitled to bring suit for injury if death had not resulted, does not refer to the party in any technical or narrow sense, but looks to the cause of action, rather than to the particular party whose names it might have reason to use upon the record. The injured party, though a married woman, would be the substantial party. The action would survive in case of the husband's death, while it would abate in case of her death. She is the meritorious cause of action, however the husband may be entitled to the fruits of the litigation. Therefore an action may be maintained under the statutes by one as administrator of his deceased wife whose death was caused by defendant's negligence, on a complaint alleging that decedent left a surviving mother, who was her nearest of kin. *Green v. Hudson River R. Co.* (N. Y.) 31 Barb. 260, 266.

#### Allowance of costs.

The words "either party," as used in Rev. St. c. 125, § 35, providing that "in all cases that are contested either at a probate court of original or appellate jurisdiction the said courts respectively may, at their discretion, award costs to either party," mean the parties to the litigation, and therefore authorizes only the allowing of costs to the parties to the litigation. *Reed v. Reed*, 25 Me. (12 Shep.) 242.

#### Appeal.

A statute providing that the party demanding an appeal shall file with the justice an affidavit made by the said party is to be construed as only requiring an affidavit by one of several appellants. *Van Campen v. Ribble*, 17 N. J. Law (2 Har.) 433, 434.

The word "parties," in statutes relating to appeals, is to be construed as meaning parties to the judgment, and not merely parties to the action. *Hogan v. Robinson*, 94 Ind. 138, 140.

"Party affected," as used in Code, § 325, authorizing any party affected by a judgment to appeal, means only such persons as are technically parties to the action, or their representatives. *Martin v. Kanouse* (N. Y.) 2 Abb. Prac. 390, 393.

The phrase "a party to the proceedings" as used in the statute providing that "from all decisions of the board of commissioners there shall be allowed an appeal by any person aggrieved; but, if such person shall not be a party to the proceeding, such appeal shall not be allowed unless he shall by

\* \* \* his affidavit set forth that he has an interest in the matter decided," etc., should be construed in its ordinary legal meaning, and be held to embrace such persons only as are parties in a legal sense, and who have been made or have become such in some mode prescribed or recognized by the law, so that they are bound by the proceeding. *Robinson v. Vanderberg County Com'rs*, 37 Ind. 333, 335.

Under Rev. Laws, p. 640, § 30, and page 642, § 47, providing that no appeals shall be granted or certioraries allowed unless the party demanding the one or applying for the other shall enter into bond, etc., an affidavit made by the president, secretary, or other officer or agent of a corporation, where the corporation is a party to the suit, is, in legal contemplation, an affidavit made by the party. *New Brunswick Steamboat & Canal Transp. Co. v. Baldwin*, 14 N. J. Law (2 J. S. Green) 440, 441.

#### Bankruptcy.

Rev. St. U. S. § 5010, authorizing a party to a bankruptcy proceeding to take the opinion of the district judge upon any point or matter arising in the course of the proceeding, does not apply to a witness summoned before the register on the application of the assignee to be examined. The only party to such proceeding is the assignee. The law gives him the right to examine this witness, and the witness is no more a party than if he were examined on behalf of the plaintiff or defendant in an ordinary action. In *re Comstock* (U. S.) 6 Fed. Cas. 252, 253.

#### Challenge of jurors.

The term "party," within the meaning of the statute giving each party to a civil suit the right to a certain number of peremptory challenges, cannot be construed to mean "persons," and therefore several plaintiffs or defendants in an action must join in exercising such right. *Hargrave v. Vaughn*, 18 S. W. 695, 82 Tex. 347; *People v. O'Laughlin*, 1 Pac. 653, 655, 3 Utah, 133.

The "parties litigant," within the meaning of a statute determining the number of challenges permitted to each party litigant in a civil action, means the antagonistic sides of the controversy. If there be a plurality of plaintiffs, they are all only one party litigant; so a plurality of defendants constitutes one, and but one, party litigant. *Cumberland Telephone & Telegraph Co. v. Ware's Adm'x* (Ky.) 74 S. W. 289, 292.

Where, in an action to recover lands, defendant impleaded his co-defendant on his warranty of title and prayed a judgment against him and such defendant denied liability on the ground that he had received no consideration for the land, the parties defendant, though they had a common in-

erest to defeat, were varying on the issue of fact as between themselves, and were therefore entitled to six peremptory challenges, under Rev. St. art. 3213, declaring that each party to a civil suit in the district shall be entitled to six peremptory challenges. *Waggoner v. Dodson*, 69 S. W. 993, 994, 96 Tex. 6.

Undoubtedly, when several defendants in a civil action join in their defense, or, severing in their answers, set out but one defense, common to them all, they constitute one party, limited to the statutory number of challenges given to a party. But when their defenses are essentially different—especially when these are hostile—defendants must necessarily sever in their answers; and, as each has a distinct issue to maintain, we think that each is to be considered a party, within the meaning of Rev. St. c. 118, § 37, providing that on the trial of any civil case each party shall be entitled to three peremptory challenges. *Hundhausen v. Atkins*, 36 Wis. 518, 526.

Rev. St. c. 82, § 74, gives to each "party" in criminal cases not capital two peremptory challenges, while in capital cases each "person" is entitled to his peremptory challenges. Held that, where there are several defendants jointly indicted and tried for an offense not capital, they are entitled to two challenges jointly, and no more, and that, if they do not agree upon the persons to whom they will object, they lose their challenge. *State v. Cady*, 14 Atl. 940, 941, 80 Me. 413.

Under Rev. St. p. 781, c. 110, § 49, providing that in civil actions each party shall be entitled to challenge three jurors without showing cause for such challenge, in a proceeding by a city for the confirmation of a special assessment, all the property owners appearing and opposing the application when tried as one case are to be treated as but one party, and are entitled to but three peremptory challenges. *Gordon v. City of Chicago* (Ill.) 66 N. E. 823, 201 Ill. 623.

In construing Rev. St. 1874, c. 110, § 49, p. 781, providing that "in all civil actions each party shall be entitled to a challenge of three jurors, without showing cause for such challenge," this court, in *Cadwallader v. Harris*, 76 Ill. 370, held that the word "party," when applied to the defendant, can only mean the person or persons named as defendant or defendants in the judgment. The definition given to the word by lexicographers is a plurality of persons—as, a political party; a select company invited to an entertainment; a company made up for a given occasion; in military affairs, a detachment or a small number of troops, etc. Thus it is seen that the word is applied as well to a number of persons as to a single individual; and under such statute the word "party" represents all the persons who may be plaintiffs

or defendants. *Schmidt v. Chicago & N. W. Ry. Co.*, 83 Ill. 405, 408.

#### Change of venue.

In the statute providing that a change of venue shall be granted upon the application of either party, the term "party" means all the parties on one side collectively. *Peters v. Banta*, 22 N. E. 95, 97, 120 Ind. 416; *Leavell v. State*, 44 N. E. 687, 691, 16 Ind. App. 72.

The word "party" in the statute providing that a change of venue may be made whenever "any party in any civil action shall apply," etc., signifies all of the defendants or all of the parties plaintiff in the action. The statute gives the right to a party plaintiff or defendant, not to one of several plaintiffs or defendants. Changes of venue may sometimes be hard on the opposite party. They might be hard on both parties if they should go on the application of a single plaintiff or defendant, where there are several, against the will of his co-plaintiffs or codefendants. It is true that we have held that each of several defendants severing in their pleadings and setting up different defenses is to be considered a party within the meaning of Rev. St. c. 118, § 37, for the purpose of challenging jurors, but none of the reasons applying in that instance are sufficient to overcome the difficulties in this, and there is no rule of construction requiring the same meaning to be given to the same word used in different connections in different statutes. We must give as reasonable a construction to the word "party" as to any other word in view of the connection in which it is used, and as often as it occurs. *Rupp v. Swineford*, 40 Wis. 28, 30.

The term "party," as employed in Const. 1867, art. 4, § 8, authorizing a change of venue "whenever any party to the cause" shall make a suggestion in writing, etc., when applied to civil cases, where there can be no severance, must be taken in a collective and representative sense, and where there are more persons than one as plaintiffs or defendants, all applications to remove must be taken as made on behalf of all the persons constituting the party plaintiffs or defendants, as the case may be. In a suit at law all the plaintiffs and all the defendants have the same interests, the former to sustain and the latter to defeat the action. But in equity it is not unfrequent that a defendant has a common interest with the complainant, and the interests of the several defendants are often adverse; and as the parties in equity, and especially in creditors' bills, are very numerous, it would frequently happen that if any party could, under the statute, obtain a change of venue, a cause would travel all through the state, and never be terminated, so that the fore-

going provision of the Constitution cannot be so construed as to authorize the removal in an equity case. *Cooke v. Cooke*, 41 Md. 362, 369.

The word "party," as used in the statutes permitting a change of venue, but declaring that only one change shall be granted to the same party from the county and only one from the judge, means a person or corporation, and refers either to plaintiff or defendant in the cause. *Citizens' St. Ry. Co. v. Shepherd* (Ind.) 59 N. E. 349, 352. In a statute providing that only one change of venue shall be granted to the same party from the county, and only one from the judge, the term "party" means a person or corporation, and refers to either a plaintiff or a defendant in the cause. *Citizens' Street R. Co. v. Shepherd*, 62 N. E. 300-303, 29 Ind. App. 412.

#### Conclusiveness of judgment or decree.

The conclusive effect of judgments respecting the same cause of action and between the same parties rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. "Parties," in that connection, include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses and appeal from the judgment. *Robbins v. City of Chicago*, 71 U. S. (4 Wall.) 657, 672, 18 L. Ed. 427; *State ex rel. Kane v. Johnson*, 27 S. W. 399, 402, 123 Mo. 43; *Douthitt v. MacClusky*, 40 Pac. 186, 189, 11 Wash. 601; *Burr v. Bigler* (N. Y.) 16 Abb. Prac. 177, 183; *Bates v. Stanton*, 8 N. Y. Super. Ct. (1 Duer) 79, 87.

The term "parties," as used in a statement that judgments are conclusive between parties and privies, includes all directly interested in the subject-matter who have a right to defend or control the proceedings on appeal; and courts will even look beyond nominal parties, and treat as the real party him whose interests are involved in the issue, and hold him concluded by any judgment that may be rendered. *Strayer v. Johnson*, 1 Atl. 222, 224, 110 Pa. 21.

Parties to a decree, who are concluded thereby, are those only who are known as such in the record, and are properly served with process or enter their appearance. *Orthwein v. Thomas*, 21 N. E. 430, 435, 127 Ill. 554, 4 L. R. A. 434, 11 Am. St. Rep. 159.

Under the term "parties" the law includes all who are interested in the subject-matter of litigation, who will be gainers or losers in its result, and for or against whom the record of the former proceeding may be adduced in another trial as *res judicata*.

*Hartford Fire Ins. Co. v. King*, 73 S. W. 71, 73, 31 Tex. Civ. App. 636.

"Parties" include not only those whose names appear upon the record, but all others who participate in the litigation by employing counsel, or by contributing towards expenses therefor, or who in any matter have such control thereof as to be entitled to direct the course of proceedings therein. *Theller v. Hershey* (U. S.) 89 Fed. 575, 576.

Those are held to be parties, so as to be bound by the judgment rendered, who have a right to control the proceedings, to make defense, to adduce and cross-examine the witnesses, and to appeal from the decision, if any appeal lies. The courts will look beyond the nominal party, and treat as the real party him whose interests are involved in the issue, and who conducts and controls the action or defense, and will hold him concluded by any judgment that may be rendered. *Bachelor v. Brown*, 11 N. W. 200, 201, 47 Mich. 366.

In *McKinzle v. Baltimore & O. R. Co.*, 28 Md. 161, which was action of replevin, the court, in speaking of the rule that a judgment, to operate as an estoppel, must be upon the same subject-matter and between the same parties, said "that the term 'parties' is not restricted to those who appear as plaintiff and defendant upon the record. It includes those who are directly interested in the subject-matter of the suit, knew of its pendency, and have the right to control and direct or defend it; or, as was said in *Albert v. Hamilton*, 25 Atl. 341, 76 Md. 304, persons who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of their rights, are concluded by the proceedings as effectually as if they were parties named on the record." *Fetterhoff v. Sheridan*, 51 Atl. 123, 125, 94 Md. 445.

A suit was brought against several as partners in the steamship business to recover damages for the infringement of a patent and for an injunction. While the action was pending they sold out their business, ships, and property to a corporation, which assumed all their debts and liabilities. After the sale the corporation was not made a party to the suit, but the suit progressed, and an injunction was granted. Held, that the corporation, not having been a party, was not bound by the injunction. *Bate Refrigerator Co. v. Gillett* (U. S.) 30 Fed. 685, 687.

Where a judgment is rendered against a county, city, or town in its corporate name, or against a board or officer representing the municipality, in the absence of fraud or collusion it will bind the citizens or taxpayers. This is on the principle that they

are represented in the litigation by agencies authorized to speak for them, and to protect their interests. So where, after the common council of a city has reconsidered and postponed indefinitely a resolution directing a public improvement to be made, a court of competent jurisdiction grants a peremptory writ of mandamus on application of some of the property owners compelling the proper officers to proceed on the resolution and award the contract, other property owners cannot, after the contract has been awarded and the work done, collaterally attack the judgment holding the resolution valid and still binding, though they may not have been parties to the record by name in the mandamus proceedings, since as taxpayers they were represented therein by the city through its officers. *Ashton v. Rochester*, 30 N. E. 965, 967, 133 N. Y. 187, 28 Am. St. Rep. 619.

#### **Criminal prosecution.**

"The parties to a criminal action are the people on one end and the defendant on the other, and where the record in the criminal case shows that the parties and their attorneys appear at every stage of the proceeding it must be presumed that the defendant was personally present." *People v. Jung Qung Sing*, 11 Pac. 755, 757, 70 Cal. 469.

The fact that Comp. Laws, § 5858, provides that no prosecution for adultery shall be commenced but on the complaint of the husband or wife, does not make the complainant in such a case a party to the prosecution. The complainant is no more than a complaining witness; the people and defendant are the only parties to the case. *Parsons v. People*, 21 Mich. 509, 514.

#### **Examination as witness.**

The word "party," as used in Code, § 390, declaring that a party to an action may be examined as a witness at the instance of the adverse party, means one who appears on the record as such, and hence, where the nominal defendant was the president of an unincorporated company, and the demand was against the company only, he might be required to submit to an examination. *Woods v. De Figanieri* (N. Y.) 16 Abb. Prac. 1, 4; *Id.*, 24 N. Y. Super. Ct. (1 Rob.) 607, 610.

"Parties," under the Code of Civil Procedure, means only such persons as are parties to the record as either plaintiff or defendant. The term includes corporations. They are persons as against the opposite party. In the absence of authority, it would seem plain that the term "party" would not include a director in a corporation. He is not the party to the proceeding. He can make no admission to bind the corporation as a party. He is simply a witness. He

may verify the pleadings, but this is by express statute. He is permitted to verify the answer because he is an officer of the party, and the party is incapable to make an affidavit. So that the term as used in Code Civ. Proc., relating to the examination of parties to an action before trial, does not include the agents, directors, or officers of a corporation as parties thereto. *People v. Mutual Gas Light Co.* (N. Y.) 14 Hun, 157, 158.

The term "party," as used in Prac. Act, § 159 (Revision, 1874), providing that any "party to an action" in the supreme or circuit court may be examined as a witness at the instance of any adverse party or parties after issue joined, means a party to the record, and hence, where a corporation alone is a defendant, and has no officer thereof, it may be examined under the statute at the instance of the plaintiff. *Apperson v. Mutual Ben. Life Ins. Co.*, 38 N. J. Law (9 Vroom) 272, 273.

#### **Jurisdiction.**

It may be laid down as a rule which admits of no exception that in all cases where jurisdiction depends on the party it is the party named in the record. *Osborn v. Bank of United States*, 22 U. S. (9 Wheat.) 738, 6 L. Ed. 204. In a case where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made on him is entirely in his official character, the state itself may be considered a party in the record. *State of Georgia v. Madrazo*, 26 U. S. (1 Pet.) 110, 121, 7 L. Ed. 73.

#### **Next friend.**

A person acting as the next friend of minors in a suit is not such a party to the suit that his admissions or declarations out of court should be received, except on proper foundation, to impeach him as a witness. *Buck v. Maddock*, 47 N. E. 208, 167 Ill. 219.

The next friend of an infant is neither the agent nor attorney for his ward. An agent or attorney derives his authority as such from his principal, and an infant cannot appoint an agent and empower him to do an act which in contemplation of law he is himself incapable of doing. The next friend does not derive his authority from the infant, and his office does not rest on such authority, either express or implied. The next friend derives his authority from the court which appoints him, and, as he is appointed to institute and conduct the suit, it follows that he has authority to do every act which the interest of the infant demands and the law authorizes. It is because the law regards an infant incapable of conducting a lawsuit in his own behalf that it has made provision for the appointment of a next friend to act for him. The next friend

is a party within Rev. St. 1889, § 2261, requiring the application for a change of venue to be made by the party. *Raming v. Metropolitan St. Ry. Co.*, 57 S. W. 268, 275, 157 Mo. 477.

The *prochein ami* or next friend is not a technical party to the cause, but he is a party within the meaning and contemplation of the Constitution and the acts of the Assembly "relating to the removal of causes," and therefore capable of making the affidavit and suggestion for removal. And we can see no reason why a guardian ad litem should not be so far considered a party to the suit as to have the right of appeal on behalf of the infants for the purpose of protecting or advancing their interests; otherwise, not being themselves able or competent, in contemplation of law, to take any step in the cause, they would be compelled, in the absence, as here, of a regularly appointed guardian, to submit, however unjust or oppressive a judgment or decree might be. *Thomas v. Safe-Deposit & Trust Co.*, 23 Atl. 3, 4, 73 Md. 451.

#### Objecting to juror.

The term "party," as used in Rev. St. c. 82, § 88, providing that if a party knows any objection to a juror in season to propose it before trial, and omits to do so, he shall not afterwards make it unless by leave of court, includes the attorney of the party as well as the party himself. *Brown v. Reed*, 16 Atl. 504, 505, 81 Me. 158.

#### Production of books and papers.

A grantor in whose name ejectment is prosecuted by his grantee under Code Civ. Proc. § 1501, is not a party to the action who may be compelled to produce books and papers under section 803. The grantee, and not the grantor, is the real party. *Adriance v. Sanders* (N. Y.) 11 Abb. N. C. 422.

#### Qualification of judge.

When a corporation sues or is sued, a stockholder thereof is in no sense a party to the suit, so as to disqualify the judge because a relative to such stockholder. *Lewis v. Hillsboro Roller Mill Co.* (Tex.) 23 S. W. 338.

Where a statute declared that a justice of the peace should not have jurisdiction of a case when related within the fourth degree by affinity or consanguinity to either of the parties, in a suit by a corporation it was no valid objection to the jurisdiction of the justice that he was related to a stockholder, since, although it may be correct to treat the members of a corporation as parties to a cause to which the corporation is a party, it is not proper to consider the stockholders parties for all purposes. *Searsburg Turnpike Co. v. Cutler*, 6 Vt. 315, 320.

The word "party," as used in Code Civ. Proc. § 170, providing that no justice, judge, or justice of the peace shall sit or act in any action or proceeding to which he is a party, or when he is related to either party by consanguinity or affinity, is not confined to the parties to the record by name, but includes all persons represented by parties to the record. Therefore in an action by an alleged daughter of a decedent to revoke letters of administration granted to decedent's grandnephew the sons of a judge who have contracted to try the case for the nephew on condition of receiving one-fourth of the estate if they succeed are parties within the spirit of the section, and their father cannot act as judge. *Howell v. Budd*, 27 Pac. 747, 750, 91 Cal. 342.

The word "party," as used in Code, § 2637, providing that no judge shall sit in any proceeding in which he is related to either party within the fourth degree of consanguinity or affinity, includes not only the parties to the record, but any person interested in the judgment or decree. Therefore a judge of a probate court is disqualified from determining the settlement of an administrator's account, where the judge's cousin is a surety on the administrator's bond; a bondsman, though not a party to the record, being a party in interest. *Crook v. Newborg*, 27 South. 432, 433, 124 Ala. 479, 82 Am. St. Rep. 190.

Rev. St. p. 275, § 2, enacts that no judge of any court shall sit in any cause in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties. Held, that where an overseer of the poor commenced proceedings before a justice who was his son-in-law, and whose wife was still living, which justice associated another with himself, the overseer was a party in such sense that the proceedings were void. *Rivenburgh v. Henness* (N. Y.) 4 Lans. 208, 209.

The word "party," as used in a statute providing that no judge shall be permitted to sit in any cause in which he was peculiarly interested or related to either party within the fourth degree of consanguinity or affinity, will not be construed in the technical and narrow meaning of one who is a party to the record, and absolutely bound by the judgment, but in the more liberal sense of including any one peculiarly interested in the result of the case. Thus a judge who is related within the fourth degree of consanguinity or affinity to counsel for the applicant in an application for alimony is disqualified from presiding in the case. *Roberts v. Roberts*, 41 S. E. 616, 617, 115 Ga. 259, 90 Am. St. Rep. 108.

Const. art. 5, § 11, declares that no judge shall sit in any case wherein he may be interested, or where either of the parties may

be connected with him by affinity or consanguinity within such degree as may be prescribed by law. Held, that the word "party" is a technical word, having a precise meaning in legal parlance, meaning to or for, by or against whom a suit is brought, whether at law or in equity, a party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal person; and hence it does not include an attorney, and a judge is not disqualified because his brother, who is attorney for one of the parties, is contingently interested in the result. *Winston v. Masterson*, 27 S. W. 768, 87 Tex. 200.

A surety on a claimant's bond in proceedings for the trial of the right of property is in legal contemplation such a party to the cause as that his relationship within the prohibited degrees to the magistrate before whom the case is pending will disqualify the magistrate from trying the case. *Hodde v. Susan*, 58 Tex. 389, 393.

Within the meaning of a statute (Code, § 540) providing that no judge can sit in any cause in which he is related to either party within the fourth degree of consanguinity or affinity, a judge who was related within the fourth degree to the person whom the defendant in a criminal case is charged with having murdered is not related to either party to the action. *Gill v. State*, 61 Ala. 169, 171.

#### Removal of cause.

The word "party," as used in the Removal Act (Act Cong. March 3, 1875, c. 137 [U. S. Comp. St. 1901, p. 509]) § 2, cl. 1, means all jointly on the one side or the other. *Mutual Life Ins. Co. v. Champlin* (U. S.) 21 Fed. 85, 90.

A party defendant to an action within the meaning of the removal act is one who is named as such, and appears in the record as a defendant at the time the writ of removal exists. *Walker v. Richards* (U. S.) 55 Fed. 129, 130.

The prochein ami or next friend is not a technical party to the cause, but he is a party within the meaning and contemplation of the Constitution and the Acts of the Assembly "relating to the removal of causes," and therefore capable of making the affidavit and suggestion for removal. And we can see no reason why a guardian ad litem should not be so far considered a party to the suit as to have the right of appeal on behalf of the infants for the purpose of protecting or advancing their interests; otherwise, not being themselves able or competent, in contemplation of law, to take any step in the cause, they would be compelled, in the absence, as here, of a regularly appointed guardian, to submit, however unjust

or oppressive a judgment or decree might be. *Thomas v. Safe-Deposit & Trust Co.*, 23 Atl. 3, 4, 78 Md. 451.

#### Security for costs.

The word "party" is held to be synonymous with the word "plaintiff," as used in *Sayles' Civ. St. art. 1436*, providing that the plaintiff in any civil suit may be ruled to give security for the costs. *Gulf, C. & S. Ry. Co. v. Scott* (Tex.) 28 S. W. 457, 458.

#### Service of writ.

The word "party" in the statute requiring writs in suits to which a sheriff or his deputy is a party to be served by a coroner, means a party of record, and not a mere party in interest. *Douglass v. Gardner*, 63 Me. 462, 464; *Walker v. Hill*, 21 Me. (8 Shep.) 481, 482.

The term "party," as used in Rev. St. Minn. p. 456, § 47, providing that summons may be served by the sheriff or by any other person "not a party to the action," extends only to parties named in the proceedings, and not to a party of interest whose name does not appear. *Owens v. Gotzian* (U. S.) 18 Fed. Cas. 927, 928.

In the statute providing "that the coroner shall serve all writs, etc., when the sheriff or either of his deputies shall be a party," the word "party" is unquestionably a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether at law or in equity, the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons. They are parties to the writ and parties on the record, and all others who may be affected by the writ indirectly or consequentially are persons interested, but not parties. *Merchants' Bank v. Cook*, 21 Mass. (4 Pick.) 405, 407, 411.

The word "party," as used in Comp. Laws, § 4849, providing that summons may be served by the sheriff where the defendant may be found, or by any other person not a party to the action, was evidently used by the lawmaking power in its technical sense, and a person, therefore, not strictly a party to the record, is competent to serve a summons in a civil action; and the fact that the person serving it was the collecting agent of the plaintiff did not disqualify him. *Plano Mfg. Co. v. Murphy* (S. D.) 92 N. W. 1072, 1073.

#### Taking of deposition.

The term "party," as used in New Code, § 870, providing for the taking of the deposition before trial of a party to an action, must be construed as meaning party to the record, and not party in interest, such being the legal and ordinary meaning of the phrase

"party to an action"; and hence the deposition of one who is not a party to the record, but only a party in interest, cannot be taken before trial under the statute. *Seeley v. Clark*, 78 N. Y. 220, 221.

The term "party," when used in a statute in reference to court proceedings, must be understood in its technical sense, and limited to those who are parties to the record, unless the context shows that the Legislature used it in a more popular sense. An officer of a defendant corporation is not a party within the statute authorizing a litigant to propound *ex parte* interrogatories to, and secure the deposition of, the opposing party. *Gulf, O. & S. F. Ry. Co. v. White* (Tex.) 32 S. W. 322, 324.

#### Testimony as to transaction with decedent.

Under Rev. St. U. S. § 858 [U. S. Comp. St. 1901, p. 659], providing that in actions by executors or administrators in which judgment may be rendered for or against them neither party shall be allowed to testify against the other as to any transaction with or statement by the intestate, etc., the word "party" was intended to include both parties who, according to the established rules of pleading and evidence, are parties to the issue, and not those who, not being parties, have an interest in the result of the issue. A witness may be interested in the issue without being a party thereto, and in an action against an executor in his representative capacity one who is interested in the issue, but not a party, was competent as a witness for plaintiff as to the statements of the testator. *Potter v. Third Nat. Bank*, 102 U. S. 163, 164, 26 L. Ed. 111.

The term "parties" comprehends all persons standing in the relation of privies in blood, privies in estate, or privies in law. The bare fact that two persons held different parcels of what was once an undivided tract of land, and derived the title from the same grantor, constituted no privy of estate, so that the testimony of a deceased witness on trial of an action of ejectment against one for the premises in his possession could be given in evidence in an action of ejectment against the other for the premises possessed by him, though both actions were by the same claimant. *Jackson v. Crissey* (N. Y.) 3 Wend. 251, 252.

A *prochein ami* is not a party to the suit within the meaning and clause of the evidence act which declares that, where an original party to a contract or cause of action is dead, or where an executor or administrator is a party to the suit, neither party shall be admitted to testify in his own behalf or on the call of his co-complainant or codefendant otherwise than now by law allowed, etc. *Trabern v. Colburn*, 63 Md. 99, 103.

6 Wds. & P.—22

The word "party," as used in Gen. St. p. 413, c. 37, § 22, providing that "no party shall be allowed to testify, by virtue of section 22, in any action or special proceeding, where the adverse party is \* \* \* an administrator or executor of a deceased person," is equivalent to the word "person" in section 22 of the same Code. To restrict the word "party" to parties to the record would be inconsistent with the whole tenor and spirit of the act, its intention being to put parties as nearly as possible upon an equal footing, and the language should be liberally construed. *Manion's Adm'r v. Lambert's Adm'r*, 74 Ky. (10 Bush) 295, 296.

The term "party," as used in the statute excluding the testimony of a party when the other party is an administrator, may be fairly held to mean the legal party to the action. In fact, this is the common meaning of "party" in law instruments and proceedings. *English v. Porter*, 63 N. H. 206, 215.

The word "party" has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or in equity. They are parties in the writ and parties in the record, and all others who may be affected by the writ indirectly or consequentially are persons interested, but not parties. The assignor of a claim against the estate of a decedent is not a party within the meaning of Gen. St. p. 1407, § 53, providing that any party to an action shall not be permitted to testify as to any transaction with or statement made by any testator or intestate represented in an action in a suit by the assignee of the claim against the representative of the decedent. *Cullen v. Woolverton*, 47 Atl. 626, 627, 65 N. J. Law, 279.

The widow of a testator, named as the administratrix of his will, and presenting the same for probate, is not a "party" in the sense in which that term is used in the statute prohibiting any party to a civil action from testifying as to any transaction with or statement by any testator or intestate represented in any such action. *Mackin v. Mackin*, 87 N. J. Eq. (10 Stew.) 528, 533.

In an action by a tenant against the executors of his former landlord for the unlawful seizure of crops for rent alleged to be due it is competent for a legatee, who also claims to own the land by gift from deceased, and to whom the tenant has attorned, to testify as a witness to the arrangement between himself and the deceased landlord whereby he became entitled to the rents; he not being a party to the action, and having no interest therein, within the meaning of Code Civ. Proc. § 400, which prohibits parties from testifying as to transactions with a deceased person in an action to which the executor is a party. *Huff v. Latimer*, 11 S. E. 758, 759, 33 S. C. 255. We



therefore hold that where a warrantor has been made a party to the suit in such a way as to render the judgment binding upon him in favor of his vendees he is a "party" thereto, within the meaning of our statute, which prohibits parties from testifying against the heirs or legal representatives of decedents. *Bennett v. Virginia Ranch, Land & Cattle Co.*, 21 S. W. 126-128, 1 Tex. Civ. App. 321.

The term "party to the action," as used in Gen. St. 1878, c. 73, § 8, providing that "it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or person, relative to any matter at issue between the parties," means a party to the issue to which the testimony relates, and not merely a party to the record. *Bowers v. Schuler*, 55 N. W. 817, 54 Minn. 99.

Where, in an action brought by an executrix, a person was made a party defendant in the summons and complaint, but the summons was never served on him, and he never appeared, his testimony was not governed by Comp. Laws, § 5260, providing that in actions by or against executors neither "party" shall testify against the other as to any transaction with testator. *Bunker v. Taylor*, 74 N. W. 450, 452, 10 S. D. 526.

In an appeal from the decree of the judge of probate allowing the probate of a will, the heirs of the deceased and the legatees in the will, not being appellants, though interested, are not parties in interest, so as to be excluded from testifying under a statute forbidding parties in interest from testifying. *Wheeler v. Towns*, 43 N. H. 56, 57.

Under Const. Schedule, § 2, providing that no witness shall be excluded because a party or interested in the issue, provided that in actions against executors or administrators "neither party" shall testify against the other as to transactions with or statements of the decedent, unless called by the opposite party, the original plaintiff in a suit against an administratrix, in which a receiver for the benefit of creditors was substituted as plaintiff, though contingently interested, was not incompetent as a witness. The competency or incompetency of the witness has to be determined relatively to his status at the time he was proposed and passed upon as a witness, without any reference to his previous relation to the record. *Stanley v. Wilkerson*, 63 Ark. 556, 560, 39 S. W. 1043, 1044.

The term "party," as used in sections 498, 499, Rev. St. 1881, providing that in certain cases a party shall be a competent witness, means a party to the issue, and heirs of a decedent, who had not only parted with their interest in his estate, but have also been defaulted, and are no longer par-

ties to any issue, are not incompetent. *Scherer v. Ingerman*, 12 N. E. 304, 305, 110 Ind. 428.

#### Verification of affidavit of pleading.

The word "party" in Code, § 157, permitting the verification of a pleading, embraces the party in interest or person for whose immediate benefit the action is prosecuted or defended, though not named on the record. The terms "party," "party to the action," and "party in interest" were at the time the Code was enacted in general use among the people and lawyers; the word "party" being applied as well to the party in interest not named on the record as to the party named therein. *Taber v. Gardner* (N. Y.) 6 Abb. Prac. (N. S.) 147, 149.

Within the meaning of Code Civ. Proc. § 525, requiring verification of a pleading to be by a party, except that in an action by a domestic corporation it may be made by an officer, or in an action by a foreign corporation it may be by the agent or attorney for the party, "party" does not embrace an officer of a corporation. "The terminology shows that an officer of a corporation party is not to be deemed a party. If otherwise, this distinction between a corporation party and its officer would be a contradiction of terms." An officer of a foreign corporation is an agent thereof in law and within the meaning of the Code provisions. *Robinson v. Ecuador Development Co.*, 65 N. Y. Supp. 427, 428, 32 Misc. Rep. 106.

A local agent of a railroad company in the county where the action is pending, and on whom, under the statute, process may be served for the company, is competent to make an affidavit to support an application by the company for a change of venue under Rev. St. art. 1271, providing that a change of venue may be granted on the application of either party supported by the affidavits of credible persons; such agent not being a party. *Texas & P. Ry. Co. v. Allen*, 26 S. W. 434, 435, 7 Tex. Civ. App. 214.

Rev. St. 1858, c. 120, § 8, authorizes a change of venue in a civil action, and provides that the party shall verify the application by his oath or affidavit. Held that, while the word "party" was sufficiently broad to include a foreign corporation which was a party to a suit, the word could not be extended to include the attorney for such foreign corporation, so as to authorize him to execute and verify the affidavit required. *Western Bank of Scotland v. Tallman*, 15 Wis. 92, 93.

The term "party," as used in Rev. St. 1889, § 2201, requiring an application for a change of venue to be made by the party, means the party in his own person, and not by agent or attorney, and in the case of an infant suing by his next friend it includes

the next friend, the next friend being neither the agent nor attorney for his ward. *Rambling v. Metropolitan St. Ry. Co.*, 57 S. W. 268, 275, 157 Mo. 477.

The word "party," in Practice Act, § 55, providing that where a pleading is verified it shall be by affidavit of the party, unless he be absent from the county where the attorney resides, refers to the party who by law is made primarily the proper person to verify the pleading, rather than the party plaintiff or defendant. *Heintzelman v. L'Amoroux*, 8 Nev. 377, 379.

#### **PARTY AGGRIEVED.**

See "Aggrieved Party."

#### **PARTY BENEFICIALLY INTERESTED.**

See "Beneficially Interested."

#### **PARTY CAST.**

In North Carolina, if the defendant in a sci. fa. against him as bail surrender the principal, he subjects the plaintiff to costs as the "party cast." *Peace v. Person*, 5 N. C. 188.

#### **PARTY CONCERNED.**

See "Concern."

#### **PARTY INJURED.**

See "Injured Person."

#### **PARTY INTERESTED.**

See "Interest."

#### **PARTY OF THE FIRST PART.**

A deed must be read according to the manifest intention of the parties, and if by mistake the words "party of the first part" are written where "party of the second part" should have been written, the mistake will not be permitted to defeat the intention of the parties, but the court will give effect to the deed so as to carry out their intentions. *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq. (11 O. R. Green) 504, 507.

Where the words, "party of the first part" were inserted by mistake in a deed executed subject to a certain mortgage, which the purchaser was to assume and pay as part of the price, the court said: "There is no ambiguity in the words, but there is a mistake. The manifest intent was that whoever was to pay the consideration was to pay the mortgage. \* \* \* If it is necessary to give a rule to justify this conclusion, that rule is: 'Verba intentioni, non e contra, debent inservire, ut res magis valeat quam pereat.' This requires that the whole of the instrument should be examined, and any part which is inconsistent with or repugnant to the intent of the whole instrument, as is

shown with certainty by the other parts, is to be rejected or modified according to the intent." *Fairchild v. Lynch*, 42 N. Y. Super. Ct. (10 Jones & S.) 265, 278.

Insolvent Act 1880, § 17, provides that the clerk of court shall assign and convey to the assignee all the estate, real and personal, of the debtor. The clerk, in an assignment, after styling himself "party of the first part," proceeded to convey all the property, etc., of the said party of the first part. The instrument was entitled "In the matter of A. B., an insolvent debtor." It recited the steps in the insolvency proceedings, and that the instrument was made by the assignor as clerk of the court; also that it was in obedience to the insolvent act. Held, that the words "party of the first part" meant the clerk acting under the statute as assignor of the insolvent's estate. *Mogk v. Peterson*, 17 Pac. 446, 448, 75 Cal. 496.

#### **PARTY TO BE CHARGED.**

See "Signed by the Parties to be Charged."

#### **PARTY TO CONTROVERSY, SUIT, OR PROCEEDING.**

In sales made by commissioners under decrees and orders of the court of equity the purchasers who have bid off the property and paid their deposits in good faith are "parties to a controversy," within the meaning of that term as used in a statute providing that a party to a controversy may obtain an appeal, etc.; it being held that the phrase in question is not restricted in its meaning to a party to the original suit. *Kable v. Mitchell*, 9 W. Va. 492, 507.

The term "party to a suit or action" applies as properly to persons seeking by writ of habeas corpus to vindicate their right to personal freedom and to the adverse parties who are restraining them of it as to contestants upon the record in any other suit. The former are persons seeking to establish their legal rights; the latter persons on whom it is sought to impose an immediate duty or liability to recognize such rights. The statutory and judicial policy which prevents a private attorney from appearing for the state in a criminal case except by special appointment for that purpose does not apply to habeas corpus proceedings, and, though an attorney cannot appear on the side of the state in a habeas corpus suit at public expense, he may appear by request of the proper officer at private expense to represent the interests of the state. *State v. Huegin*, 85 N. W. 1046, 1053, 110 Wis. 189, 62 L. R. A. 700.

The phrase "party to the proceeding," as used in Gav. & H. St. § 31, providing that from all decisions of commissioners there

shall be allowed appeals from the circuit or common pleas court by any person aggrieved, but, if such person shall not be a party to the plea, such appeal will not be allowed, etc., embraces such persons only as are parties in a legal sense, and who have been made or become such in some mode prescribed or recognized by the law, so that they are bound by the proceeding. *Robinson v. Vanderberg County Com'rs*, 37 Ind. 333, 335.

## PARTY-RATE TICKET.

"Party-rate tickets" is a name given to designate railroad tickets for the transportation of 10 or more persons at a reduced rate. They are issued in the form of one ticket for all the persons in the party to be so transported. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 12 Sup. Ct. 844, 848, 145 U. S. 263, 36 L. Ed. 699.

A party-rate ticket is a ticket for the transportation of a party of persons from a place in one state or territory to a place situate in another state or territory at a rate less than that charged to a single individual for a like transportation on the same trip. *Raleigh & G. R. Co. v. Swanson*, 28 S. E. 601, 602, 102 Ga. 754, 89 L. R. A. 275.

## PARTY WALL

As an incumbrance, see "Incumbrance (On Title)."

A party wall is ordinarily a wall built partly on the land of one and partly on the land of another for the common benefit of both in supporting timbers used in the construction of contiguous buildings. *Brown v. Werner*, 40 Md. 15, 19; *Barry v. Edlavitch*, 35 Atl. 170, 171, 84 Md. 95, 33 L. R. A. 294. A party wall is a wall erected on the boundary between adjacent landowners, part being on the property of the one, and part on the other, and which is or can be used for the mutual support of adjacent buildings. *Musgrave v. Sherwood (N. Y.)* 54 How. Prac. 338, 339.

The term "party wall" is commonly applied to a wall of which, if divided longitudinally, the two parts rest on land belonging to different owners, built solidly of materials not easily divided, or whose parts cannot be taken down without danger to the whole structure. In such case either party may remove the half on his own land, if it does not injure the other's half, unless one or other owner has an easement by grant to have his neighbor keep up his half to support his own. *Sherred v. Cisco*, 6 N. Y. Super. Ct. (4 Sandf.) 480; *Eno v. Del Vecchio*, 11 N. Y. Super. Ct. (4 Duer) 53; *Bradbee v. Christ's Hospital*, 4 Man. & G. 714; 2 Car. & P. 250; *Fettretch v. Leamy*, 22 N.

Y. Super. Ct. (9 Bosw.) 510, 525; *Nash v. Kemp (N. Y.)* 49 How. Prac. 522, 527.

A party wall is the division wall between two connected and mutually supporting buildings, either both actually erected or one contemplated, of different owners, commonly, but not necessarily, standing half on the land of each, ordinarily maintained at mutual cost, and always with the right of each owner to insert therein his timbers. *Duscomb v. Randolph*, 64 S. W. 21, 23, 107 Tenn. (23 Pickle) 89, 89 Am. St. Rep. 915.

A party wall has been defined to be a structure for the common benefit and convenience of both the tenements which it separates, and either party may use it. Such a wall is a substitute for a separate wall to each adjoining owner, and neither may impair its value to the other. Each adjoining proprietor is the owner in severalty of his part, both of the wall and of the land on which it stands, subject to the gross easement of support, and for other common needs in favor of the other proprietor. *Fidelity Lodge, No. 59, I. O. O. F., of New Castle, v. Bond*, 45 N. E. 338, 339, 147 Ind. 437.

A party wall is a wall erected on the line between two adjoining estates belonging to different persons, for the use of both estates. *Lukens v. Lasher*, 51 Atl. 887, 889, 202 Pa. 327; *Odd Fellows' Hall Ass'n of Portland v. Hegele*, 32 Pac. 679, 681, 24 Or. 16. A party wall is a wall between two estates, used for the common benefit of both. *Glover v. Mersman*, 4 Mo. App. 90, 91. See, also, *Harber v. Evans*, 14 S. W. 750, 101 Mo. 661, 10 L. R. A. 41, 20 Am. St. Rep. 646.

A party wall is a dividing wall between two houses, to be used as an exterior wall for each. *Ensign v. Colt*, 52 Atl. 829, 831, 75 Conn. 111.

A common or party wall is one which has been built at a common expense, or one which has been built by one party, but in which another has acquired a common right. Every wall or separation between two buildings is presumed to be a common or party wall. *Campbell v. Mesier (N. Y.)* 4 Johns. Ch. 334, 340, 8 Am. Dec. 570.

A party wall is one in which there is community of use. Rector, Wardens, and Vestrymen of Church of Holy Communion v. *Paterson Extension R. Co.*, 43 Atl. 696, 697, 63 N. J. Law, 470.

A dividing wall between two buildings owned by different parties, the foundations of which rest both on the ground of each, is a party wall. It is immaterial that the foundation is not equally laid on the lot of each party, and that the wall itself above the foundation is fully within the lot of one of the adjoining owners. *Appeal of Western Nat. Bank*, 102 Pa. 171, 182.

A party wall is a wall constructed upon the line of lands of two adjoining proprietors, and partly upon each, or it may be that the wall and the land upon which it stands are held in common. *Hunt v. Ambruster*, 17 N. J. Eq. (2 C. E. Green) 208, 213.

A party wall, in the legal sense of the term, can only exist in one of two ways—either by contract or by statute—for the common law creates no such right. It is possible that such a right may arise by prescription. *List v. Hornbrook*, 2 W. Va. 340, 342.

#### **Solid structure.**

By usage the words "party wall" and "partition wall" have come to mean a solid wall. *Bonney v. Greenwood*, 52 Atl. 786, 790, 96 Me. 335. And the owner of land, in building a party wall, has no right, against objections of the adjoining owner, to leave openings for windows. *Normille v. Gill*, 34 N. E. 543, 544, 159 Mass. 427, 38 Am. St. Rep. 441.

A party wall is understood to be ordinarily a solid or dead wall, but when a party wall is erected without limitations by either party, except as to its strength, then, if the party erecting it meets the requirements of the other in this respect, he may leave openings therein, provided that said openings shall not interfere with the right of the other to the use of the party wall as a party wall, and provided further that such openings would not greatly increase the hazard by fire to the property of such other. *Everly v. Driskill*, 58 S. W. 1046, 1049, 24 Tex. Civ. App. 413.

There is no rule in this state which requires a wall to be absolutely solid, under all circumstances, in order to be a party wall. The term does not, as matter of law and necessarily, imply a solid structure; and evidence as to the general custom in New York in regard to flues, when party walls are erected, may be some evidence of the meaning of the term as used in an agreement for such a wall. *Hammann v. Jordan*, 29 N. E. 294, 295, 129 N. Y. 61 (reversing *Hammann v. Jordan*, 13 N. Y. Supp. 228, 229, 59 N. Y. Super. Ct. [27 Jones & S.] 91).

#### **Wall belonging entirely to one owner.**

A wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing line between two tenements, is a party wall. *Spero v. Shultz*, 43 N. Y. Supp. 1016, 1018, 14 App. Div. 423.

#### **Wall entirely on land of one owner.**

A wall built entirely on one man's land may acquire by grant the characteristics of a party wall. *Brondage v. Warner* (N. Y.) 2 Hill, 145, 148; *Fettretch v. Leamy*, 22 N.

Y. Super. Ct. (9 Bosw.) 510, 525; *Nash v. Kenp* (N. Y.) 49 How. Prac. 522, 527. Evidence showed that the wall had been built by defendant's ancestor, as a part of his residence, when there was no building on plaintiff's lot, which extended to the line, and that the building was occupied for 24 years before plaintiff purchased it. Held, that the wall, as a boundary, had been established by acquiescence. *Pearsall v. Westcott*, 51 N. Y. Supp. 663, 666, 30 App. Div. 99.

A division wall may become a party wall by agreement, either actual or presumed; and, although such wall may have been built exclusively upon the land of one, if it has been used and enjoyed in common by the owners of both houses for a period of 20 years, the law will presume, in the absence of evidence showing that such use and enjoyment were permissive, that the wall is a party wall. In such cases the law presumes an agreement between the adjacent owners that the wall shall be held and enjoyed as the common property of both. *Barry v. Edlavitch*, 35 Atl. 170, 171, 84 Md. 95, 33 L. R. A. 294.

The wall of a building wholly upon the land of one of such owners does not, from the fact that it is built up to the divisional line, become a party wall, to the extent that the other may build his timbers into it, or rest them upon it. *Simonds v. Shields*, 44 Atl. 29, 30, 72 Conn. 141.

## **PASS.**

See "To be Passed."

The word "pass," as used in Act Aug. 13, 1813, c. 56, making it an offense to use a British pass or protection, will include a piece of cloth. It is as much a pass as if a ring or a watch seal or any other symbol had been given, upon the exhibition of which the party would be permitted to go unmolested. *United States v. Briggs* (U. S.) 24 Fed. Cas. 1232.

#### **Canal or railroad.**

Where a person subscribes to the stock of a railroad company upon condition that the road should pass through a certain county, and on a certain designated route, the word "pass" should be construed to mean "runs" or "is located"; and it is not a condition precedent to the right of the company to demand the amount subscribed that it should actually construct and complete the road along the route designated. *North Missouri R. Co. v. Winkler*, 29 Mo. 318, 320.

"Passing through the town," as used in a contract to pay a certain sum of money in six months after the canal passing through the town be put under contract, on condition that it shall pass through the town, means,

"not the completion, but the final location and establishment, of the line of canal." *State v. Collins*, 6 Ohio (6 Ham.) 126, 142.

"Pass through," as used in Gen. St. p. 2660, par. 83, providing that railroad companies may, before or after the completion of the main line, construct branches within the limits of any county through which such road may pass, should not be construed in the sense of going from one boundary to another. The words "pass through," as used in reference to the main line, may be considered as used in the sense in which an arrow is said to pass through air; the notion of motion or location in a body or space being referred to. Passage through a county at the point of departure of the branch road from the main line was the object of the reference to the main line, and the fixing of the terminus a quo and the terminus ad quem of the main line, which could construct branches by a reference to its passing through a county, was not intended. *Grey v. Greenville & H. Ry. Co.*, 46 Atl. 638, 642, 59 N. J. Eq. 372.

#### **Coin or bank note.**

Utter distinguished, see "Utter."

The word "passing," used of notes, includes any delivery of a note to another, for value, with intent that it shall be put into circulation as money, and does not necessarily import that the notes are transferred as genuine. *United States v. Nelson* (U. S.) 27 Fed. Cas. 80, 82.

"To pass counterfeit money" means delivery as money, or as a known and conventional substitute for money, and does not necessarily mean to transfer for a valuable consideration received from the person to whom the bill is given. *Commonwealth v. Starr*, 86 Mass. (4 Allen) 301, 303.

"Pass," as used in St. 1804, c. 120, § 4, providing that if any person shall have in his possession within the state any counterfeit bank bill, etc., for the purpose of rendering the same current as true, or with intent to pass the same, knowing it to be counterfeit, etc., he shall be punished, should be construed in a technical sense, meaning to deliver bank notes as money, or as a known and conventional substitute for money, and was intended to prohibit the passing of counterfeit bank bills as money, or to be used or passed as money, by any person, at any rate of discount or otherwise, whether, as between the party passing them and the immediate receiver, they were passed as true or not. *Hopkins v. Commonwealth*, 44 Mass. (3 Metc.) 460, 464.

The word "pass," as used in Act June 30, 1864, making it an offense to utter, pass, publish, sell, or counterfeit United States notes, may include, in a proper case utter,

publish, and sell. *United States v. Nelson* (U. S.) 27 Fed. Cas. 80, 82.

"The plain or ordinary and usual sense of the word 'pass,' as applied to coin or bank notes, is to deliver in exchange for something else, and is equally expressed by the words 'sell, exchange, or deliver.'" *State v. Watson*, 65 Mo. 115, 119.

"Pass," as used with relation to the crime of forgery, is the putting of a paper off, or giving it in payment or exchange. *United States v. Mitchell* (U. S.) 26 Fed. Cas. 1276.

As used in Act April 22, 1794, § 5, providing a punishment for every person convicted of having falsely uttered, paid, or tendered in payment any counterfeit or forged coin, knowing it to be forged or counterfeit, or who shall be concerned in printing, forging, or passing any counterfeit notes of the Banks of Pennsylvania and North America or the United States, knowing them to be such, "passing" is not synonymous with "uttering and publishing," for to offer a false or forged bank note in payment would be an uttering or publishing, but there would not be a passing of such note until it was received by the person to whom it was offered. *Commonwealth v. Searle* (Pa.) 2 Bin. 332, 338, 4 Am. Dec. 446.

#### **Same—Gambling.**

The term "passing," in the act prohibiting the passing of counterfeit money, includes the losing of counterfeit money at gambling. *State v. Beeler* (S. C.) 1 Brev. 482, 483.

#### **Same—Pledging.**

"Passing," as used in a statute prohibiting the felonious and fraudulent passing of counterfeit money, etc., does not include the pledging of such a note with the understanding that it was to be redeemed at a future date. *Gentry v. State*, 11 Tenn. (3 Yerg.) 451.

#### **Passing of papers.**

In a written agreement for an exchange of real estate and other property, and providing that one of the parties should pay the taxes on his land, and interest on a mortgage thereon to date, and that taxes and ground rent must be paid on the property of the other up to passing of papers, the "passing of papers" meant the execution and delivery of formal conveyances securing to each the title contracted for. *Linthicum v. Thomas*, 59 Md. 574, 577.

#### **Real estate.**

"Pass," as used in Wag. St. p. 541, § 15, providing that if any testator shall by will pass any real estate, means "devise." *Gant v. Henly*, 64 Mo. 162, 163.

The term "pass," as used in Rev. St. § 2199, providing that, if any testator shall by will "pass any real estate to his wife, such devise shall be in lieu of dower," etc., means only "devise." *Young v. Boardman*, 97 Mo. 181, 185, 10 S. W. 48, 50.

#### Statute.

The terms "make," "ordain," "constitute," "establish," and "pass," as used with relation to a grant of legislative authority to a municipal corporation to enact business ordinances, mean the same thing. *Kepner v. Commonwealth*, 40 Pa. (4 Wright) 124, 129.

Const. art. 3, § 18, provides that no member of the Legislature shall be interested directly or indirectly in any contract with the state, or any county thereof, authorized by law, and passed during the term for which he should have been elected. Laws 24th Leg. p. 50, § 5, fixed the rate that publishers should receive for publishing delinquent tax lists, which law was amended and re-enacted by the Twenty-Fifth Legislature, and whether or not the latter law made any material change in the rate to be paid for the publication of the tax lists under the law passed by the Twenty-Fourth Legislature, it was a law passed at the Twenty-Fifth Legislature, within the meaning of the constitutional provision, preventing a member of the latter Legislature from making a contract for publishing the delinquent tax list. *Lillard v. Firestone County*, 57 S. W. 338, 340, 23 Tex. Civ. App. 363.

Ordinarily a bill is said to have passed one of the houses of the state Legislature when the final vote in its favor in that house has been taken and announced; but it is held that under the last clause in section 11, art. 4, Const., authorizing the Governor to sign certain bills within three days after the adjournment of the Legislature, bills that were finally voted upon more than three days before the day of adjournment, if forwarded within the last three days, are deemed to be passed within that time, and may be signed by the Governor. *Burns v. Sewell*, 48 Minn. 425, 430, 51 N. W. 224.

#### PASS AND REPASS.

The privilege of "passing and repassing," as used in a grant of dower to certain rooms on the floors of a building, a room on the second floor, and a room in the garret, and the privilege to pass and repass to such rooms and the well, as is most convenient, includes a right of passing to and from the public street. *Miles v. Douglas*, 34 Conn. 393, 394.

A deed giving the grantee a right to use a specified portion of an adjoining lot as an alley in common, for the purpose of passing and repassing from the lot conveyed, gives a right to use the alley for the passage of

foot travelers, teams, and vehicles, and does not authorize the grantee to erect any permanent structure on the alley. *Gillespie v. Weinberg*, 42 N. E. 676, 677, 148 N. Y. 238.

#### PASSAGE.

See "On a Passage."

#### PASSAGE OF ACT.

See "Final Passage."

#### As date of passage by Legislature.

The "passage" of an act, within the meaning of an act laying duties on goods imported from and after the passage of the act, means the day on which it is passed, and not the time of its being signed by the President. *United States v. Williams* (U. S.) 28 Fed. Cas. 677, 678.

The phrase "after the passage of this act," as used in Gen. St. c. 860, § 1, providing that arrest or imprisonment for any action accruing "after the passage of this act for the recovery of debt or of state or town taxes is hereby abolished," which act was passed on the 31st day of March, and to take effect on the 1st day of July, must be construed to refer to March 31st, and not to July 1st; and hence arrest is prohibited in every case where the cause of action occurred after the 31st of March, and from that time no arrest could be made, and no writ could command it. *Elliot v. Cranston*, 10 R. I. 88, 89.

A provision that an act shall take effect from its passage means from and including the whole day it actually passed—not even deferred until the day of its approval by the executive. *Ex parte Lucas*, 61 S. W. 218, 221, 160 Mo. 218.

The word "passage," in Const. art. 6, providing that no act of the Legislature, except, etc., shall take effect until the expiration of 90 days after its passage, unless, etc., means the date of the passage of the act by the two houses, and not to the date of its approval by the Governor. *State v. Mounts*, 14 S. E. 407, 36 W. Va. 179, 15 L. R. A. 243.

#### As time of becoming a law.

An act of the Legislature is passed only when it has gone through all the forms made necessary by the Constitution to give it force and validity as a binding rule of conduct for the citizen. Whether it receives the signature of the Governor, or remains in his hands unreturned for 10 days, or, being vetoed, is carried by two-thirds of both houses, its passage is dated from the time it ceased to be a mere proposition or bill and passed into a law. *Wartman v. City of Philadelphia*, 83 Pa. (9 Casey) 202, 208.

The time of the passage of an act is the time when it has passed through the various

stages rendered necessary by the provisions of the Constitution to make it a valid statute, and been approved and signed by the Governor, and not the time when it was to take effect. *Johnson v. Fay*, 82 Mass. (16 Gray) 144, 145.

The word "passage," in Const. art. 2, § 20, declaring that no law of a general nature shall take effect until 40 days after its passage, means the time when it becomes a law by the signature of the Governor, or by final passage over his veto. *Logan v. State*, 50 Tenn. (3 Heisk.) 442, 445.

#### As time of taking effect.

The words "passage of the act," and similar expressions, in statutes, have legal reference to the time of their taking effect. *Rogers v. Vass*, 6 Iowa (6 Clarke) 405, 408.

The term "passage of the act," in a limitation statute to take effect at a date subsequent to its passage, which provides that, in case the cause of action has accrued at the time of the passage of the act, a party may have the whole period prescribed by the statute in which to commence action, means the time when the act actually takes effect. *Schneider v. Hussey*, 1 Pac. 343, 344, 2 Idaho (Hask.) 8.

The term "passage of the act," as used in a statute which provides that the State Board of Medical Commissioners, within 90 days after the passage of the act, shall receive through its president applications for certificates and examinations, taken in connection with Const. art. 5, § 19, which provides that no act shall take effect until 90 days after its passage, unless in case of an emergency, is to be construed, in the absence of an emergency clause, as meaning after the act goes into effect. *Harding v. People*, 15 Pac. 727, 729, 10 Colo. 387.

Where the Constitution provides that, unless otherwise provided by the Legislature, an act shall not take effect until three calendar months after the adjournment of the Legislature, for that session, in the absence of an emergency clause the expression "after the passage of this act," as used in a law, can have but one meaning, namely, after the law goes into effect. *State v. Bemis*, 64 N. W. 348, 352, 45 Neb. 724.

#### PASSAGE OF MAIL.

A statute providing that any person who shall knowingly and willfully obstruct or retard the "passage of the mail," etc., means the transmission of mail matter from the time the same is deposited in a place designated by law or by the rules of the Post-Office department, up to the time the same is delivered to the person to whom it is addressed. "Mail matter in the post office,

ready for delivery, and there for that purpose, is on its passage, within the meaning of the statute." *United States v. Claypool* (U. S.) 14 Fed. 127, 128.

#### PASSAGEWAY.

Where a statute imposed a penalty on any person who should smoke or have in his possession any lighted pipe or cigar in any street, lane, or passageway, it was held that the terms "street, lane, or passageway" include any way which was actually open and used for the ordinary purposes of an open way. *Commonwealth v. Thompson*, 53 Mass. (12 Metc.) 231, 232.

The word "passageway," as used in Greater New York Charter, § 762, punishing the obstruction of the passageways of a theater, means that portion of the building through which persons going to or from their seats are accustomed to, or must of necessity, pass. *Sturgis v. Grau*, 79 N. Y. Supp. 843, 844, 89 Misc. Rep. 330.

#### PASSBOOK.

A passbook used by a depositor in a savings bank is not negotiable paper, such as to justify the payment of the amount of the deposit to one having possession of the passbook. *Smith v. Brooklyn Sav. Bank*, 4 N. E. 123, 101 N. Y. 58, 54 Am. Rep. 653.

A passbook is a book of the buyer or usually debtor party, in which he allows the other party to enter their mutual transactions, and thus these entries become in a great degree the written admissions of both parties. Whatever is entered there by one party is entered with the other's consent, and therefore is presumed to be right, whatever may be the subject of the entries, for parties may make their passbooks evidence of every transaction. *Ruch v. Fricke*, 28 Pa. (4 Casey) 241, 245.

#### PASSENGER.

See "Carrier of Passengers"; "Emigrant Passengers."

A "passenger," in the legal sense of the word, is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor. *Bricker v. Philadelphia & R. R. Co.*, 18 Atl. 983, 132 Pa. 1, 19 Am. St. Rep. 585; *Pennsylvania R. Co. v. Price*, 96 Pa. 256, 258, 23 Alb. Law J. 69; *Fitzgibbon v. Chicago & N. W. Ry. Co.*, 79 N. W. 477, 479, 108 Iowa, 614; *Travelers' Ins. Co. v. Austin*, 42 S. E. 522, 523, 116 Ga. 264, 59 L. R. A. 107, 94 Am. St. Rep. 125; *Stalcup v. Louisville, N. A. & C. Ry. Co.*, 45 N. E. 802, 803, 16 Ind. App. 584.

A passenger is a person who undertakes, with the consent of the carrier, to travel in a conveyance provided by the latter, otherwise than in the service of the carrier as such. *Higley v. Gilmer*, 3 Mont. 90, 99, 35 Am. Rep. 450; *Denver, S. P. & P. Ry. Co. v. Pickard*, 6 Pac. 149, 152, 8 Colo. 163; *Berry v. Missouri Pac. Ry. Co.*, 124 Mo. 223, 247, 25 S. W. 229.

A "passenger" has been defined to be a person whom a railway, in the performance of its duty as a common carrier, has contracted to carry from one place to another place for a valuable consideration, or whom the railway, in the course of the performance of that contract, has received at its station, or in its car, or under its care. *Schepers v. Union Depot R. Co.*, 29 S. W. 712, 713, 126 Mo. 665; *Simmons v. Oregon R. Co.*, 69 Pac. 440, 441, 41 Or. 151.

A passenger is one whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care either on the means of conveyance, or at the point of departure of that means of conveyance. *Chicago & E. R. Co. v. Field*, 34 N. E. 406, 407, 7 Ind. App. 172, 52 Am. St. Rep. 444; *Pennsylvania R. Co. v. Price*, 96 Pa. 256.

The word "passenger" ordinarily conveys the idea of one who, for hire, has taken a place in a public conveyance for the purpose of being transported from one place to another. *De La Vergne Refrigerating Mach. Co. v. McLeroth*, 60 Ill. App. 529, 534 (citing *Webst. Dict.*; *Bouv. Law Dict.*; *And. Law Dict.*).

Webster defines "passenger" as one who travels in some conveyance, as a stagecoach or steamboat; a passer or passer-by; one who is making a passage; a traveler, especially by some established conveyance; a person conveyed on a journey. *Pennsylvania R. Co. v. Price*, 96 Pa. 256, 258, 2 Ky. Law Rep. 183, 189.

Worcester defines "passenger" to mean one who passes; is on his way; a traveler; a wayfarer. *Pennsylvania R. Co. v. Price*, 2 Ky. Law Rep. 183, 189, 96 Pa. 256.

The term "passenger" is said to include all persons who pay freight for their persons, apart from their merchandise. *The Main v. Williams*, 14 Sup. Ct. 486, 487, 152 U. S. 122, 38 L. Ed. 381.

A passenger is one who enters the vehicle of a carrier with the intention of paying in money the usual fare for his transportation, or is supplied with a ticket or pass entitling him to ride to a given point. *Holt v. Hannibal & St. J. R. Co.*, 74 S. W. 631, 633, 174 Mo. 524.

It is not easy to construct a definition of the term "passenger," which, on the one hand, includes all persons entitled to the rights of passengers, and, on the other, excludes all those who are not. In a great majority of cases there can be no question on this score, because a person riding on a passenger coach, who has prepaid his fare, is necessarily a passenger. The purchase of a ticket or the prepayment of the fare is not necessary to create the relation of passenger and carrier. *Rawlings v. Wabash R. Co.*, 71 S. W. 534, 97 Mo. App. 515 (citing *Fett Carr.* § 210).

A passenger may be said, in general terms, to be any person whom the carrier is, as carrier, transporting. The carrier's servant going on his master's business is not a passenger, but one riding on a free ticket may be such. *Norfolk & W. R. Co. v. Tanner*, 41 S. E. 721, 722, 100 Va. 379 (citing *Blash. Non-Cont. Law*, § 1092).

Rev. St. § 4492 [U. S. Comp. St. 1901, p. 3058], requiring a barge carrying passengers while in tow of a steamer to be equipped with fire buckets, does not apply to a canal boat laden with coal for transportation, having on board the wife and children of the captain. *Transportation Line v. Cooper*, 99 U. S. 78, 79, 25 L. Ed. 382.

The wife and neighbors of the owner of a tugboat, going on a tug during a trial trip merely to witness the operation of the machinery, are not passengers, within the meaning of the statute requiring boats for passengers to be inspected and licensed. *United States v. Guess* (U. S.) 48 Fed. 587.

Children on board a vessel and persons not paying are not to be excluded, in estimating the number of passengers on a vessel, under Act March 2, 1819, subjecting a vessel to forfeiture where there was an excess of two to every five tons of the vessel. *United States v. The Louisa Barbara* (U. S.) 26 Fed. Cas. 1000, 1001.

"Passenger," as used in Rev. Code 1855, p. 647, providing that, when any passenger shall die from any injury by the defects in any railroad, the latter shall forfeit the sum of \$5,000, refers exclusively to passengers carried as such; and in this respect, and so far as the principles of law governing the liability are concerned, it makes no change in the previous law of carriers or passengers. *Schultz v. Pacific R. R.*, 36 Mo. 13, 24.

#### Person about to take passage.

A person who has purchased a ticket from a common carrier's agent, paid him therefor, and is in waiting at the depot, intending thereafter, as soon as possible, to take passage, or one who has gone to the depot with the intention in good faith to procure a ticket to take passage on the car-



rier's train at the first opportunity, and for this purpose has placed himself in the care of the carrier, and its servants and agents, preparatory to taking passage on its train, is a passenger. *St. Louis S. W. Ry. Co. v. Franklin (Tex.)* 44 S. W. 701, 702.

One becomes a passenger when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one offered himself to be carried on a trip about to be made, and that the other has accepted the offer, and has received him to be properly cared for until the trip is begun, and then to be carried over the railroad. *Webster v. Fitchburg R. Co.*, 37 N. E. 165, 167, 161 Mass. 298, 24 L. R. A. 521.

One who enters upon depot grounds by the approaches furnished by the carrier is a passenger. The fare does not have to be paid, nor the train entered, but the person must merely enter within the control of the carrier at the depot through the usual channels of business, with intention of becoming a passenger by either paying fare before or after entering the train. *Baltimore & O. R. Co. v. State*, 32 Atl. 201, 202, 81 Md. 371.

It is not necessary to create the relation that the passenger should have entered a train, but, if he is at the place provided for passengers—such as the waiting-room or platform at the station—with the intent of taking passage, and has a ticket, he is entitled to all the rights and privileges of a passenger. *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167; *Gordon v. Grand St. & N. R. Co. (N. Y.)* 40 Barb. 546, 550.

#### **Same—Going to train with ticket.**

One who has a railroad ticket, and is present to take the train at the ordinary point of departure, is a passenger, though he has not entered the cars. *Central R. & Banking Co. v. Perry*, 58 Ga. 461, 467.

A person who walks across a track at a railway station to take passage on a train is a passenger, for whose safety the railroad company is bound to exercise the highest degree of diligence. *Chicago & E. I. R. Co. v. Chancellor*, 60 Ill. App. 525, 526.

One who goes upon the gang plank of a steamboat for the purpose of taking passage thereon is a passenger. *Rogers v. Kennebec Steamboat Co.*, 29 Atl. 1069, 1070, 86 Me. 261, 25 L. R. A. 491.

One who had purchased a ticket, and was crossing the track under the direction of an agent of the company, was a passenger, and entitled to all the rights as such. *Baltimore & O. R. Co. v. State*, 63 Md. 135, 136.

A person, in possession of a ticket, who while running from the street, across the company's tracks, outside the passenger station, apparently to catch a train about to start, is struck and killed by another train, has not become a passenger. *Webster v. Fitchburg R. Co.*, 37 N. E. 165, 166, 161 Mass. 298, 24 L. R. A. 521.

Where one runs to catch a train as it is starting, and is not seen by any of the trainmen, and, without any negligence on their part, is injured while attempting to board it while moving, he is not a passenger, and the company is not liable. *Jones v. Boston & M. R. R.*, 39 N. E. 1019, 1020, 163 Mass. 245.

A person, having purchased a ticket of a railroad company with the intention of becoming a passenger on one of its trains, passed through a turnstile provided by the company for that purpose, and onto its depot platform. Held, that the relation of carrier and passenger existed between the parties when the purchaser of the ticket passed through the turnstile onto the platform. *Illinois Cent. R. Co. v. Treat*, 75 Ill. App. 327.

#### **Same—Going to train without ticket.**

One in good faith coming to the depot to take passage on the cars is a passenger, though he have not bought a ticket. *Grimes v. Pennsylvania Co. (U. S.)* 36 Fed. 72, 73.

Where one in good faith inquired of a railroad agent for a ticket for passage in the caboose of a freight train, and was referred to the conductor, but was injured before getting upon the train, held, that the relation of passenger was established. *Alender v. Chicago, R. I. & P. R. Co.*, 37 Iowa. 264, 267.

#### **Same—Going to purchase ticket.**

A man walking towards a railroad station, with the intention of buying a ticket and taking a train, is not a passenger before he reaches the station. *June v. Boston & A. R. Co.*, 153 Mass. 79, 26 N. E. 238.

One who was injured while riding to a railroad station, with intent to take passage on the train, in a stage run by the company to bring passengers to their trains, held to be a passenger, and entitled to claim damages for negligence of the driver, although he had not yet bought his ticket, nor made any formal announcement of his purpose to do so. *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168, 171, affirming (N. Y.) 36 Barb. 420.

It is the lawful right of every citizen *prima facie* to become a passenger on a railway train, and neither the purchase of a ticket nor the entry into the car is essential to create the relation of carrier and passenger, and where a person enters the ticket office of a railway company to buy a ticket he is entitled to the protection of a passenger, even though the agent refuses to sell him a ticket. *Norfolk & W. R. Co. v. Galther*, 16 S. E. 935, 936, 89 Va. 639.

**Same—Signaling car to stop.**

The facts that plaintiff signaled defendant's street car to stop for her to get on board, and that the driver intended to stop the car for that purpose, are not sufficient to establish the relation of carrier and passenger. *Donovan v. Hartford St. Ry. Co.*, 32 Atl. 350, 351, 65 Conn. 201, 29 L. R. A. 297.

One who attempts to board a street car moving six miles an hour is not a passenger, though he signaled the car to stop, and is entitled only to such care on the part of the trainmen as is due to any person in the street. *Baltimore Traction Co. v. State*, 28 Atl. 397, 399, 78 Md. 409.

**Same—Boarding car or train.**

One is a passenger in a street car who is in the act of stepping on the platform, the car having stopped for him, and, in case of an accident when stepping on, his rights are those of a passenger. *McDonough v. Metropolitan R. Co.*, 137 Mass. 210, 211.

Where defendant's train stops before crossing the track of another road, where there is no depot, but where defendant allows passengers to take trains, one who enters the train there becomes a passenger after entering the car, and his rights and duties are the same as other passengers. *Dewire v. Boston & M. R. Co.*, 19 N. E. 523, 524, 148 Mass. 343, 2 L. R. A. 166.

Plaintiff had hailed a street car, and the car had stopped for the purpose of enabling him to take passage, and while he was in the act of boarding it he was injured by another car, approaching it from behind. Held, that even though he was not actually on the platform of the car, but was only in the act of carefully and prudently attempting to step upon the platform, he was to be regarded as a passenger. *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550.

The rear car of an electric railway train was just passing over the further crosswalk at a street crossing, at which the city ordinance required it to stop for passengers, and was running three miles an hour, when plaintiff came on the street. Plaintiff, intending to board the train, ran towards the motor car, but was not seen by the conductor

until within 10 feet of the car. There was no slacking of speed or other act showing any intention on the part of the conductor or motorman to accept him as a passenger. Held, that by his attempt to board the train he did not become a passenger so as to require of the railway company the highest degree of care to avoid injuring him. *Schepers v. Union Depot R. Co.*, 29 S. W. 712, 713, 126 Mo. 665.

The relation of carrier and passenger may be implied from an attempt to enter in a proper manner a street car as a passenger, with the intention of being transported therein. *North Chicago St. Ry. Co. v. Williams*, 29 N. E. 672, 675, 140 Ill. 275.

The relation of carrier and passenger may be implied from slight circumstances, but one who intends to take passage on a street car cannot be regarded as a passenger while he is in the act of entering it, unless he does so with a proper degree of care and prudence, so that until such a person enters the car, or is in the act of prudently entering it, he has not placed himself in the charge of the street car company, so as to become a passenger. *Baltimore Traction Co. v. State*, 28 Atl. 397, 399, 78 Md. 409.

A person may become a passenger on a street car before he has actually entered the car, as otherwise he might, in good faith, and in the exercise of due care, place himself in a position of peril while in the act of taking passage upon the invitation of the carrier, and the latter be bound to the exercise of ordinary care only. Thus a person who has hailed a car, which has stopped for him, and who is in the act of carefully and prudently attempting to step on the platform, is to be regarded as a passenger. *Smith v. St. Paul City Ry. Co.*, 18 N. W. 827, 32 Minn. 1, 50 Am. Rep. 550.

Where a street car had stopped for a person at a crossing, and he was endeavoring to enter it when he was hurt, as the car had actually stopped for the purpose of enabling him to take passage, and he was in the act of stepping on the platform, he was a passenger, he having accepted defendant's invitation to take passage, which had been signified by its stopping the car and waiting for him to enter. *Smith v. St. Paul City Ry. Co.*, 18 N. W. 827, 32 Minn. 1, 50 Am. Rep. 550.

**Same—Transferring from one car to another.**

One who, having received a transfer from one line of a street railway company to its other line, is proceeding from the sidewalk to her car on the latter line, which is standing at the end of the route, when she is struck by a piece of the trolley which breaks while being changed, as usual at

such point, from one end of the car to the other, is entitled to recover, as a passenger, for her injuries. *Keator v. Scranton Traction Co.*, 43 Atl. 86, 87, 191 Pa. 102, 44 Wkly. Notes Cas. 128, 129, 44 L. R. A. 546, 71 Am. St. Rep. 758.

#### Person on conveyance.

As a general rule, every one on a passenger train of a railroad company, and there for the purpose of carriage, with the consent, express or implied, of the company, is presumptively a passenger, but there must be some form of acceptance by the company of the person as a passenger. This acceptance need not be direct, or expressed to him, and generally is implied from the circumstances; and if the train be a regular train, or a train carrying passengers in general, or a special train fitted for the carriage of persons in general, and a person boards such a train without notice that it is reserved for particular persons, no doubt the presumption will arise that he was a passenger. If the train is not designed for the use of passengers in general, there is no implied acceptance of one who enters upon it, without right, as a passenger. *Fitzgibbon v. Chicago & N. W. Ry. Co.*, 79 N. W. 477, 479, 108 Iowa, 614.

Where one enters a street car as a passenger, his status is not affected by the fact that no demand was made for his fare, nor any paid. *Ohio & M. R. Co. v. Muhling*, 30 Ill. (20 Peck.) 9, 24, 81 Am. Dec. 336; *Buck v. People's Street Ry., Electric Light & Power Co.*, 46 Mo. App. 555, 563; *Bartlett v. New York & S. B. F. & S. Transp. Co.*, 8 N. Y. Supp. 309, 312, 57 N. Y. Super. Ct. (25 Jones & S.) 348; *Cogswell v. West St. & N. E. Electric Ry. Co.*, 5 Wash. 46, 31 Pac. 411, 413.

Where a party is properly on a car (although one of a freight train) in which a railroad company allows people to travel, with the knowledge of the agents of the company, for the purpose of being transported, he is a passenger, and the company is liable for any negligence on its part where by he is not transported safely, whether he has a ticket or not. *Secord v. St. Paul, M. & M. Ry. Co. (U. S.)* 18 Fed. 221, 223.

A child nine years of age, who was carried several blocks on a street car, the driver and conductor knowing him to be on board, was a passenger, whether he intended to pay fare or not, and was entitled to the diligence due to passengers of his age and discretion. *Metropolitan St. R. Co. v. Moore*, 10 S. E. 730, 731, 83 Ga. 453.

Payment of fare is not necessary to create the relation of carrier and passenger. *Rose v. Des Moines Val. R. Co.*, 39 Iowa, 246, 252.

Children of such an age that they are carried free, if accompanied by adults, are within 1 Pub. St. c. 112, § 212, making a railroad company liable in damages to passengers whose lives are lost in railroad accidents, etc., though the accompanying adults are riding on free passes. *Littlejohn v. Fitchburg R. Co.*, 20 N. E. 103, 105, 148 Mass. 478, 2 L. R. A. 502.

The term "passenger" includes a person entering a passenger train without the consent or knowledge of the conductor, and allowed to remain thereon, without the payment of fare, after the conductor has knowledge that he is on the train. *Sherman v. Hannibal & St. J. R. Co.*, 72 Mo. 62, 65, 37 Am. Rep. 423.

One on a railroad train by the invitation and permission of the conductor is not a passenger, so as to entitle him to recover, as a passenger, for injuries received. *Stalcup v. Louisville, N. A. & C. Ry. Co.*, 45 N. E. 802, 803, 16 Ind. App. 584.

Where a person goes aboard a railway train in good faith for the purpose of being carried from one place to another, and is permitted by the conductor to ride, the company is liable, in the absence of a special contract, for an injury arising from the carrier's negligence. *Simmons v. Oregon R. Co.*, 69 Pac. 440, 441, 41 Or. 151.

One who has secured a ticket, and entered a railroad train standing at a station, with the intent to be transported, is a passenger. *Choate v. Missouri Pac. Ry. Co.*, 67 Mo. App. 105, 109.

A person who refuses to pay his fare, and threatens to resist expulsion, is not a passenger, though he is not expelled. *Higley v. Gilmer*, 3 Mont. 90, 99, 35 Am. Rep. 450; *Atchison, T. & S. F. R. Co. v. Headland*, 33 Pac. 185, 188, 18 Colo. 477, 20 L. R. A. 822.

One who fraudulently evades the payment of his fare on a railway train is not a passenger. *Condran v. Chicago, M. & St. P. Ry. Co. (U. S.)* 67 Fed. 522, 523, 14 C. A. 506, 28 L. R. A. 749; *Toledo, W. & W. Ry. Co. v. Brooks*, 81 Ill. 292, 293; *McVeety v. St. Paul, M. & M. Ry. Co.*, 47 N. W. 809, 45 Minn. 268, 11 L. R. A. 174, 22 Am. St. Rep. 728.

A person fraudulently traveling on a pass issued to another person is not a passenger. *Toledo, W. & W. Ry. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Way v. Chicago, R. I. & P. Ry. Co.*, 19 N. W. 828, 64 Iowa, 48, 52 Am. Rep. 431; *Louisville, N. A. & C. Ry. Co. v. Thompson*, 8 N. E. 18, 20, 107 Ind. 442, 57 Am. Rep. 120. But the fact that a free pass is used by a passenger in violation of a statutory prohibition does not destroy his rights as a passenger. *Buffalo,*

*P. & W. Ry. Co. v. O'Hara (Pa.)* 12 Wkly. Notes Cas. 473.

It is not necessary that a person should be on a train of a railroad, in order to be regarded as a passenger. As a passenger, he has the right to stand or walk on the platforms provided at stations for the convenience of passengers while the train is stopping for refreshments, and on a street alongside of the platform. *Jeffersonville, M. & L. R. Co. v. Riley*, 39 Ind. 568, 585.

#### Same—Employé of carrier.

Where an employé of a railroad company, whose duties are not connected with the running of its trains, rides on one of its trains on a free pass, and is injured, the company is liable to him as to a passenger. *Central R. R. v. Henderson*, 69 Ga. 715, 716.

A person in the employment of a railway company, riding from his home to his employment in a caboose car attached to a freight train, without paying fare, according to the custom and the understanding of the parties, from which car and trains all persons except employés of the company are excluded, of which exclusion such person has full knowledge, is not a passenger, but only an employé of the company, as between whom and the company a presumption of negligence, on the part of the latter, is not varied by the fact of a collision. *Kansas Pac. Ry. Co. v. Salmon*, 11 Kan. 83, 91.

A painter, employed by a railroad company, painting depots, etc., along the line of the road, and transported over the road, to discharge his duties, in a small steam hand car used only by the officers and employés of the railroad company, is not a passenger, nor entitled to the rights of a passenger. *McQueen v. Central Branch U. P. R. Co.*, 30 Kan. 689, 1 Pac. 139.

A person traveling on a railroad train, under a contract with the corporation that, in consideration of his making certain quarterly payments, and supplying the passengers with iced water, he shall receive quarterly season tickets, and be permitted to peddle refreshments on the train, is a passenger, and not a servant. *Commonwealth v. Vermont & M. R. Co.*, 108 Mass. 7; 8, 11 Am. Rep. 301.

Where an employé of a railroad travels to and from his work on the cars of the company, and his transportation constituted part of the contract of service, while so traveling he is an employé, not a passenger, and hence the company is not liable for an injury to him through the negligence of a co-employé. *Vick v. New York Cent. & H. R. R. Co.*, 95 N. Y. 267, 271, 47 Am. Rep. 36.

A railroad employé who is ordered to go to a certain point on the railroad, and travels thither on an employé's pass, is during

the trip a passenger. *McGucken v. Western New York & P. R. Co.*, 28 N. Y. Supp. 298, 299, 77 Hun, 69.

One may be both a passenger and an employé of a railroad company—an employé when passing over the road at a time when actually engaged in performing duties for the company, but a passenger while not so engaged, but riding from one place to another, even though continuing all the while, in a popular sense, in the employ of the company. Thus a paymaster of a railroad company, traveling upon the business of the company from station to station, and stopping between stations for the purpose of paying off employés of the company wherever they may be, is not while so doing a passenger, within the meaning of a clause in a policy of accident insurance granting double indemnity to the insured if injured while riding as a passenger on a passenger car using steam as a motive power. *Travelers' Ins. Co. v. Austin*, 42 S. E. 522, 523, 116 Ga. 264, 59 L. R. A. 107, 94 Am. St. Rep. 125.

Where an employé of a railroad company had not for several days been in the actual service because the trains were interrupted by guerrillas, but took his place in the baggage car among other employés, and was received by the conductor as an employé who was passing from one point to another on the train, and engaged no passage, paid no fare, and did not expect to pay any, he was an employé, and not a passenger, within Act 1855, § 647, allowing damages to a passenger resulting from defects or insufficiency in any railroad. *Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 418, 433.

A railroad employé riding in the baggage car with other employés without the payment of fare, though not traveling in the master's service, was not a passenger. *Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 418, 433.

#### Same—Express messenger.

An express messenger who is injured, while engaged in his duties as such, by the derailing of the express car, has the same right of action against the railway company as any passenger would have under the same circumstances. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 523.

Where an express company hires its freight transported by steamer or railroad, and hires an agent to take charge of such freight, whose passage is paid for in the contract, such agent occupies the position of an ordinary passenger, as to the liability of the common carrier, for injuries he may sustain, caused by the negligence of its employés. *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71, 72.

An express messenger riding in a baggage car is entitled to the same care as a passenger, so far as is consistent with his position in such car. *San Antonio & A. P. Ry. Co. v. Adams*, 24 S. W. 839, 841, 6 Tex. Civ. App. 102.

**Same—Postal clerk.**

A United States railway postal clerk, who has finished his regular run, and is on a train returning home, riding free on the strength of his photograph commission, in accordance with the custom of the railroad company under its contract to carry the mails, is a passenger, and entitled to damages resulting from the negligence of the railroad's employes, whether he is riding in a passenger car or is in the postal car assisting his fellow clerks in handling the mails. *Cleveland, C., C. & St. L. Ry. Co. v. Ketcham*, 33 N. E. 116, 119, 133 Ind. 346, 36 Am. St. Rep. 550, 19 L. R. A. 339.

A mail agent traveling on a railroad under a contract between the government and the railroad company is a passenger. *Arrowsmith v. Nashville & D. R. Co.* (U. S.) 57 Fed. 165, 167; *Louisville & N. R. Co. v. Kingman* (Ky.) 35 S. W. 264, 265; *Mellor v. Missouri Pac. Ry. Co.*, 14 S. W. 758, 105 Mo. 455, 10 L. R. A. 36; *Nolton v. Western R. Corp.* (N. Y.) 10 How. Prac. 97, 101 (affirmed in 15 N. Y. 444, 69 Am. Dec. 623); *Seybolt v. New York, L. E. & W. R. Co.*, 95 N. Y. 562, 570, 31 Hun, 100, 101, 47 Am. Rep. 75; *Hammond v. Northeastern R. Co.*, 6 S. C. (6 Rich.) 130, 139, 24 Am. Rep. 467; *Norfolk & W. R. Co. v. Shott*, 22 S. E. 811, 812, 92 Va. 34.

Under Act April 4, 1868, providing that when any person shall sustain an injury or loss of life while lawfully employed in or about the premises of a railroad, or in or about any train, and such person is not an employé of the company, the right of action shall be only such as exists in case of an employé, provided that the act shall not apply to passengers, a government mail agent, who is injured while traveling in charge of the mail, is not a "passenger," within the meaning of the exception in the act. *Pennsylvania R. Co. v. Price*, 96 Pa. 256, 257, 23 Alb. Law J. 69, 2 Ky. Law Rep. 183, 189; *Price v. Pennsylvania R. Co.*, 113 U. S. 218, 219, 5 Sup. Ct. 427, 428, 28 L. Ed. 980; *Pittsburgh & L. E. R. Co. v. Bishop*, 7 O. C. D. 73, 75, 76.

The relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in its employ, whether this be by contract between them, or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in cases of mail and express

agents, or messengers and others. So it is held that a United States postal clerk is a passenger. *Gulf, C. & S. F. Ry. Co. v. Wilson*, 15 S. W. 280, 281, 79 Tex. 371, 11 L. R. A. 486, 23 Am. St. Rep. 345.

**Same—Palace car porter.**

A porter of a Pullman car, who is given free transportation by the railway company on whose line he runs, under a contract between the Pullman Company and the railway company, is not a passenger of the latter, so as to create the usual legal presumption of negligence through the mere happening of an accident causing him personal injuries. *Hughson v. Richmond & D. R. Co.*, 2 App. D. C. 98, 103.

A porter of a palace car, whose duties are to collect fares and wait on passengers in such car, is entitled to the rights of a passenger, in respect of the careful running and management of the train. *Jones v. St. Louis S. W. Ry. Co.*, 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 713, 46 Am. St. Rep. 514.

**Same—Person in charge of stock.**

A drover traveling on a railway on a free pass is, in effect, a passenger for hire. *Little Rock & Ft. S. Ry. Co. v. Miles*, 40 Ark. 298, 320, 48 Am. Rep. 10.

A person accompanying stock on a railroad train without any right of transportation, and who has not paid his fare at the time by an accident, though intending so to do, is not a passenger. *Gardner v. New Haven & Northampton Co.*, 51 Conn. 143, 50 Am. Rep. 12.

When a railroad company is in the practice of granting a drover's ticket to the owners of live stock transported over their road, that they may take care of their stock, upon their releasing the company from any risk on account of it and paying the rate of freight which is much less than where they do not take care of their stock, such ticket authorizing them to travel on the freight train without any further fare than that included in the freight, a drover who is on a freight train for the purpose of seeing to his stock, and who has paid the freight therefor, stands in the relation of a passenger to the company, and not of an employé or servant, and the company is liable to him for injuries resulting from a collision, as though he were a passenger in a passenger train, and it is immaterial whether he has received a drover's ticket or not. *Flinn v. Philadelphia, W. & B. R. Co.* (Del.) 1 Houst. 469, 494.

A person who is riding on a freight train in charge of stock in shipment, with the consent of the railroad company, whether on a regular ticket or on a drover's pass, is

a passenger, and the carrier owes him the same duty as other passengers traveling on passenger trains, which requires it to use the highest reasonable and practicable skill and diligence to protect him from injury. *New York, O. & St. L. R. Co. v. Blumenthal*, 43 N. E. 809, 811, 160 Ill. 40 (affirming 57 Ill. App. 538).

Where a farmer, traveling with stock, rode in a caboose car, for riding in which fares were usually collected, and through the carelessness of a brakeman the caboose went off the track and was turned over, and plaintiff's leg was broken in consequence, held, that the plaintiff was a passenger, and, though not entitled to comfort, he was entitled to the usual safety of a passenger, and should receive compensatory damages. *Indianapolis, B. & W. Ry. Co. v. Beaver*, 41 Ind. 493, 494.

A person traveling with the consent of a railroad company on a freight train in charge of stock or goods carried by the company for him is a passenger. *Chicago & A. R. Co. v. Winters*, 51 N. E. 901, 904, 175 Ill. 293.

A stock drover traveling on a freight train upon a ticket called a "stock pass," for the purpose of taking care of his stock on such train, and for which stock he has paid freight, is a passenger for hire, and not a gratuitous passenger. *Ohio & M. Ry. Co. v. Selby*, 47 Ind. 471, 473, 17 Am. Rep. 719.

A drover transported over a railroad, on a pass, for the purpose of taking care of his stock on the train, is a passenger. *Carroll v. Missouri Pac. Ry. Co.*, 88 Mo. 239, 243, 57 Am. Rep. 332.

A drover riding on a pass, while accompanying cattle, is a passenger, and has the same right of action for injuries suffered by him. *Hanover Junction, H. & G. R. Co. v. Anthony (Pa.)* 3 Walk. 210, 212.

It is well settled that one who is carried by a common carrier, on condition that he is to care for stock carried, does not thereby cease to be a passenger, but is entitled to the same care as other passengers carried on the same train or conveyance. *Memphis & C. Packet Co. v. Buckner*, 57 S. W. 482, 483, 108 Ky. 701.

#### **Same—Riding in place not intended for passengers.**

The mere boarding of a train with intention to ride thereon and to pay the required fare does not necessarily make a person a passenger, but one who, without a ticket, boards a passenger train, prepared to pay his fare, and with a bona fide intention of paying it, is not a passenger if he takes passage on a part of a train not intended for passengers—as, for instance, the front end of the baggage car. This holding is not

grounded upon the fact that the person is without a ticket, since if one who has no ticket enters the coach of a railroad company with the intention and ability to pay his fare, and, being called upon, does pay it, he thereby becomes a passenger, and there is an implied contract on the part of the carrier to carry him safely; but, if passage is taken upon a part of the train not intended for passengers, a holding that a person so situated was in fact a passenger would place upon the carrier the highest obligation to one with whom it did not know it sustained the relation of carrier. *Missouri, K. & T. Ry. Co. v. Williams*, 42 S. W. 855, 91 Tex. 255.

The particular place where a person may be on a passenger train does not necessarily and conclusively determine whether or not such person is a passenger. One who has paid his fare and secured his ticket may disregard some rules prescribed by the carrier, and yet such conduct on his part would not change the fact that he was a passenger. A person who boards a passenger train, having the means and intending in good faith to pay his fare as soon as he has an opportunity to do so, is as much a passenger as though he had paid his fare and procured a ticket before getting on the train. So, though the position on the train of a person who has boarded it without purchasing a ticket may be important in determining whether or not he intended to pay his fare, it does not conclusively fix his status as to being a passenger or trespasser. In consonance with these doctrines, it is held that a person who boarded a passenger train, able to and intending in good faith to pay his fare, was a passenger, though, in his hurry, the train being already in motion, he got on the front platform of an express car, which the conductor could not reach without stopping the train. *Missouri, K. & T. Ry. Co. v. Williams (Tex.)* 40 S. W. 350, 351.

Where a person got on the platform of an express car without having procured a ticket, and remained there in violation of the company's rules, the fact that a brakeman accepted from him the required fare from the point where he got on to his destination did not constitute the person a passenger. *Chicago & E. R. Co. v. Field*, 34 N. E. 406, 407, 7 Ind. App. 172, 52 Am. St. Rep. 444.

#### **Same—Riding on engine.**

The term "passenger," as used in an insurance policy providing for certain payments if the insured is injured while riding as a passenger in a conveyance using steam, etc., as a motive power, is used to designate the character or relation the insured sustains to the proprietor of the conveyance; and a passenger, by going upon an engine, does not thereby lose his character as passenger. *Berliner v. Travelers' Ins. Co.*, 53 Pac. 918,

921, 121 Cal. 458, 41 L. R. A. 467, 66 Am. St. Rep. 49 (citing *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 186, 14 N. E. 197, 5 Am. St. Rep. 510; *McGee v. Missouri Pac. Ry. Co.*, 92 Mo. 208, 216, 4 S. W. 739, 1 Am. St. Rep. 706; and *Nashville & C. R. Co. v. Erwin*, 3 Am. & Eng. R. Cas. 465).

One who rode a part of his journey on an engine, and, while the train was at a station, got off, and, after it had started, got on the front platform of a crowded passenger car, and soon after, and without having entered the car, fell off and was killed, was not a passenger, and had not acquired the rights of such. *Merrill v. Eastern R. Co.*, 1 N. E. 548, 549, 139 Mass. 238.

One may become a passenger of a common carrier without ever being actually on a train of the common carrier. It is not easy to lay down a rule defining what in all cases constitutes one a passenger of the carrier on whose train such person is. But it is essential to constitute one a passenger riding on a train of the carrier operating such train that such person should be rightfully on such train, or should be thereon with the knowledge or consent of the carrier or his agent in charge of the train. One riding on the engine of a freight train, in accordance with an arrangement with the fireman of the engine, to shovel coal in return for the privilege of riding, is not a passenger of the carrier operating the train; the conductor thereof not having knowledge of his presence or consented thereto. *Woolsey v. Chicago, B. & Q. R. Co.*, 58 N. W. 444, 445, 39 Neb. 798, 25 L. R. A. 79.

#### Same—Riding on freight train.

Generally speaking, a passenger is one who travels in a public conveyance by virtue of a contract, express or implied, with the carrier. It is obvious that in this sense a person riding on a freight train in pursuance of the rules of the company, and by its consent, is a passenger. He may be a passenger with restricted rights, as against the company, because of the terms of the contract under which he is being carried, but he is none the less a passenger. *Simmons v. Oregon R. & Nav. Co.*, 69 Pac. 1022, 1023, 41 Or. 151.

Where a railroad company is in the habit of carrying passengers on its freight trains, and shortly before the starting of a freight train, at a particular time, leaves the caboose open on a side track, where passengers have been in the habit of taking it, the company impliedly invites passengers to enter, so that one entering the caboose there becomes a passenger. *Illinois Cent. R. Co. v. Axley*, 47 Ill. App. 307, 308.

Where a person wrongfully gets on a freight train which is not used for carrying passengers, and remains on it without the

consent of the servants of the company in charge of the train, he cannot claim the rights of a passenger; and, if injured while being thus carried, the company is not liable unless the injury was caused by the gross or willful neglect of its servants. *Louisville & N. R. Co. v. Moss*, 13 Ky. Law Rep. 684.

One who, without knowing that such permission has been forbidden, goes on a freight train by permission of the engineer, who is acting as conductor, and pays the usual fare, is entitled to the privileges of a passenger. *Hanson v. Mansfield Ry. & Transp. Co.*, 88 La. Ann. 111, 114, 58 Am. Rep. 162.

A brakeman employed on a freight train in charge of a conductor has no implied authority to bind the company by a contract of passage, and his permission to a person to ride does not make such a person a passenger. *Candiff v. Louisville, N. O. & T. Ry. Co.*, 7 South. 601, 42 La. Ann. 477.

If a railroad company permits one paying fare to ride on a freight train, he becomes a passenger, and is entitled to the same degree of care as though the train were a passenger train. *International & G. N. Ry. Co. v. Irvine*, 64 Tex. 529, 534.

A person having a ticket for passage on a railroad, who boards a freight train which does not carry passengers, believing the ticket good on that train, is to be treated as a passenger, and is not a trespasser. *Bogges v. Chesapeake & O. Ry. Co.*, 16 S. E. 525, 37 W. Va. 297, 23 L. R. A. 777.

#### Person leaving train.

Where a person had a ticket giving him a right to ride as a passenger, and had no opportunity to surrender it or pay his fare, but left the train after it had stopped at a station where passengers were accustomed and had a right to leave the train, and was injured while so doing by a train on another track, he still continued a passenger up to the time of the injury. *McKimble v. Boston & M. R. R.*, 2 N. E. 97, 98, 139 Mass. 542.

While it is undoubtedly true that one who has bought a ticket, or otherwise become entitled to transportation on a train of cars of a railroad corporation, is ordinarily a passenger from the time when he reasonably and properly starts from the ticket office or waiting room of the station to take his seat in the car of the train until he has reached the station to which he is entitled to be carried, and has had an opportunity by safe and convenient means to leave the train or roadway of the corporation at that station, he loses his character as a passenger by getting off the train at his destination before the train stops. *Commonwealth v. Boston & M. R. R.*, 129 Mass. 500, 501, 87 Am. Rep. 382.

A person ceases to be a passenger when he has alighted from a train, gone on the sidewalk of the highway, and thence started to cross the track, on his way from the station. *Allerton v. Boston & M. R. R.*, 15 N. E. 621, 623, 146 Mass. 241.

A passenger on a street car, who steps from the car into a public street, ceases to be a passenger the moment he leaves the car. *Creamer v. West End St. Ry. Co.*, 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456.

An approach to a railway depot on premises belonging to the company constitutes a part of such premises, and the relation of carrier and passenger continues until the passenger has passed beyond such approach. *Gulf, C. & S. F. Ry. Co. v. Glenk*, 30 S. W. 278, 279, 9 Tex. Civ. App. 599.

While one is passing from one train to another, as required by the conditions of his ticket, he remains a passenger, and is entitled to all rights as such. *Baltimore & O. R. Co. v. State*, 60 Md. 449, 462.

Plaintiff, a married woman, while traveling alone with her baby, was transferred to a station of defendant's railway, over which she had a valid ticket, purchased from a connecting line, and which included her transfer from one road to the other. The station was kept open at all times, both day and night, for the use of passengers; and plaintiff remained there to await her train, which would not arrive for 10 hours, with the assent of defendant's agent. While alone in the waiting room at night, she was assaulted by defendant's night agent. Held, that she was a passenger, and that defendant was liable for the act of its employé. *St. Louis S. W. Ry. Co. of Texas v. Griffith*, 35 S. W. 741, 743, 12 Tex. Civ. App. 631.

#### PASSENGER CAR.

A coach specially equipped and used as a pay car, and not as a vehicle for the transportation of passengers, is not, in contemplation of a policy of accident insurance granting double indemnity to the insured if injured while riding as a passenger on a passenger car using steam as a motive power, a passenger car; and this is so although it had been formerly used as a passenger car, and was capable of being so used again. *Travelers' Ins. Co. v. Austin*, 42 S. E. 522, 524, 116 Ga. 264, 59 L. R. A. 107, 94 Am. St. Rep. 125.

#### PASSENGER STATION OR DEPOT.

"Passenger station" means nothing less than a place at which passenger tickets are ordinarily sold, as used in Gen. Laws, c. 163, § 22, providing that no railroad corporation shall eject any person from its cars for non-

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payment of fare, excepting at some passenger station. *Baldwin v. Grand Trunk Ry. Co.*, 15 Atl. 411, 412, 64 N. H. 596.

A store on a railroad's right of way, where railroad tickets were sold, and which was resorted to by passengers while waiting for the cars, and over which the company had no control, was not a passenger depot, within the meaning of the separate coach act (Sand. & H. Dig. § 6219), requiring the maintenance of separate waiting rooms in passenger depots. The expression "passenger depot," as employed in the act, means a depot building used for the reception of passengers. *St. Louis, I. M. & S. Ry. Co. v. State*, 61 Ark. 9, 11, 31 S. W. 570, 571.

#### PASSENGER TRAIN.

See "Regular Passenger Train."

A passenger train consists of passenger, baggage, express, and mail cars; and hence, as used in Laws 1891, p. 103, fixing the rate of fare on railroads according to the gross earnings of passenger trains, the earnings of the baggage, express, and mail cars must be included. *Commissioner of Railroads v. Wabash R. Co.*, 82 N. W. 526, 527, 123 Mich. 669.

Mixed trains, made up in part of a passenger equipment and in part of freight cars, used for the transportation of passengers, are passenger trains, within the meaning of the terms of a contract giving a railroad company depot facilities for passenger trains. *Chicago G. W. Ry. Co. v. St. Paul Union Depot Co.*, 71 N. W. 23, 68 Minn. 220.

#### PASSION.

See "Sudden Heat and Passion"; "Sudden Passion."

"Passion," as used in a charge defining manslaughter as voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, means any of the emotions of the mind known as "anger," "rage," "sudden resentment," or "terror," rendering the mind incapable of cool reflection. *Stell v. State* (Tex.) 58 S. W. 75, 76.

"Passion" presupposes absence of malice. "Malice" excludes passion. *State v. Johnson*, 23 N. C. 354, 362, 35 Am. Dec. 742.

#### PASSIVE TRUST.

"Passive trusts," as used in the statute of uses and trusts (Rev. St. c. 84), abolishing passive trusts, mean those which are express, or created by the words of some deed or other instrument in writing, and not those trusts arising or resulting by implication of



law, which in most instances still continue to exist, and which may, in the broadest sense, be denominated passive. Every express passive trust is abolished, and the deed or instrument by which it is created, or attempted to be, takes effect as a conveyance directly to the cestui que trust, in whom the legal title vests, and the trustee acquires no estate or interest whatsoever. A conveyance of land from A. to B. to the use or in trust for C., the trustee having no active duties to perform, constitutes a passive trust, and the trustee takes no title, but the same vests immediately and absolutely in the cestui que trust to the extent of the estate granted. *Goodrich v. City of Milwaukee*, 24 Wis. 422, 429.

Where a special duty is to be performed by the trustee in respect to the estate, such as to collect the rents and profits, to sell the estate, etc., the trust is called "active." All other trusts are denominated "passive trusts," because there is no duty imposed on the trustee. He simply acts as the reservoir of the legal estate, because from the terms and character of the conveyance and limitation the statute cannot transfer the legal estate to the cestui que use or trust. *Perkins v. Brinkley* (N. C.) 45 S. E. 541, 542.

The prime requisite of a passive trust is that the trustee is made, in form, a mere holder of the legal title; the right to the possession and profits being in another. If there are no active duties for the testator to perform with respect to administering the property, and the primary use be expressly or impliedly by reason of such active duty vested in the trustee, the trust is necessarily active, and not affected by the statute which would otherwise execute the use, and thus vest the legal title in the equitable owner. *Holmes v. Walter*, 95 N. W. 380, 382, 118 Wis. 409, 62 L. R. A. 986.

## PAST CONSIDERATION.

A past consideration is an act done before a contract is made, and, though beneficial to the defendant, is not such a consideration as will support a contract, unless done on request. *Chaffee v. Thomas* (N. Y.) 7 Cow. 358, 360.

## PAST DUE.

"Past-due interest" means interest which is collectible on demand. *Coquard v. Bank of Kansas City*, 12 Mo. App. 261, 265.

## PASTEBOARD.

Pasteboard is paper of coarse and inferior quality. It is included within the term "paper," in a contract for the furnishing of

apparatus with which to make paper. *Paterson v. Garret*, 30 Ky. (7 J. J. Marsh.) 112-115.

## PASTILLE.

Webster defines "pastille" as an aromatic or medicated drop or lozenge of sugar confectionery, so that an indictment charging the advertisement of a pastille which will prevent pregnancy, without setting out its ingredients, so as to show whether they are of a quality calculated to corrupt the morals of youth, is insufficient. *Abendroth v. State*, 30 S. W. 787, 788, 24 Tex. Cr. R. 325.

## PASTIME.

Money staked on the event of an election is not money bet on a game, sport, or pastime. *Hickna v. Littlepage* (Ky.) 2 Dana, 344; *Graves v. Ford*, 42 Ky. (3 B. Mon.) 113, 114.

## PASTOR.

A pastor is one who has been installed, according to the usages of some Christian denomination, in charge of a specific church or body of churches, and a person who has been called as pastor of a congregation does not accept such call by merely acting as minister. *First Presbyterian Church v. Myers*, 50 Pac. 70, 75, 5 Okl. 809, 38 L. R. A. 687.

## PASTURE.

See "Common of Pasture."

The term "pasture" includes not only the grass, but also the ground or sod from which it grows. *Gulf, C. & S. F. Ry. Co. v. Jones*, 21 S. W. 145, 146, 1 Tex. Civ. App. 372.

## PASTURAGE.

Pasturage is the right of grazing one's cattle on the estate of another. Civ. Code La. 1900, art. 726.

## PATENT.

Under sections 1 and 2 of the act of Congress of March 3, 1885, c. 355, 23 Stat. 443 [U. S. Comp. St. 1901, pp. 571, 572], limiting appeals to the United States Supreme Court from the Supreme Courts of territories to actions when the value of the matter in dispute exceeds \$5,000, or the case involves the validity of a patent, the word "patent" refers to a patent of an invention, and not to a patent of land. *Street v. Ferry*, 7 Sup. Ct. 231, 119 U. S. 385, 30 L. Ed. 439.

**PATENT (Of Invention).**

See "Combination Patent"; "Foreign Patent"; "Letters Patent"; "Reissued Patent."

The word "patent" means the exclusive privilege granted by the sovereign authority to an inventor with respect to his invention. *Atlas Glass Co. v. Simonds Mfg. Co.* (U. S.) 102 Fed. 643, 647, 42 C. C. A. 554.

A patent is a grant to the patentee, his heirs or assigns, for a stated period, of the exclusive right to make, use, and vend the invention or discovery throughout the territory of the United States. *Ft. Wayne, C. & L. R. Co. v. Haberkorn*, 44 N. E. 322, 15 Ind. App. 479. A patent is a grant to the patentee, his heirs and assigns, for a stated period, of the exclusive right to make, use, and vend the invention or discovery throughout the territory of the United States. *Eclipse Wind Engine Co. v. Zimmerman Mfg. Co.*, 44 N. E. 1115, 1116, 16 Ind. App. 496.

A patent implies a grant from the sovereign power, securing to the vendor for a limited time the exclusive right to make, use, and vend the invention. It conveys to the inventor substantive rights, and secures to him a valuable monopoly, which he can enforce for his own advantage, either by using it himself, or by conveying the privilege to others. He receives something tangible; something which has a present, existing value, which protects him from competition, and is the source of gain and profit. An instrument which falls short of this, which gives one limited and temporary protection, which is but a condition precedent to the definitive grant, and which conveys no monopoly or the right to proceed against infringers, is not a patent contemplated by the statute. *Société Anonyme pour la Transmission de la Force par l'Electricité v. General Electric Co.* (U. S.) 97 Fed. 604, 605.

A patent protects the first producer or inventor of an article against the manufacture, production, and sale of any such article without his consent. *Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutilier*, 15 N. Y. St. Rep. 117, 118.

A patent is prima facie evidence that the patentee was the first and original inventor of the improvements described in the specifications, and a reissued patent granted under authority of the act of 1836 is prima facie evidence that the machine described in the specifications thereof is substantially the same as the machine intended to be patented by the original drawing. *Sloat v. Spring* (U. S.) 22 Fed. Cas. 330, 334.

A patent is not a regulation of commerce, nor a license to sell the patented article, but a grant that no one else should

manufacture or sell the patented article, and therefore a grant simply of an exclusive right in the discovery, which the national authority could protect against all interference. *Minnesota v. Barber*, 10 Sup. Ct. 862, 868, 136 U. S. 813, 34 L. Ed. 455.

A patent to an original inventor of a machine which first performs a useful function protects him against all mechanisms that perform the same function by equivalent mechanical devices, but a patent to one who has simply made a slight improvement on a device that performed the same function before as after the improvement is protected only against those who use the very improvement that he describes and claims, or mere colorable evasions of it. *McBride v. Kingman* (U. S.) 97 Fed. 217, 219, 38 C. C. A. 123.

A patent must be for a method, detached from all physical existence whatever. *Whitney v. Carter* (U. S.) 29 Fed. Cas. 1070, 1071.

A patent must combine utility, novelty, and invention. It may in fact embrace utility and novelty in a high degree, but still be only the result of mechanical skill, as distinguished from invention. A person, to be entitled to a patent, must have invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereon. The fact that a device has gone into general use and displaced other devices, while in some cases evidence of invention, is not conclusive of patentability, and is not sufficient to support a patent where the changes made from the prior art are mere changes of mechanical construction, or form, size, or materials. *Klein v. City of Seattle* (U. S.) 77 Fed. 200, 204, 23 C. C. A. 114.

The word "patents" found in Bankr. Act July 1, 1898, c. 544, § 70a, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], providing that a trustee in bankruptcy shall, by operation of law, be vested with the bankrupt's title to interests in patents and patent rights, includes cases wherein the title in the letters patent, in whole or in part, is vested in the bankrupt, either by the issuance of letters in his name, or by proper assignment in writing from the patentee. In *re McDonnell* (U. S.) 101 Fed. 239, 240.

**As a contract.**

A patent is a contract by which the government secures to the patentee the exclusive right to vend and use his invention for a few years in consideration of the fact that he has perfected and described it, and has granted its use to the public forever after. *National Hollow Brake Beam Co., v. Interchangeable Brake Beam Co.*, 106 Fed. 693, 701, 45 C. C. A. 544.

**As a monopoly.**

See, also, "Monopoly."

A patent is a mere monopoly or exclusive right to an invention not existing at the common law, but by special grant from the government. *Deane v. Hodge*, 27 N. W. 917, 919, 35 Minn. 146, 59 Am. Rep. 321.

A patent is a monopoly, as generally denominated, the consideration for which is the disclosure by the patentee of something not then within the domain of public knowledge, or the ability or mechanical skill of persons in the art having personal knowledge of anything which was then old, to produce as the result of such mechanical skill, when called upon to do so by the necessity of the trade. *Farmers' Mfg. Co. v. Spruks Mfg. Co.* (U. S.) 119 Fed. 594, 596, (citing *Dunbar v. Meyers*, 94 U. S. 187, 24 L. Ed. 34; *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901; *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856).

A patent secures to the patentee the right to debar others from making the thing patented, but it does not confer upon him the right to make it. That he could do, though not exclusively, without a patent. Consequently his right of property in the patented article, when made, is not founded on government grant, and may as legitimately be subjected to state legislation as any other tangible property. But the monopoly which it does grant is a property right created under the Constitution and laws of the United States, and is assignable; and a state law providing that notes shall not be given for an assignment of the patent itself is as plainly obstructive of the exercise of a right founded by federal law as would be the inhibition of payment in the current funds on the sale of a patent for cash. *Pegram v. American Alkali Co.* (U. S.) 122 Fed. 1000, 1005.

**As property.**

See "Property."

**Reissued patent.**

Under Rev. St. § 4916 [U. S. Comp. St. 1901, p. 3393], authorizing the reissue of any patent, a reissue of a reissued patent is included. *Selden v. Stockwell Self-Lighting Gas Burner Co.* (U. S.) 9 Fed. 390, 397.

**PATENT (Of Land).**

The word "patent," as used in 24 Stat. 388-390, relating to the allotment of lands to Indians, and providing for the conveyance of land by patent to an Indian after a certain time in discharge of any trust, means nothing more than an instrument or memo-

randum in writing, designed to show that for a period of 25 years the United States would hold the land allotted in trust for the sole use and benefit of the allottee, or his heirs, and subsequently, at the end of that time convey the fee discharged of the trust and free of all charges or incumbrances. *United States v. Rickert*, 23 Sup. Ct. 478, 480, 188 U. S. 432, 47 L. Ed. 532.

A patent of the government to land vests in the patentee the perfect legal title, which relates back to the entry of the land. *Rankin v. Miller*, 43 Iowa, 11, 17.

**As a deed.**

A patent to land is the deed of the government. *United States v. Mullan* (U. S.) 10 Fed. 785, 792.

A patent is the instrument by which the government, whether state or national, passes its title. *Hayner v. Stanley* (U. S.) 13 Fed. 217, 223.

A patent is an instrument which, under the law of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, a court of equity will, on proper proceedings, enforce such equities; but in an action in the federal court in which the legal title is involved the patent when regular on its face is conclusive. *Redfield v. Parks*, 10 Sup. Ct. 83, 86, 132 U. S. 239, 33 L. Ed. 327.

A patent is simply a deed of a state to its grantee. Its execution and delivery are an admission that all previous proceedings have been had, and all necessary formalities have been complied with. *Bushey v. South Mountain Mining & Iron Co.*, 136 Pa. 541, 552, 20 Atl. 549, 550.

A patent from the commonwealth is simply a deed of land by her to a purchaser. The term, though seldom used except in grants from the state to individual purchasers under the land laws, is just as applicable to any grant of land by the commonwealth under any other laws. *Reilly v. Mountain Coal Co.*, 54 Atl. 29, 35, 204 Pa. 270.

The term "patent" in the act of Congress exempting certain lands held by patentees or their heirs from state taxation for three years from the date of the patents, referred to the instrument executed by the principal officers of the government as evidence of the title transferred to the patentee. *Fisher v. Wisner*, 34 Iowa, 447, 450.

A patent of land issued on a grant, made in 1846, is a deed of the United States. As a deed its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possesses in the land, and it takes effect by relation at the time

when proceedings were instituted by the filing of the petition before the board of land commissioners. *Beard v. Federy*, 70 U. S. (3 Wall.) 478, 491, 18 L. Ed. 88 (cited in *Manning v. San Jacinto Tin Co.* [U. S.] 9 Fed. 726).

A patent is nothing more nor less than a deed from the state, and an innocent purchaser of land covered by a patent stands just as an innocent purchaser of land from one who holds title by a deed. *Nickels v. Commonwealth* (Ky.) 64 S. W. 448, 450.

"Patent" is sometimes used in the United States to mean the title deed by which a government, state or federal, conveys its land; so that under Rev. St. 1889, § 5441, providing that a debtor's homestead shall be subject to execution on all causes of action existing at the time of acquiring such homestead, and for that purpose such time shall be the date of filing for record the deed of such homestead, the term "deed" is held to include a patent under the federal homestead act. *Stinson v. Call*, 63 S. W. 729, 730, 163 Mo. 323.

#### As evidence of title.

A patent is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles until it is set aside or annulled by some judicial tribunal. *United States v. Stone*, 106 U. S. 525, 535, 27 L. Ed. 163; *United States v. Mullan* (U. S.) 10 Fed. 785, 792; *Hayner v. Stanly* (U. S.) 13 Fed. 217, 223.

A patent for land from the government is the highest evidence of title. It is evidence that all prerequisites have been complied with, and cannot be questioned either in a court of law or equity, unless it be on the ground of fraud or mistake. *Carter v. Spencer*, 5 Miss. (4 How.) 42, 56, 34 Am. Dec. 106.

"A patent of the United States issued to a conferee of a Spanish or Mexican grant under the act of Congress of March 3, 1851, treated simply as the deed of the United States, is, in its operation, like the deed of any other grantor, and passes only such interest as the United States possessed; the deed taking effect by relation at the date of the presentation of the petition of the patentee to the board of land commissioners. But such patent is not merely a deed of the United States. It is a record of the government—of its action and judgment with respect to the title of the patentee existing at the date of the cession of California—and as such record is conclusive evidence of title in the patentee at the time the jurisdiction of the subject passed from the Mexican government to the United States." *Leese v. Clark*, 20 Cal. 387, 412.

A patent is the instrument by which the government, whether state or national,

passes its title. It is the government conveyance. But, if the government possess at the time no title, none passes by its execution. It is of itself evidence of title only, because, the government being the original source of title, the presumption of law is that the title remains with the government until some other disposition of it is shown; but, if an earlier patent is produced, a subsequent one ceases to have any operation. *Patterson v. Tatum* (U. S.) 18 Fed. Cas. 1331, 1334.

#### As a judgment.

A patent or certificate of title to land within its jurisdiction, issued by the Land Department is a judgment of that tribunal, and a conveyance of the legal title. *United States v. Winona & St. P. R. Co.* (U. S.) 67 Fed. 948, 956, 15 C. C. A. 96.

#### As a record.

In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence, having the dignity of a record of the existence of that title, or of such equities respecting the claim as to justify its recognition and confirmation. *Langdeau v. Hanes*, 88 U. S. (21 Wall.) 521, 530, 22 L. Ed. 606; *Wright v. Roseberry*, 7 Sup. Ct. 985, 988, 121 U. S. 488, 30 L. Ed. 1039; *Wisconsin Cent. R. Co. v. Price County*, 10 Sup. Ct. 341, 346, 133 U. S. 496, 33 L. Ed. 687; *Miller v. Tobin*, 16 Pac. 161, 164, 16 Or. 540.

"A patent for land has, in the legislation of Congress, a twofold operation. It conveys the title where previously that remained in the United States; but where issued upon the recognition and confirmation of a claim to a previously existing title it is evidence of the record of the existence of that title, or of equities respecting the land requiring recognition by a quitclaim from the government. It always imports that the government conveys, or has previously conveyed, interests in the lands—something which it at the time owns, or its predecessor once owned. And by the proceedings previous to its issue there is created in the claimant an equitable right to the conveyance of the legal title, or his right to such title is so established that he can enforce it against others who, with notice of his claims, may have obtained the patent." *Marsh v. Nichols Shepherd & Co.*, 9 Sup. Ct. 168, 170, 128 U. S. 605, 32 L. Ed. 538.

#### PATENT AMBIGUITY.

##### See "Ambiguitas Patens."

A patent ambiguity is that which appears ambiguous on the face of the deed or instrument. *Harris v. Kelly* (Pa.) 13 Atl.

523, 526; *Lycoming Mut. Ins. Co. v. Saller*, 67 Pa. 108, 112 (citing *Bac. Max. Reg.* 23); *Brown v. Guice*, 46 Miss. 299, 302; *Deery v. Cray*, 77 U. S. (10 Wall.) 263, 269, 19 L. Ed. 887; *Stokeley v. Gordon*, 8 Md. 496, 505; *Chambers v. Ringstaff*, 69 Ala. 140, 143; *Mudd v. Dillon*, 65 S. W. 973, 975, 166 Mo. 110; *Lathrop v. Blake*, 23 N. H. (3 Fost.) 46, 60; *Mesick v. Sunderland*, 6 Cal. 297, 312.

"An ambiguity is patent that is apparent on the face of an instrument, where the mere reading of it shows that something more must be added before the reader can tell which of certain things or persons is meant." *Dorr v. School Dist.*, 40 Ark. 237, 241; *McNair v. Toler*, 5 Minn. 435, 439 (Gil. 356, 358).

A patent ambiguity is one which remains uncertain after all the evidence of surrounding circumstances and collateral facts admissible under the proper rules of evidence is exhausted. *McRoberts v. McArthur*, 62 Minn. 310, 311, 64 N. W. 903; *Kretschmer v. Hard*, 32 Pac. 418, 419, 18 Colo. 223.

"A patent ambiguity is an uncertainty that arises at once on the reading of the contract. We do not have to wait until some other fact is brought to our knowledge before the uncertainty is apparent, but the doubt is suggested at once, and by the phrase itself." *Strong v. Waters*, 50 N. Y. Supp. 257, 258, 27 App. Div. 299.

A patent ambiguity is one that appears on the face of the instrument, and that which occurs when the expression of an instrument is so defective that a court of law which is obliged to put a construction on it, placing itself in the situation of the parties, cannot ascertain what they meant. *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 208, 9 Am. Rep. 690.

When a doubt exists as to the intention of the party or parties to an instrument, it is called a "patent ambiguity." *Breckenridge v. Duncan*, 9 Ky. (2 A. K. Marsh.) 50, 12 Am. Dec. 359.

#### **Latent ambiguity distinguished.**

A patent ambiguity is one which arises solely from the terms of the instrument, while a latent ambiguity is one not appearing on the face of the instrument, but which is developed by extrinsic evidence. *Conlan v. Doull*, 9 Pac. 568, 569, 4 Utah, 287.

A patent ambiguity is an ambiguity appearing on the face of an instrument in question, and differs from a latent ambiguity, which is an ambiguity arising from the fact that the words of the instrument apply equally well to two different things or subject-matters. Thus where there was a conveyance of the water in a certain brook, and it appeared that there were two branches of

it which crossed the grantor's land, there was a latent, and not a patent, ambiguity. *Petrie v. Trustees of Hamilton College*, 53 N. E. 216, 217, 158 N. Y. 458.

The artificial distinction of patent and latent ambiguity is thus enunciated by Lord Bacon (*Rules & Maxims, Regula*, 23): "Ambiguitas patens is that which appears to be ambiguous on the deed or instrument; latens is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." This definition is cited by Mr. Taylor, more, as he says, out of respect to that great man than in the expectation that it will afford much practical information; and Judge Story, over 70 years ago, in *Pelsch v. Dickson* (U. S.) 19 Fed. Cas. 123, declared that he had endeavored in vain to reconcile the conflicting authorities as to latent and patent ambiguity. In *re Hastings* (N. Y.) 6 Dem. Sur. 307, 318.

#### **PATENT DANGER.**

"Patent dangers" are those seen, or by their presence perceptible to the senses. *Williams v. Walton & Whann Co.* (Del.) 32 Atl. 726, 729, 9 Houst. 322.

#### **PATENT DEFECT.**

A "patent defect" is one that may be discovered by the exercise of ordinary diligence. Where it appeared that an animal sold was affected with spavin, and slightly lame from that cause, and that there was a knot on the leg affected which could be plainly seen, but the buyer took the animal without seeing it in motion, the defect was a patent one, and there could be no recovery in an action for deceit. *Lawson v. Baer*, 52 N. C. 461, 462.

#### **PATENT FLOUR.**

Every flouring mill separates its product into two or more grades. Into the first grade it puts its best quality, which is called its "patent flour," and is the best product obtained in that mill from wheat handled by it. What is left of that wheat goes into inferior grades of flour. The skill of the miller is directed to getting the largest percentage, compatible with desired excellence, of patent flour out of a given quantity of wheat. All patent flour in the market is not of the same quality. The quality may be influenced by the percentage of the product the miller sees fit to set apart for that grade.—*Nordyke & Marmon Co. v. Kehlor*, 58 S. W. 287, 289, 155 Mo. 643, 78 Am. St. Rep. 600.

#### **PATENT FUEL.**

The term "patent fuel" was said in a case involving the issue whether the term

"coal" in a marine policy included a substance called "patent fuel" to be capable of being aptly applied to coal broken by a patented machine, and having a peculiar shape, and it was held that parol evidence was admissible to show whether the substance in question was included in the term "coal." *Howard v. Great Western Ins. Co.*, 109 Mass. 384, 388.

#### PATENT HAVING SHORTEST TERM.

Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], providing that every patent granted for an invention which has been patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the "shortest term," means the foreign patent which at the time the United States patent was granted has then the shortest term to run, irrespective of the fact that the foreign patent may afterwards lapse or become forfeited by the nonobservance of a condition subsequent, prescribed by the foreign statute. *Pohl v. Anchor Brewing Co.*, 10 Sup. Ct. 577, 579, 134 U. S. 381, 33 L. Ed. 953.

The provision of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], that patents shall be so limited as to expire with any foreign patent for the same invention "having the shortest term," means the expiration of such term of the foreign monopoly as the patentee is by the grant of the foreign patent given power over and control of. So that the United States patent does not cease when a foreign patent ceases because of nonpayment of patent fees for a part of the term for which the patent might, on payment of all the fees, remain in force. *Diamond Match Co. v. Adirondack Match Co.* (U. S.) 65 Fed. 803, 804.

#### PATENT INSIDE.

Sheets of paper the size of a newspaper, partly printed and partly blank, it being intended that the blank portions should be used by a newspaper in printing local news, etc., on the same. *Palmer v. McCormick* (U. S.) 30 Fed. 82, 84.

#### PATENT LEATHER.

"Patent leather" is a trade term used in the leather trade to designate glazed calfskin. *Keutgen v. Lawrence* (U. S.) 14 Fed. Cas. 434.

#### PATENT MEDICINES.

Patent medicines are medicines prepared for immediate use by the public, put up in packages or bottles labeled with the name and accompanied with wrappers containing

directions for their use and the conditions for which they are specifics. *State v. Donaldson*, 42 N. W. 781, 41 Minn. 74.

#### PATENT RIGHT.

Case or suit touching patent rights, see "Touching Patent Rights."

A "patent right" is the exclusive liberty conferred by letters patent from the sovereign on an inventor or his alienee of making and vending articles according to the invention. *Avery v. Wilson* (U. S.) 20 Fed. 856, 858.

A patent right, in its usual significance, means a privilege granted by the government to the first inventor of a new and useful discovery or mode of manufacture that he shall be entitled during a limited period to the exclusive use and benefit thereof. *Crown Cork & Seal Co. v. State*, 40 Atl. 1074, 1076, 87 Md. 687, 67 Am. St. Rep. 371.

A patent right is the right protected by the patent laws to use the process, combination, or appliance discovered by the patentee for the production of a certain result. It is an incorporeal right conferred by the government by way of encouragement due and as compensation for the improvement of time and labor and money in the discovery of new and useful things to minister to the comfort and aid in the progress of the public. *Commonwealth v. Central District & Printing Telegraph Co.*, 22 Atl. 841, 842, 145 Pa. 121, 27 Am. St. Rep. 677.

In construing the act of May 4, 1869, regulating the execution and transfer of notes given for "patent rights," the courts say: "To construe the phrases 'patent right,' 'patent inventions,' and 'inventions claimed to be patented' as used in the act to mean machines manufactured under letters patent by the patentee or his assigns, would give them an unusual, forced, and unnatural import." The statute does not apply to negotiable paper given for machines built under letters patent, nor to negotiable paper given to procure the agency to sell machines so built in certain specified territory. *State v. Peck*, 25 Ohio St. 26, 29.

The phrase "patent rights," as used in Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 505 [U. S. Comp. St. 1901, p. 3451], providing that a trustee shall be vested by operation of law with the bankrupt's title as of the date of bankruptcy to interests in patents and patent rights, includes rights acquired under a patent to a third party, such as a license or manufacturing right. In re *McDonnell* (U. S.) 101 Fed. 239, 240.

The words "patent right" shall, for the purpose of the act relating to the sale of patent rights, be construed to include any in-

strument, article, or thing whatsoever having as part thereof, or attached thereto, or connected therewith any devise, combination, or mechanism whatever upon which letters patent may have been granted and in force, or printed or represented to have been granted and in force, or either, at the time of the making of the note or other instrument upon which an action is or may be brought. Gen. St. Minn. 1894, § 8054.

#### **As monopoly.**

A patent right is a monopoly of a certain way of doing a thing. *Vose v. Singer*, 86 Mass. (4 Allen) 226, 230, 81 Am. Dec. 696.

A patent right is an exclusive right; it is a monopoly. The owner may prevent the use of the article patented by every other person unless the right is purchased of him. *In re Gilbert El. R. Co.*, 70 N. Y. 361, 370; *Gilbert El. Ry. Co. v. Anderson* (N. Y.) 8 Abb. N. C. 434, 442.

The monopoly granted by the patent laws of the United States government is one entire thing, and cannot be divided into parts except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant, and convey, either (1) the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the country. *Waterman v. Mackenzie*, 138 U. S. 252, 261, 11 Sup. Ct. 334, 34 L. Ed. 923, 927.

#### **As property.**

See "Property."

#### **PATENTABILITY.**

Patentability may exist where combination of old elements produced a new and useful result or an old result in a new and useful manner, provided always that the conception and embodiment of the combination must involve the exercise of the inventive faculty, and not merely the skill of a mechanic familiar with the art. Invention must exist in every case. Invalidity and identity, standing alone, are not involved. *Goss Printing-Press Co. v. Scott* (U. S.) 103 Fed. 650, 657.

Mere utility does not establish patentability, and it is not every slight improvement in a mechanism that is the result of the exercise of the inventive faculty. In the progress of the arts such improvements are constantly developing themselves, but are, at any rate, clearly the result of obvious mechanical suggestion. *Shoe v. Gimbels* (U. S.) 96 Fed. 96, 99.

#### **PATENTABLE COMBINATION.**

A combination, to be patentable, must produce a single new and useful result, or an old result in a better or cheaper manner, as the product of the combination. If the combination produces an aggregate of several results, each the complete result of one of the combined elements, it does not constitute a "patentable combination." *S. F. Heath Cycle Co. v. Hay* (U. S.) 67 Fed. 246, 249. A combination, to be patentable, must produce a single new and useful result, or an old result in a better and cheaper manner, as the product of the combination; and where the combination produces an aggregate of two or more results, each the result of one of the combined elements, it does not constitute a patentable combination. *Wellman v. Midland Steel Co.* (U. S.) 106 Fed. 221, 224.

In a "patentable combination," the old elements must so co-operate with each other as to produce a new and useful result. A mere duplication of old elements may be useful, but it does not produce a result differing from what would be produced by the elements separated, except in quantity or degree. While this may be a useful result, it is not a new or patentable result. *Maier v. Bloom* (U. S.) 95 Fed. 159, 168.

#### **PATENTABLE INVENTION.**

The combination of old elements, whereby all the constituents so enter into it as that each qualifies every other, and thus form either a new machine of a distinct character and function or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions, constitutes "patentable invention." On the other hand, the assemblage of old devices, without securing some new and useful result as the joint production of the combination—something more than a mere aggregation of old results—is not such invention, but is a mere matter of mechanical judgment, the natural outgrowth or development of mechanical skill as distinguished from invention. *J. L. Mott Iron Works v. Hoffmann & Billings Mfg. Co.* (U. S.) 110 Fed. 772, 775.

#### **PATENTABLE NOVELTY.**

There is no patentable novelty or invention in producing a college badge by placing different shades of color in divided stripes upon a guidon floating from a staff. *Caldwell v. Powell* (U. S.) 71 Fed. 970.

Novelty is not negated by prior structures in another art which were not designed or used prior to the new invention to do its work. *Binns v. Zucker & Levett Chemical Co.* (U. S.) 70 Fed. 711, 713.

The application of a well-known method to a new use in an art analogous to that to which it had been applied does not involve patentable novelty. *Falk Mfg. Co. v. Missouri R. Co.* (U. S.) 91 Fed. 155, 156.

#### PATENTABLE PROCESS.

By "patentable process" is meant the application or operation of some element or power of nature or of one subject to another; as, for example, the art of tanning, dyeing, smelting ores, or the like. In such cases invention consists in the application of old and well-known principles to new and useful purposes. There can be no patent upon an abstract philosophical principle. The laws of nature and properties of matter are presumed to be known to and subject to be utilized by all alike. But the application of any one or more of these laws or principles to a practical object, and so as to secure a useful result not previously attained, is patentable process. *Boyd v. Cherry* (U. S.) 50 Fed. 279, 282.

A driven well is held to be a "patentable process," although it does not consist of any new instrument, machine, or mechanical device. The difference between the new process and the old is that the pressure of the atmosphere, which, in the ordinary well, projects at the sides and bottom of the well pit to maintain an equal atmospheric pressure upon the water, whereby the flow of water into the well is made dependent upon the force of gravity, in the new process is removed from within the well pit, and ceases to operate against the inward flow of water, so that the pressure of the atmosphere operates with its full force to force the water from the earth into a well pit, and without any opposition caused by meeting in its flow the pressure of the atmosphere at the sides or bottom of the pit. *Andrews v. Carmen* (U. S.) 1 Fed. Cas. 868, 870, 871.

#### PATENTABLE SUBJECTS.

"Patentable subjects," as defined by the patent law, are "any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter." Act 1836, § 6. *Providence Rubber Co. v. Goodyear*, 76 U. S. (9 Wall.) 788, 796, 19 L. Ed. 566.

#### PATENTED.

See "Thing Patented."

In determining whether an invention has been previously patented in a foreign country, so as to cause the American patent to expire with the foreign one, under Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], the date of the actual sealing and the issuance of the foreign patent is to be taken as the

date when the article is patented; in other words, the term "patented," as used in the statute, does not mean the preliminary proceedings, but the actual issuance of the patent under the seal of the government. *Edison Electric Light Co. v. Waring Electric Co.* (U. S.) 59 Fed. 353, 364.

The word "patented," as used in Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382], providing that "no person shall be debarred from receiving a patent for the invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented in a foreign country," may well be construed as applying to foreigners obtaining patents in their own country, and the phrase "caused to be patented," in such section, as applicable to such persons, not citizens of the same country, including Americans, as should cause their inventions to be introduced or patented there. It does not include either foreigners or citizens who first obtained their patents in this country. *Bate Refrigerating Co. v. Sulzberger*, 15 Sup. Ct. 508, 513, 157 U. S. 1, 39 L. Ed. 601.

#### PATH.

See "Bicycle Path"; "Private Path."

"Path" is constantly used in our old acts as synonymous with 'road,' and until within a few years it was the custom for large portions of the population of this state to use the term 'path' to the exclusion of 'road.'" *Singleton v. Commissioner of Roads* (S. C.) 2 Nott & McC. 526, 527.

#### PATHOLOGY.

"Pathology," as used generally, means that part of medicine which explains the nature of diseases and their causes and symptoms. *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 400, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748.

#### PATHOLOGICAL CONDITION.

"A pathological condition means neither more nor less than a diseased condition of the body." *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 400, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748. And therefore, where a policy of insurance against bodily injuries expressly excepted any disease or bodily infirmity, there could be no recovery where a pathological condition existed. *Dozler v. Fidelity & Casualty Co.* of New York (U. S.) 46 Fed. 446, 449, 13 L. R. A. 114.

#### PATIENT.

The word "patient," in Code Civ. Proc. §§ 834, 836, providing that a physician shall



not be allowed to disclose any information acquired in attending a patient, unless the provisions thereof are expressly waived by the patient, includes persons under disabilities, such as infancy, lunacy, etc., as such persons are patients, within the ordinary meaning of the term. *Corey v. Bolton*, 63 N. Y. Supp. 915, 916, 31 Misc. Rep. 138.

In the chapter relating to insane persons other than paupers and indigents, the word "patient" means any person detained and taken care of as an insane person. Gen. St. Conn. 1902, § 2735.

## PATRIMONY.

See "Separation of Patrimony."

## PATROLMAN.

The word "patrolman," in the statement of facts in a mandamus proceeding to compel the reinstatement of a patrolman to the police force, was said to have been used as meaning "policeman," and not "police officer," within the meaning of the statute creating a distinction between policemen and police officers. *State ex rel. Chapman v. Walbridge*, 54 S. W. 447, 448, 153 Mo. 194.

## PATRONAGE.

To state that a loose woman is under the patronage of a man is a technical statement that she is supported by him for the purpose of sexual indulgence." Such a statement is libelous. *More v. Bennett*, 48 N. Y. 472, 475.

## PATRONIZE.

In construing Cr. Code, § 57, providing that "whosoever keeps or maintains a house of ill fame or a place for the practice of prostitution or lewdness, or whoever patronizes the same," etc., shall be guilty of a misdemeanor, the court said: "The primary meaning of the word 'patronize' is to act as a patron toward. To say a person patronized a house of ill fame, and to say that such a person was a patron of a house of ill fame, are synonymous expressions, and the words, 'being a patron of a house of ill fame,' found in the second count of the information, add nothing to the charge made therein that plaintiff in error did patronize a house of ill fame, and are to be regarded as mere words of surplusage." *Raymond v. People*, 9 Ill. App. (9 Bradw.) 344, 345.

## PATTERN.

A pattern is a mere model, which may be used to construct machinery and create

working implements. *Brewer v. Ford*, 12 N. Y. Supp. 619, 624, 59 Hun, 17.

## PAUPER.

See "Foreign Paupers"; "State Pauper"; "Town Pauper."

A pauper, as defined by Webster, is a poor person, especially one so indigent as to depend on charity for maintenance, or one supported by some public provision; by Bouvier, as one so poor that he must be supported at public expense. The words "pauper" and "poor" have nearly the same meaning, and they both embrace several classes. In *re Hoffen's Estate*, 36 N. W. 407, 409, 70 Wis. 522; *Town of Saukville v. Town of Grafton*, 31 N. W. 719, 720, 68 Wis. 192; In *re Whiting (Pa.)* 3 Pittsb. R. 129, 133 (citing Bouv. Law Dict. tit. "Pauper").

The term "pauper and indigent," as used in an act to provide additional accommodations for the insane, means that the lunatic has neither money nor estate. *Chosen Freeholders of Camden County v. Ritson*, 54 Atl. 839, 840, 68 N. J. Law, 666.

A prisoner on execution may be a "pauper," and, if so, the selectmen are bound to provide for his relief. *Amherst v. Hollis*, 9 N. H. 107, 110.

### Inmate of poor farm.

A contract made pursuant to a call for "sealed proposals for a superintendent of the manual labor and poorhouse farm for the year 1887. Bids will state (1) how much they will give for the land; (2) how much per head for taking care of the blind and helpless paupers per month; (3) how much per head for taking care of all other paupers per month"—was construed to refer only to such paupers as were supported and maintained on the poorhouse farm, and not to include all poor persons in the county to whom partial relief was granted at their homes. *Kirk v. Brazos County*, 73 Tex. 56, 60, 11 S. W. 143.

### Person legally declared a pauper.

The term "paupers," used in reference to the support of paupers by the overseers of the poor, only applies to persons whom a justice of the peace has by a previous order declared to be paupers. *Sayres v. Inhabitants of Springfield*, 8 N. J. Law (3 Halst.) 166, 169.

### Person needing relief.

The word "pauper," in Rev. St. c. 46, §§ 5, 6, relative to the payment by towns of expenses necessarily incurred for the relief of paupers and poor persons, is not used in its strict technical sense, as confined to persons who have been a public charge, but in-

cludes all poor and indigent persons standing in need of relief. *Hutchings v. Thompson*, 64 Mass. (10 Cush.) 238, 239.

"Pauper," as used in Gen. St. c. 20, § 19, providing that the kindred within a certain degree of any poor person who shall become chargeable to any town shall be bound to support such pauper in proportion to their respective abilities, does not necessarily imply a person who has actually received support from a town, as the word in this chapter is used indiscriminately to designate poor and indigent persons standing in need of relief and poor persons likely to become chargeable, as well as such poor persons as actually have received such support from the town. *Walbridge v. Walbridge*, 46 Vt. 617, 625.

A person who is in want of immediate relief by reason of sickness or insanity, or in immediate need of food, clothes, and shelter upon the principles of common humanity, is a pauper; and the aid and assistance furnished by public authority and according to law to the child or wife of any person liable for such support and in present need of relief, at his request or with his consent, are equivalent to like aid and assistance furnished to the party himself, and for the time during which they are furnished render the person a pauper. *City of Charleston v. Inhabitants of Groveland*, 81 Mass. (15 Gray) 15, 17.

Every person unable to provide for and maintain himself is prima facie a pauper, entitled to relief; and although some other township, or some other person, as in the case of parent and child, or master and slave, provided for by statute, may be subjected to his maintenance, yet the township in which he may be must provide for him, and permanently, or at least until his disability is removed, unless they can find some other township or some person legally chargeable, and this, although such pauper may not have any legal settlement within the state. *Overseers of Poor of South Brunswick v. Overseers of Poor of East Windsor*, 8 N. J. Law (3 Halst.) 64, 67.

A "pauper," within the meaning of Rev. St. c. 46, §§ 113, 116, providing for the relief and support of persons standing in need of aid, is one residing or found in any town where he falls into distress and stands in need of immediate relief. *Shearer v. Inhabitants of Shelburne*, 64 Mass. (10 Cush.) 3, 5.

#### Person receiving public aid.

The word "paupers," in Const. Amend. art. 3, providing that every male citizen of 21 years and upwards, except paupers and persons under guardianship, who shall reside, etc., shall be entitled to vote, etc., means persons receiving aid and assistance from

the public for themselves or their families under the provisions made by law for the support and maintenance of the poor. *Opinion of the Justices*, 124 Mass. 596, 597.

The term "pauper," as so used, does not include persons who are exempted from taxation by the assessors on the ground of their poverty, as authorized by statute, though in a certain loose and indefinite sense the persons in question may be called paupers. *Opinion of Judges*, 28 Mass. (11 Pick.) 538, 543.

#### Person with money or property.

No man is to be considered as a pauper who has credit or property with which he can, under the circumstances in which he is placed, immediately relieve his wants if he will; but, when a man with a house and a little real estate is by sickness or other accident reduced to want, he is not to be compelled to sell his house and clothing, and turn himself and family out of doors, sick and naked, in order to entitle him and his family to relief. It is not the interest of those who may be chargeable with his support that he should be compelled to do this. *Town of Poplin v. Town of Hawke*, 8 N. H. 305, 307.

A party who is the owner of unincumbered real estate of the value of \$400 or \$500 is not a pauper, within a statute defining "pauper" as a poor and indigent person, so as to charge the town in which he is lawfully settled with his support. *Town of Ludlow v. Town of Weathersfield*, 18 Vt. 39, 40.

Gen. St. p. 199, § 1, provides that all persons who have not estate sufficient for their support shall be provided for and supported at the expense of the town where they belong. A man who was partially blind, and nearly incapacitated for work, occupied with his wife a basement of a small house with an acre of ground, having a life interest in the land and basement, which interest was not worth over \$200 and was all the property he owned. It was held that it was not necessary that his interest in the property should be disposed of, and the proceeds expended, before he could be regarded as a pauper, so as to be entitled to help from the town under the statute. *Fish v. Perkins*, 52 Conn. 200, 202.

The fact that an alleged pauper might have obtained \$5 upon a demand in his favor at the time when he received relief from a town was not conclusive evidence that he was not a pauper at the time such relief was furnished, since there might be circumstances rendering it necessary for a person to have immediate supplies, not admitting of even a little delay, and this necessity would constitute the person a pauper, within the meaning of the poor laws, if the means at such person's command were not at hand

at the time of his necessity, and his distress was of such a sudden nature as to prevent him from going after such means. *Inhabitants of Sturbridge v. Inhabitants of Holland*, 28 Mass. (11 Pick.) 459, 461.

The fact that an alleged pauper owned two promissory notes, the dates and value not ascertained, one of them for \$25 and one for \$1.50, and that \$7 was collected and paid over to such pauper after his admission to the poorhouse, was not conclusive evidence that he was not a pauper at the time of his reception into the poorhouse. *Town of New Milford v. Town of Sherman*, 21 Conn. 101, 112.

A man and his wife were each over 70 years old. He had no work, if he had been able to do it. They were very scantily and poorly clothed, and had no provisions and no income. They had two cows, which had ceased giving milk, and therefore furnished no support at the time. It was midwinter, and the weather was cold. It was held that such parties were paupers. It was not necessary that they should have sold their cows, which would aid them to a living the following summer, and eaten the last morsel of food, and reached the point of starvation, before the supervisor of the poor was required to aid them. *Town of Big Grove v. Town of Fox*, 89 Ill. App. 84, 86.

The term "pauper" does not include one who is the proprietor of a promissory note of \$96 against a person able to make payment, though the alleged pauper has no knowledge of the existence of the note during the time support is being furnished him, and therefore the town is not liable for such support. *Stewart v. Inhabitants of Town of Sherman*, 4 Conn. 553, 556.

The Massachusetts courts have said that selectmen in their capacity as overseers of the board are to act in the exercise of sound discretion in determining who is a pauper and what is necessary for his relief, though their heirs are subject to the revision of courts and juries. *Inhabitants of Monson v. Williams*, 72 Mass. (6 Gray) 416, 417. One may be a pauper, though he has some property. The rule as laid down by Richardson, C. J., in *Town of Poplin v. Town of Hawke*, 8 N. H. 305, is that one who is in possession of such credit or property that he might relieve himself without disposing of what must be immediately replaced in order to enable him to live is not a pauper, and one not in possession of such credit or property is entitled to relief under the statute. *Moultonborough v. Tuftonborough*, 43 N. H. 316, 319.

#### **Person unwilling to support himself.**

Whether a man who was able, but unwilling, to provide for himself by labor is a pauper, will be a question only between him-

self and the place of his proper settlement, in an action against him for money paid for his use, if it should turn out that he was not in fact a pauper; but the town where he happens to be has only to inquire whether he is in actual distress, and, if he is, such town is obliged to relieve him. *Inhabitants of Paris v. Inhabitants of Hiram*, 12 Mass. 262, 267.

#### **Sick person.**

As used in Gen. St. §§ 1891-1991, relating to paupers and nonresidents who may fall sick within the state, not having money or property, the term "pauper" included poor persons unable to earn a livelihood in consequence of bodily infirmity, idiocy, lunacy, or other cause, and whose disability was likely to be more or less permanent. *Lander County v. Humboldt County*, 32 Pac. 849, 21 Nev. 415.

A pauper is a poor person, particularly one so indigent as to depend on the parish or town for support. A laboring man, who had always been able to make a living until his last sickness, is not a pauper, though without money or property with which to pay the expenses of that sickness. *Lee Co. v. Lackle*, 30 Ark. 764, 768.

A poor person, smitten with a contagious disease, is not included in that class of paupers which a county is obliged to maintain in its poorhouse. *La Salle County Sup'rs v. Reynolds*, 49 Ill. 186, 190.

In a general sense all poor persons may be said to be paupers, but not as the word is used in Rev. St. § 1953, wherein it has been defined to be poor persons, particularly those so indigent as to depend upon the proper authorities of the county charged with the support of the poor. In a technical sense the word "pauper" does not apply to a poor person smitten with a contagious disease, who on account of his sickness receives aid from the county, though under a pauper act. *Sweetwater County Com'rs v. Carbon County Com'rs*, 44 Pac. 66, 68, 6 Wyo. 254 (citing *La Salle County Com'rs v. Reynolds*, 49 Ill. 186).

#### **Slave entitled to support from master.**

The term "pauper," in the sense of the statute providing that it shall be the duty of the selectmen to provide for all paupers, does not include a negro slave, who is entitled to support from the estate of her master. *Town of East Hartford v. Pitkin*, 8 Conn. 393, 397.

#### **Weak-minded person.**

Within the meaning of a contract whereby a person agreed to care for all paupers belonging to his town and to receive all their labor and services, a person of weak mind, small mental capacity, and regarded as non compos mentis, yet under no guardianship, and capable of making contracts for neces-

saries, and having good bodily health and strength, and capable of performing many kinds of labor on a farm, thus being able to earn enough to support himself, was held not to be a pauper. *Wilson v. Brooks*, 81 Mass. (14 Pick.) 341, 344.

**Wife of one able to support her.**

The term "pauper" does not include the wife of a man who is bound by law to support her, and who is abundantly able so to do, though he has maltreated her and expelled her from his house without just cause, and refuses to provide for her; and therefore the superintendents of the poor cannot maintain an action against the husband for board, clothing, and medical aid furnished the wife as a pauper. *Norton v. Rhodes* (N. Y.) 18 Barb. 100, 101.

**Wife of sick pauper.**

Where a pauper is sick and needs the assistance of his wife, who is otherwise able to maintain herself, both may, by the necessity of such assistance, become paupers and liable to support. *Town of South Hampton v. Town of Hampton Falls*, 11 N. H. 134.

**PAVE—PAVEMENT.**

**See "Asphalt Paving."**

To pave is to lay or cover with stone or brick, so as to make a level or convenient surface for horses, carriages, or foot passengers. *Buell v. Ball*, 20 Iowa, 282, 290, 291; *Warren v. Herly*, 31 Iowa, 31, 36; *City of Harrisburg v. Segelbaum*, 24 Atl. 1070, 1073, 151 Pa. 172; *Morse v. City of Westport*, 19 S. W. 831, 833, 110 Mo. 502; *In re Phillips*, 60 N. Y. 16, 22.

A pavement is not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone, but it may be as well formed of pebbles or gravel, or other hard substances, which will make a compact, even, hard way or floor. *City of Little Rock v. Fitzgerald*, 28 S. W. 32, 33, 59 Ark. 494, 28 L. R. A. 496 (citing *Burnham v. City of Chicago*, 24 Ill. [14 Peck] 496). In criticism of this definition it may be said that "paving" is the generic term, under which "gravelling" is the specific, and that, while the generic includes the specific, as the greater the less, the reverse does not follow. *McNair v. Ostrander*, 23 Pac. 414, 415, 1 Wash. St. 110.

No particular material is necessary to constitute a pavement. It may be made of anything which will produce a hard, firm, smooth surface for travel. *City of Philadelphia v. Eddleman*, 32 Atl. 639, 169 Pa. 452, 36 Wkly. Notes Cas. 438.

Paving is defined to be the laying of streets with pavement. *Ten Eyck v. Di-*

*rectors of Protestant Episcopal Church*, 20 N. Y. Supp. 157, 159, 65 Hun. 194.

As the word "building" is a synonym of "paving," a town has power to pave with asphalt under a power to macadamize, build, gutter, and curb streets. *Morse v. City of Westport*, 19 S. W. 831, 833, 110 Mo. 502.

The power to pave city streets, conferred upon the common council by charter, includes curbs, sidewalks, gutters, trimmings, and grading. *Jacquemin v. Finnegan*, 80 N. Y. Supp. 207, 209, 39 Misc. Rep. 623.

Where a lease requires the lessee to pay for paving, it refers to the time when it is paved the first time, and not to any subsequent paving. *Ten Eyck v. Rector*, 65 Hun. 194, 197, 20 N. Y. Supp. 157.

**Excavating and removing obstacles.**

In a charter authorizing a city to require the owner of lots to pave and repair one-half the width of the streets contiguous to the respective lots, the word "pave" is used as a comprehensive, ultimate term, and includes all things necessary to make a level and convenient surface for horses, carriages, and foot passengers, of any convenient common or practical material, and includes all necessary excavation or filling to prepare the surface and the removal of obstacles, as well as laying the paving stones or other surface material. *Buell v. Ball*, 20 Iowa, 282, 290, 291.

**Flagging.**

A sidewalk is paved, when it is laid or flagged with flat stones, as well as when paved with brick, as is frequently done. If the laying of a sidewalk or footway with brick would be a paving, or, if done a second time, a repaving, and it would certainly, come within the ordinary signification of that term, then a relaying of the same surface with flat stones would be well designated under the general term as a pavement. The difference in the material could not change the character or general identity of the work, as embraced in the generic term, which includes a process for covering a street or walk or public place with stone or brick or concrete, so as to give a level surface convenient for use in the manner and for the purpose for which it is intended. *In re Phillips*, 60 N. Y. 16, 22.

In a general sense paving includes flagging, whether on a street or sidewalk. *In re Burmeister*, 76 N. Y. 174, 181; *Id.* (N. Y.) 56 How. Prac. 416, 425. "Paving" is a more comprehensive word than "flagging"; the word including flagging, as well as other modes of making a smooth surface for streets and sidewalks. *City of Schenectady v. Trustees of Union College*, 21 N. Y. Supp. 147, 151, 66 Hun. 179.

"Pavement" is a more comprehensive word than "flagging." It includes flagging, as well as other modes of making a smooth surface for streets, including sidewalks. In *re Burmeister*, 76 N. Y. 174, 181.

#### Construction of gutters or curbing.

The term "pave" will apply to and describe the construction of gutters. The fact that the stone was deposited in a manner different from that on the rest of the street does not deprive it of the character of a pavement. *Warren v. Henly*, 31 Iowa, 31, 36.

The term "pave" includes curbing, which is a necessary part of paving a street, to support and separate the footway from the cartway. *Wistar v. City of Philadelphia*, 80 Pa. (30 P. F. Smith) 505, 511, 21 Am. Rep. 112.

#### Macadamizing.

The term "paving," within the meaning of the statute giving a city the power of paving its streets, includes macadamizing the gutters and streets. *Huidekoper v. City of Meadville*, 83 Pa. 156, 158.

Within the meaning of the charter authorizing special assessments to be made for paving streets, the term "pavement" is not limited to uniformly arranged masses of solid material, as blocks of wood, brick, or stone; but it may be as well formed of pebbles or gravel or other hard substance, which will make a compact, even, hard way or floor. So is the work defined by lexicographers, and so is it understood by well-informed persons in ordinary intercourse. Macadamizing is one mode of paving, deriving its name from the man who invented that particular mode. *Burnham v. City of Chicago*, 24 Ill. (14 Peck) 496, 499, 500.

Any substance which is spread upon the street, so as to form a compact, hard, or level surface or floor, may be properly designated as a pavement. The term may be aptly used to describe either a stone or a macadam pavement. *Lillenthal v. City of Yonkers*, 39 N. Y. Supp. 1037, 1038, 6 App. Div. 138.

"Paving," as used in Act 1857, enacting that certain city councils might by ordinances establish such regulations in regard to a certain railway as might be required for the paving along certain streets, does not include macadamizing. A macadam road is not paved, in the meaning of the term "paved," as used in the statutes. Such a road is artificial; improved it may be, but not paved, in the technical or natural sense of the word. *Leake v. City of Philadelphia*, 10 Pa. Co. Ct. R. 263, 265; *Id.*, 24 Atl. 351, 353, 150 Pa. 643.

"Paving," as used in Act April 23, 1889 (P. L. 44), authorizing boroughs to require the paving, curbing, and macadamizing of streets, is more general than the word "mac-

adamizing," though in the legislative mind macadamizing was regarded as a species of paving. As popularly understood, a macadamized street is a paved street, but every paved street is not necessarily a macadamized street. According to Webster, "pave" means "to lay or cover with bricks or stone, so as to make a level or convenient surface for carriage or foot passengers; to floor with brick or other solid material." The same author defines "macadamize" as "to cover, as a roadway or path, with small broken stones, so as to form a smooth laid surface." *City of Harrisburg v. Segelbaum*, 24 Atl. 1070, 1073, 151 Pa. 172.

"Paved," as used in an ordinance, providing that the requirement that a street railroad company should construct tracks and begin running its cars within a specified time after approval of the ordinance should not apply if the streets were not graded and paved, cannot be construed to include a street macadamized with broken stone in a strip in the middle to make a solid road for winter, while the remainder of the bed was what is ordinarily termed a "dirt road." *United Railways & Electric Co. v. Hayes (Md.)* 48 Atl. 364, 365, 92 Md. 490.

There can be no doubt but that macadam is a species of pavement, and may well be called a pavement. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192, 206, 13 S. W. 822, 826, 8 L. R. A. 801.

#### Repaving.

A power to pave implies a power to repair and repave, when the condition of the streets requires it. *Wistar v. City of Philadelphia*, 80 Pa. (30 P. F. Smith) 505, 511, 21 Am. Rep. 112.

#### Laying of sidewalk.

The term "paving" includes the laying of a sidewalk, within the meaning of Laws 1856, c. 338, § 1, authorizing assessments by the city for paving. In *re Burke*, 62 N. Y. 224, 229.

"Pavement" and "sidewalk improvement," as used in an act giving a city power to build and maintain suitable pavement or sidewalk improvement, are convertible terms. *City of Little Rock v. Fitzgerald*, 28 S. W. 32, 33, 59 Ark. 494, 28 L. R. A. 496.

The flagging of a sidewalk of a street is a "pavement," within the meaning of that term as used in Acts 1873, c. 335, relating to assessments for the pavement of streets. In *re Grube* (N. Y.) 20 Hun, 303, 304.

#### PAVING TILES.

Plain glazed tiles of different colors, used for hearths, bathrooms, walls, dados, wain-

scoting, and ornamental purposes, are not "paving tiles," within the meaning of Tariff Act 1883, but are properly enumerated as "earthenware glazed, composed of earthy or mineral substances, not enumerated or provided for in this act," under another section of the act. *Rossman v. Hedden* (U. S.) 37 Fed. 99, 102.

## PAWN.

A pawn is that sort of bailment in which goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor. *Coggs v. Bernard*, 2 Ld. Raym. 809, 913.

A pawn is defined to be a bailment or delivery of goods by a debtor to his creditor, to be kept until the debt is discharged. It is the "pignori acceptum" of the civil law, according to which the possession of the pledge ("pignus") passed to the creditor therein, differing from the "hypotheca," where it did not. *Barrett v. Cole*, 49 N. C. 40, 41.

A pawn arises when a movable thing is given as security. *Livingston v. Story*, 36 U. S. (11 Pet.) 351, 388, 9 L. Ed. 746.

A pawn is a mere collateral security for the payment of a debt. *Johnson v. Smith*, 30 Tenn. (11 Humph.) 396, 398.

Pothier defines a pawn or pledge to be a contract by which a debtor gives to his creditor a thing to be detained as security for his debt, which the creditor is bound to return when the debt is paid. Judge Story says the definitions of pawns and pledges as given by some of the writers are limited in terms to cases where a thing is given as mere security for debt, but a pawn may be given as security for any other engagement. The definition of "domat" is therefore more accurate, because it is more comprehensive, namely, that it is the appropriation of the thing given for the security of an engagement. *Surber's Adm'r v. McClintic*, 10 W. Va. 236, 242.

A thing is called a "pawn" when it is pledged for money lent, and is delivered into the actual possession of the creditor. *Wolff v. Farrell* (S. C.) 3 Brev. 68, 70.

A thing is said to be pawned when a movable thing is given as security, and the antichresis when the security given consists in immovables. Civ. Code La. 1900, art. 3135.

A pledge or pawn is property deposited with another as security for the payment of a debt. Civ. Code Ga. 1895, § 2956.

In Georgia a pledge or pawn is declared to be property deposited with another as security for the payment of a debt. *Jones, Pledges*, § 1. Lord Holt, who was the first

to make a systematic statement of the general law of bailment, defined a pawn to be that sort of bailment "when goods and chattels are delivered to another to be a security to him for money borrowed of him by the bailor." *First Nat. Bank v. Harkness*, 42 W. Va. 156, 164, 24 S. E. 548, 552, 32 L. R. A. 408.

### As requiring delivery.

Under Code, § 2110, delivery is essential to constitute a pawn. At common law, therefore, incorporeal things, though they might be sold or mortgaged, cannot be pawned. *First Nat. Bank of Macon v. Nelson*, 38 Ga. 391, 402, 95 Am. Dec. 400.

A pawn is property deposited with another as security for the payment of a debt. Delivery of property is essential to this bailment; for the warehouse receipts, bill of lading, or other commercial paper symbolical of the property may be delivered in pledge. *Commercial Bank of Jacksonville v. Flowers*, 42 S. E. 474, 475, 118 Ga. 219.

## PAWNBROKER.

### As broker, see "Broker."

Pawnbrokers are brokers who loan money in small sums on the security of personal property. *City of Little Rock v. Barton*, 33 Ark. 436, 444.

A pawnbroker has none of the characteristics of a broker, and is not an agent at all. He contracts in his own name, has no employer, charges no brokerage, and always takes possession of the property. Neither does he deal in money, notes, and bills of exchange, like brokers, and his business is to lend money on the security of personal property pawned or left with him. The verbal coincidence of the last two syllables of the longer word being "broker" is purely fortuitous, for a pawnbroker is not a broker at all. *Schaul v. City of Charlotte*, 24 S. E. 526, 527, 118 N. C. 733.

Under Act June 4, 1879 (1 Starr & O. Ann. St. p. 1369), providing that every person or company engaged in the business of receiving property in pledge or as security for money or other thing advanced to the pawnor or pledgor is a pawnbroker, two important elements are required to constitute a pawnbroker: (1) The person must be engaged in the business of receiving property in pledge for money advanced. An occasional loan will not be sufficient, but the person must so engage in the occupation that it will be known as his regular business or occupation. (2) The person must be engaged in receiving property in pledge or as security for money or other thing advanced to the pawnor or pledgor. *City of Chicago*

v. Hulbert, 8 N. E. 812, 813, 118 Ill. 632, 633, 59 Am. Rep. 400.

A person who had formerly taken in goods upon pledge, but who had ceased to do so, still continuing to sell the unredeemed pledges, is a pawnbroker, and as such subject to the bankrupt laws. *Rawlinson v. Pearson*, 5 Barn. & Ald. 124.

Any person or persons who loan money upon deposits or pledge of personal property or other valuable thing, or any person, persons, or corporations who loan money upon chattel property for security, and require possession of the property so mortgaged, on condition of returning the same upon payment of a stipulated amount of money, is a pawnbroker or chattel loan broker. *Cobbe's Ann. St. Neb. 1903*, § 3910.

Whoever loans money on deposit or pledges personal property, or who purchases personal property or choses in action, on condition of selling the same back again at a stipulated price, is hereby defined and declared to be a pawnbroker. *Bates' Ann. St. Ohio 1904*, § 4387.

Any person who loans money on deposit of personal property, or who deals in the purchase of personal property on condition of selling the same back again at a stipulated price, or who makes a public display at his or their place of business of the sign generally used by pawnbrokers to denote their business, to wit, three gilt or yellow balls, or who publicly exhibits a sign of "Money to loan on personal property or deposit," is a pawnbroker. *Ky. St. 1903*, § 3787.

A pawnbroker is one who pursues the business of lending money upon interest, and receiving upon deposit as security for the payment of such loan and interest any personal property. *Rev. St. Tex. 1895*, art. 3636.

Every person, firm, or company, whose business or occupation it is to take or receive, by way of pledge, pawn, or exchange, any goods, wares, or merchandise, or any kind of personal property whatever, as security for the repayment of money loaned thereon, shall be deemed a pawnbroker within the meaning of the war revenue act of 1898. *U. S. Comp. St. 1901*, p. 2287.

The definition in Ordinance No. 1894 of the city of St. Paul providing (section 1): "Any person or persons, or corporation or firm, who loans money on deposit or pledge of personal property or any valuable thing, or who deals in the purchasing of personal property or other valuable thing on condition of selling the same back again at a stipulated price, whether he does the same for himself or as an agent of some person or firm or corporation, or who by any means, method, or device loans money on personal property when the same is deposited for security or

is deposited for any other purpose, is hereby defined and declared a pawnbroker, for the purpose of this ordinance"—is not necessarily any broader than the general and ordinary meaning of the word "pawnbroker," for every part of the definition contains the essential element of a loan of money on pawn or pledge deposited with the lender. But, even if the definition is broader than the ordinary meaning of the word, the ordinance would not be invalid. The attempted broader definition alone would be invalid. *City of St. Paul v. Lytle*, 69 Minn. 1, 2, 71 N. W. 703, 704.

The business of a pawnbroker consists in the lending of money on interest. The repayment of the loan and the payment of the interest are secured by an adequate pledge of goods on the part of the borrower to the lender. It is an essential requisite to the carrying on of the two businesses of auctioneer and pawnbroker by the same person at the same time that the proprietor should obtain a license for each. *City of Philadelphia v. Hunt (Pa.) 3 Phila. 440*, 441.

A licensed auctioneer in the city of Philadelphia, who advances money on goods and charges commissions on such advances, is liable to the payment of a pawnbroker's license under the city ordinance. *Hunt v. City of Philadelphia*, 35 Pa. (11 Casey) 277, 279.

#### PAWNBROKER'S TICKET.

As contract, see "Contract."

#### PAY.

See, also, "Paid."

A decree of distribution, distributing property to be held in trust by the trustees, that they should manage such property and "pay over and deliver" the same, indicates that, as far as is consistent with the nature of the property, the beneficiaries are entitled to receive it in the same condition in which it was received by the trustees. *Goad v. Montgomery*, 51 Pac. 681, 684, 119 Cal. 552, 63 Am. St. Rep. 145.

As apply.

"Paid," as used in a will giving a life estate to the children, and providing that on the decease of either the share belonging to the one so dying be paid to her children, is used in the sense of "applied," and not in the sense of requiring the estate to be sold in order to pay the children money. *Salisbury v. Slade*, 48 N. Y. Supp. 55, 53, 22 App. Div. 346.

Bequest imported.

The words "to pay," in a will devising a portion of an estate in trust to executors

to pay the income to a grandson during his life and the principal at their discretion, and, in case he should die without issue, then on his death to pay said principal to W. and S., being without special reference to any technical meaning, was equivalent to a direct bequest of the amount of the principal to W. and S., subject to the contingency. *Roosa v. Harrington*, 64 N. E. 1, 2, 171 N. Y. 341.

#### **Borrow distinguished.**

There is a difference between "paying an indebtedness" and "borrowing money." It is not a "borrowing of money" to purchase a lot, agreeing to pay the consideration therefor. *City of Richmond v. McGirr*, 78 Ind. 192, 193.

#### **As creating a charge.**

"Paying," as used by a testator in devising a freehold and copyholds to his son for life and after his decease to his first and other sons, paying £10 a year to M. C. for life, created a charge, and not a trust. *Hodge v. Churchward*, 16 Sim. 71.

#### **As compensation for services.**

As used in a promise by a contractor that he would see that the men at work for a subcontractor should have their pay in the spring, "pay" means not only that which was subsequently earned, but all that would be due them whenever earned. *McDonald v. Fernald*, 38 Atl. 729, 68 N. H. 171.

"Pay," as a military term, means a fixed and direct amount given by law to persons in the military service, in consideration of and as compensation for their personal services. *Sherburne v. United States (U. S.)* 16 Ct. Cl. 491, 496.

#### **Conversion into personalty implied.**

The words "to pay," in a will giving a devise in trust of real estate to certain beneficiaries and directing the trustee to pay a particular sum to a beneficiary on the latter attaining a certain age, is insufficient to warrant the implication of an intention to convert the real into personal estate. A direction to convert is sometimes implied, but only when the design and purpose of the testator is equivocal, and so strong as to leave no substantial doubt. In re *Tatum*, 69 N. Y. Supp. 501, 503, 34 Misc. Rep. 25.

A will gave the residue of the property of the testatrix to her husband and children, to be shared equally between them; her husband to hold the shares of the children in trust until their majority or arrival at a certain age, and then to pay over the whole sum. Held, that the words "pay over" evidenced an intention on the part of the testatrix that her estate should be converted into money, and such money then paid

to the legatees. *Clarke v. Clarke*, 24 S. E. 202, 207, 46 S. C. 230, 57 Am. St. Rep. 675.

The word "paid," as used in a will bequeathing an interest in real and personal property to one person, and directing that after such person's death the principal and interest thereof be paid to another, indicates an intention to have such first person's share converted into money. *Terry v. Smith*, 8 Atl. 886, 888, 42 N. J. Eq. (14 Stew.) 504.

#### **As deposit.**

A statute relating to partition sales, and providing that the highest bidder, on being declared a purchaser, should sign the conditions and pay 10 per cent. of the purchase money in cash, means, not a deposit to secure further fulfillment of his contract, but an actual payment, on account of the purchase money, of a part of the purchase money. *Bailey v. Dalrymple*, 19 Atl. 840, 841, 47 N. J. Eq. (2 Dick.) 81.

#### **Distribution or transfer of property.**

The word "pay," as used in a will directing that the testator's executors shall divide and pay certain amounts raised by a mortgage on certain real estate to certain legatees, is not used to denote the distribution or division of the real estate. *Weeks v. Cornwell*, 10 N. E. 431, 434, 104 N. Y. 325.

The words "pay, assign, and transfer," in their more ordinary sense, apply rather to personal than to real estate; but they are not necessarily confined to personal estate. Real estate may be said to be transferred by any conveyance by which it passes from one owner to another. *Stokes v. Salomons*, 4 Eng. Law & Eq. 133, 137.

"Pay and deliver over," as used in wills in connection with devises and bequests, in directing the executors to pay and deliver over the same, appropriately apply to a disposition of the personal estate and have influence in determining whether or not that is the character of the fund which the testator intended the beneficiary should receive. In re *Thompson's Estate*, 1 N. Y. Supp. 213, 215.

#### **Gift imported.**

The use of the word "pay" might be consistent with an intention to make a gift, but, when used with reference to the discharge of an obligation, will not be held to be used with that intention; so that the handing of a bank book, with the order to draw out money and pay it, "as I wish to have it done," to different parties, will not constitute a gift. *Hart v. Ketchum*, 53 Pac. 931, 932, 121 Cal. 426.

#### **Payable on demand.**

Where a complaint stated that defendant made its order in writing requiring the



treasurer "to pay" to bearer a certain sum, with interest from date, out of any money belonging to the school fund, the same having that day been allowed for salary as a teacher, a fair and clear import of the language was that the orders were payable on demand. *Terry v. City of Milwaukee*, 15 Wis. 490, 491.

#### **As discharge of obligation.**

The word "pay" indicates the discharge of an obligation, rather than an investment of money. *Hopson v. Aetna Axle & Spring Co.*, 50 Conn. 597, 601.

#### **Payment in money.**

The term "pay bills" implies the use of money. *Claffin v. Continental Jersey Works*, 85 Ga. 27, 43, 11 S. E. 721, 723 (citing *Abb. Law Dict.* tit. "Bill").

"Paid," as used in a statute providing that the amount for which any building is insured against fire shall be paid to the insured or his personal representatives, should be construed in its appropriate legal sense of satisfaction in money of a debt due from one to another. The rebuilding of the destroyed building by the insurance company is not a payment, within the meaning of the statute, though it would be a satisfaction of the insurer's liability, and in a sense payment. *Milwaukee Mechanics' Ins. Co. v. Russell*, 62 N. E. 338, 340, 65 Ohio St. 230, 56 L. R. A. 159.

An insurance policy provided that any loss should be paid at the actual cash value of the property destroyed, within 60 days after due notice, etc., but that, in case of any loss or damage, it should be optional with the company to replace the articles lost or damaged with others of the same kind and quality, and to rebuild or repair the building within a reasonable time, etc. It was held that the insurer might settle a loss under the policy, either by paying in cash or by rebuilding, etc.; the court saying: "Standing alone, no doubt, this [the agreement to pay] would mean a payment in money, but it cannot be deemed to create a conflict between the policy and the condition. The provisions are entirely in harmony. *Tolman v. Manufacturers' Ins. Co.*, 55 Mass. (1 Cush.) 73, 76. In that case the policy contained a proviso allowing the defendants, instead of paying in money, to replace the property lost with other of like kind and quality at the option of the defendants. After a loss the insured indorsed on the policy: 'Pay the loss under the within policy to J. T.'—to which the defendants assented in writing. The plaintiff claimed that the defendants had thereby lost their option and must pay in money. The court held otherwise; saying: 'To pay is defined by lexicographers as to discharge a debt; to deliver a creditor the value of a debt, either in

money or in goods, to his acceptance, by which the debt is discharged.' We consider the effect of this indorsement to be as if written out in this manner: 'Pay or discharge the obligation arising from the loss under the policy to J. T.' It was held that the company still retained the right to pay in money or to replace in kind, at their option. In the present case, by its just construction, the contract reserves to the defendants the right to pay the loss in money or to indemnify the party by furnishing him with a building of like character and of equal value with the one destroyed." *Beals v. Home Ins. Co.*, 36 N. Y. 522, 527.

The word "pay," while often in commercial transactions meaning satisfaction in money, has a much wider signification in its ordinary usage, and includes satisfaction, discharge, or compensation. The term is so used in Acts 1898, c. 280, providing that all tickets or scrip issued to laborers for labor done shall be paid to the person holding the same, and therefore a person holding an order payable in merchandise is not entitled to payment in money. *Marriner v. John L. Roper Co.*, 16 S. E. 906, 907, 112 N. C. 164.

The word "pay," as used in a resolution of the congress of the republic of Texas providing for the pay of volunteers, is not to be restricted to pay in money alone. It is not so limited in the resolution itself, and therefore includes land thereafter granted to a soldier who has served for a term of three months. While the grant by the republic may have been but a bounty in a sense, yet it was in substance a recompense or payment for duties performed in the military service of the republic in a more adequate sense and form than the money payment provided by the then law. *Halsted v. Allen* (Tex.) 73 S. W. 1068, 1069.

#### **As receive and apply.**

A direction to trustees to pay the cestui que trust the rents and profits of real estate or the income of personal estate is in legal effect the same as a trust to receive such rents and profits or income and to apply the same to the use of the cestui que trust. *Mason v. Jones* (N. Y.) 2 Barb. 229, 248.

#### **Sale and indebtedness implied.**

In an instrument obligating the maker to pay a certain amount for certain merchandise, the word "pay" implies an indebtedness; and, it being expressed that the payment is to be for a specified merchandise, a sale of such merchandise will be understood. *Lent v. Hodgman* (N. Y.) 15 Barb. 274, 278.

#### **As transfer.**

"Pay," as used in a will directing the executors to pay over the whole sum belong-

ing to each child's share upon her attaining a certain age, should be construed in the sense of "transfer." *Appeal of Clarke*, 39 Atl. 155, 161, 70 Conn. 185.

Though the word "pay" is generally a word of transfer, when used in an order, it cannot be construed in such sense in a written order by a defendant in execution, directing the sheriff to pay to defendant's son whatever surplus remains of the proceeds of an execution sale of defendant's land after paying the executions against him, which order does not express any consideration, and is not shown to have been given for valuable consideration. Such an order is merely an authority to the son to receive the money, and not a transfer or an assignment of it to him. *Robinson's Adm'r v. Tipton's Adm'r*, 31 Ala. 595, 611.

The use of the word "pay," in an order by one having money in possession of the drawee, which recited that the drawer owed the payee a less sum and directing the drawee to pay the sum due the drawer to the payee, though generally a word of transfer, was not used in that sense; for, if it was, it would assign over the whole of the money due, which was certainly not intended. The order in question was held not to be an equitable assignment of any portion of the money in the possession of the drawee. *Clayton v. Fawcett's Adm'r's (Va.)* 2 Leigh, 19, 23.

#### **Vesting of trust estate indicated.**

"Pay," as used in a will devising property to a trustee, and directing the latter to hold the fund until he finds it prudent to pay it to the beneficiary for which it is intended, construed in its ordinary and natural signification as to render what is due, and to show that the provision only affected the possession, and did not prevent the property from vesting in the beneficiary, since, when one pays, he gives up what belongs to another. *Lippincott v. Stottsenburg*, 20 Atl. 360, 363, 47 N. J. Eq. (2 Dick.) 21.

#### **PAYABLE.**

The word "payable" is a descriptive word, meaning "capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable." *First Nat. Bank v. Greenville Nat. Bank*, 19 S. W. 334, 335, 84 Tex. 40 (citing *Webst. Dict.*).

The word "due" is only equivalent to "payable." *Ball v. Northwestern Mut. Acc. Ass'n*, 56 Minn. 414, 419, 57 N. W. 1063, 1064.

*Bankr. Act* 1867, § 19, providing that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy may be provable against his estate,

includes "all debts, no matter how long standing. No debt can be considered due and payable which is barred by limitation, and a debt so barred cannot be proved in bankruptcy." A debt, to be barred by limitations, and hence not provable, must be one which is barred throughout the United States. *In re Ray* (U. S.) 20 Fed. Cas. 322, 324.

*Wag. St.* p. 216, § 15, providing that every promissory note for payment of money to the payee therein named, or order, or bearer, and expressed to be for value received, shall be "due and payable" as therein expressed, cannot be construed as meaning that such notes fall due on the day mentioned on their face; but days of grace are allowable on such paper. *Turk v. Stahl*, 53 Mo. 437, 438.

Where a corporation pledged its stock to a trustee to secure a corporate debt, and then issued certificates, each of which recited the pledge, and declared that the holder was entitled to a certain sum of money, payable in said pledged stock at par at any time after the said stock should come into the possession of the corporation, the word "payable" should be construed to refer to the legal satisfaction of the equitable demand, and to entitle the holder or the equitable holder of the stock to be made the legal owner, whenever the pledged stock should be returned to the company and new certificates issued therefor. *Higgins v. Lansing*, 40 N. E. 362, 372, 154 Ill. 301.

A bond payable in 20 years after date is, by the common acceptance of those terms, a bond which matures at the expiration of 20 years, the payment of which neither the payor nor the payee can enforce until a lapse of that period. *City of Alma v. Guaranty Sav. Bank* (U. S.) 60 Fed. 203, 205, 8 C. C. A. 564.

#### **As importing promise.**

Where a bank issued a paper writing which recited that a certain person had deposited in the bank a certain sum, payable to the order of another, the word "payable" should be construed as an express promise to pay on demand. *Cate v. Patterson*, 25 Mich. 191, 194.

In certificates of deposit there is sometimes an express promise to pay, but the promise is most frequently implied from the word "payable." The acknowledgment by a banker of the deposit of money by another, nothing further showing that it was a special deposit, is sufficient to show the relation of debtor and creditor between the banker and depositor or person for whose benefit the deposit was made; and the word "payable," used in such a connection, must be understood to be used with reference to that relation, and can mean nothing less

than that the maker of the paper intends thereby to be understood to promise to pay the sum acknowledged to have been received. *First Nat. Bank v. Greenville Nat. Bank*, 19 S. W. 834, 835, 84 Tex. 40.

The word "payable," in an instrument issued and signed by the officer of a bank certifying that A. has deposited a certain sum in the bank payable to order upon the return of the certificate, naturally expresses no more than the thing on which it is predicated is the subject of payment. The instrument is merely a certificate of deposit, and is not made a promissory note by the use of such word. *Patterson v. Poindexter* (Pa.) 6 Watts & S. 227, 232, 40 Am. Dec. 554.

#### As to be paid.

The word "payable," as used in a certificate of deposit which recited that the owner had deposited a certain sum with the maker, payable to their order, etc., is equivalent to the expression "to be paid," or "which the maker agrees to pay." *Easton v. Hyde*, 13 Minn. 90, 91 (Gil. 83, 85).

"Payable," as used in commercial transactions, means "to be paid," rather than "which may be paid"; so that a promise in an instrument to pay \$1,000 and interest, "payable" in certain bonds, is an absolute condition for the payment in such bonds, and the payee, on the maker's default, is entitled only to damages to the extent of the value of the bonds. *Johnson v. Dooley*, 44 S. W. 1032, 1033, 65 Ark. 71, 40 L. R. A. 74.

Rev. St. art. 2201, provides that an administrator appealing from an order of removal shall give a bond, with two or more good and sufficient sureties, payable to the county judge. Held, that the word "payable" indicated that a sum should be named in the bond to be paid. *Munzesheimer v. Wickham*, 12 S. W. 751, 752, 74 Tex. 638.

In *Johnson v. Dooley*, 44 S. W. 1032, 65 Ark. 71, 4 L. R. A. 74, it was held, in construing a clause in a note payable in levee bonds of the state of Arkansas at par, that the word "payable," when so used in commercial transactions, means "to be paid," rather than which "may be paid," and that a note payable in the manner indicated does not become payable in money on the failure of the maker to pay or tender the bonds on the day the note is due, since it does not give him the mere privilege or option to pay in bonds, but makes a promise to pay in the specific funds named. *Poppleton v. Jones*, 69 Pac. 919, 922, 42 Or. 24.

#### As paid.

The word "payable" is not equivalent to the word "paid." Its legal meaning is that a specified amount becomes due, and its payment can be enforced. The statement, filed

in the organization of a joint-stock company, designating the capital stock as "payable on the execution thereof," does not imply that the stock was all paid in before recording. It simply designates the beginning of liability. *Hill v. Stetler*, 4 Pa. Com. Pl. 119, 122.

#### As vested.

By a marriage settlement stock was settled, subject to life interests in the husband and wife, in trust for their children, share and share alike, the shares to be paid them at 21 or marriage, and the shares of children dying, leaving issue, before their shares had become payable, were to be in trust for their issue; but, in case any of the children should die before their shares should become payable, without leaving any issue, then their shares were to be in trust for the surviving children. There were six children of the marriage, who all attained 21. Two of them died in the lifetime of their surviving parents. Held, that the word "payable" meant vested, and consequently the representatives of the deceased children were entitled to shares of stock. *Mocatta v. Lindo*, 9 Sim. 56.

Testator bequeathed £10,000 in trust for his son J. for life, remainder in trust for the children of J. when and as they should attain 21, as tenants in common, and if any of them should die before their shares became payable, leaving issue, their shares to be paid to their issue, but if any of them should die before their shares became payable, leaving no issue, their shares to be paid to the survivors at the same time as their original should become payable. J. had four children, all of whom attained 21, but one of them died in his lifetime without issue. Held, that the word "payable" meant "attain 21," and consequently one-fourth of the fund vested in the deceased child. *Jones v. Jones*, 13 Sim. 561, 568.

#### PAYABLE AS CONVENIENT.

See "Convenience—Convenient."

#### PAYABLE IN THIS STATE.

Gen. St. c. 230, §§ 21-23, providing that a trustee may be charged "for any negotiable promissory note or other instrument on which he is liable, made or payable in this state," does not mean that the same must be specifically made payable within the state, but refers to notes made within the state and payable there generally. *Orcutt v. Hough*, 54 N. H. 472, 473.

#### PAYABLE IN TRADE.

"Payable in trade," as used in a written contract for services, the compensation

to be a certain sum payable in trade, is equivalent to saying "payable in such articles as the defendant dealt in, and cannot be limited to one particular article." *Dudley v. Vose*, 114 Mass. 34, 36.

A contract payable in trade generally, and which specifies no time or place for its delivery, imports that the promisee, before bringing suit, shall notify the promisor what kind of trade he will have and when he is ready to receive it. *Woods v. Dial*, 12 Ill. 72, 73.

#### PAYABLE MONTHLY.

An averment that certain sums agreed to be paid were "payable monthly" was inconsistent with the idea that the payments were to be made in advance. *Webster v. Cook*, 38 Cal. 423, 426.

#### PAYEE.

The term "payee," in a nonnegotiable note providing that the failure to pay interest when due, at the election of the payee, should make the principal and interest at once due, was construed to include an assignee of the instrument. *Seastrunk v. Pioneer Savings & Loan Co. (Tex.)* 34 S. W. 466, 467.

#### PAYING.

See "Yielding and Paying."

A bill of lading stating goods to have been shipped on account of the defendant, and that they were to be delivered in London the consignees "paying freight" for the same, did not compel the master of the ship to look to the consignees for the payment of the freight, but he might deliver without insisting on payment, and look to defendant, the owner, for payment. *Domett v. Bedford*, 5 Barn. & Adol. 521.

A lease, with a proviso of re-entry if the rent should be in arrears 21 days, and by which the lessee covenanted to pay the rent, and the landlord covenanted that the lessee, "paying the rent" at the appointed times, should quietly enjoy, etc., did not make the payment of the rent a condition precedent to the performance of the covenant for quiet enjoyment. *Dawson v. Dyer*, 5 Barn. & Adol. 584.

#### As creating estate in fee.

The word "paying," in a will devising certain lands to testator's son, he paying a legacy to his sisters as thereafter specified, is undoubtedly in some instances amply sufficient to carry the fee, where the other parts of the will do not give such an estate in express words or by necessary implication. It will sometimes enlarge an estate which

the testator has in so many words called "an estate for life," when a reasonable doubt exists as to what may be called the general intent of the testator. In this case the words of the first devise carry a fee. If they are clear and express, and not limited by any subsequent expressions, they can derive no additional strength by inference from the circumstances of the charge. If the subsequent words are sufficient to control and narrow down the express devise in fee to an estate in tail, they surely must have the same force in qualifying that which is built wholly upon inference and conjecture. It is only in doubtful cases, and to ascertain an uncertain intention, that this circumstance can be permitted to weigh. *Wortendyk v. Wortendyk*, 7 N. J. Law (2 Halst.) 363, 378.

#### PAYING MONEY INTO COURT.

The phrase "paying money into court" is of more frequent occurrence in the law of tender than elsewhere. When the fact of a tender is relied on to defeat recovery of costs for damages and delay, the money necessary to keep the tender good must be brought into court; and in order to constitute a sufficient payment into court, Code, § 2685, requires that there must be a delivery of the money to the clerk of the court. *Warren v. Matthews*, 11 South. 285, 286, 96 Ala. 183.

#### PAYING QUANTITIES.

The term "paying quantities," as used in an oil lease for a given term and as much longer as oil can be produced in paying quantities, means paying quantity to the lessee. If the well pays a profit, even small, over operating expenses, it produces in paying quantity, though it may never repay its cost, and the operation as a whole may result in a loss. The phrase "paying quantities," therefore, is to be construed with reference to the operator, and by his judgment, when exercised in good faith. *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 44 S. E. 433, 436, 53 W. Va. 501, 97 Am. St. Rep. 1027 (citing *Young v. Forest Oil Co.*, 194 Pa. 243, 45 Atl. 121).

#### PAYMENT.

See "Aggregate Payment"; "Cash Payment"; "Compulsory Payment"; "Direct Payment"; "Final Payment"; "Guaranty of Payment"; "Immediate Payment"; "Involuntary Payment"; "In Payment of"; "Part Payment"; "Place of Payment"; "Presumption of Payment"; "Prompt Payment"; "Ultimate Payment"; "Voluntary Payment."

All payments, see "All."

A payment is defined to be the performance of an obligation for the delivery of

money. *Green v. Hughitt School Tp.*, 59 N. W. 224, 226, 5 S. D. 452.

Payment is defined to be the act of paying; the delivery of money as payment in the course of business. *Haun v. State*, 54 Pac. 130, 132, 7 Kan. App. 509.

Payment is defined to be the act of paying, or that which is paid; discharge of a debt, obligation, or duty; satisfaction of a claim; recompense; the fulfillment of a promise or the performance of an agreement; the discharge in money of a sum due. *Stokes v. Stokes*, 54 N. Y. Supp. 319, 325, 34 App. Div. 423.

"Payment of money," in its general sense, means a delivery of money by one person from whom it is due to another to whom it is due. *Hathaway v. Davis*, 33 Cal. 161, 166.

In legal contemplation payment is the discharge of an obligation by the delivery of money or its equivalent, and is generally made with the assent of both parties to the contract. *Commercial Bank v. Toklas*, 56 Pac. 927, 928, 21 Wash. 36; *Brady v. Wasson*, 53 Tenn. (6 Heisk.) 131, 135.

Payment is a mode of extinguishing a debt. *Bradford v. Richard*, 16 South. 487, 489, 46 La. Ann. 1530.

"Payment" is a mode of extinguishing obligations. It is not only the delivery of a sum of money, but the performance of an obligation. It is an act calling for the exercise of the will or consent, without which it has not the characteristics of that mode of extinguishing obligations. *Bloodworth v. Jacobs*, 2 La. Ann. 24, 26.

The word "payment" has a specified and clear meaning, which is that a claim has been paid. *Ridings v. McMenamin* (Del.) 39 Atl. 463, 464, 1 Pennewill, 15.

The defense of payment, in its most restricted sense, is the discharge in money of a sum due (*Bouv. Law Dict.*); but in its most general acceptation it is the fulfillment of a promise, the performance of an agreement, the accomplishment of every obligation, whether it consist in giving or doing. It is not a technical term, and has been imported into law proceedings from the exchange, and not from law treatises. *Root v. Kelley*, 80 N. Y. Supp. 482, 483, 39 Misc. Rep. 530 (citing *Beals v. Home Ins. Co.*, 36 N. Y. 522, 527). See, also, *Bantz v. Bassett*, 12 W. Va. 772, 780; *Scott v. Gilkey*, 49 Ill. App. 116, 122; *Exchange Bank of Virginia v. Cookman*, 1 W. Va. 69, 77.

Comp. Laws, § 3456, defines payment as the performance of an obligation for the delivery of money. *Green v. Hughitt School Tp.*, 59 N. W. 224, 226, 5 S. D. 452.

Payment of money is delivery by a debtor to his creditor of the amount due. *Bron-*

*son v. Rodes*, 74 U. S. (7 Wall.) 229, 250, 19 L. Ed. 141.

The term "payment," when used voluntarily and with full knowledge of the facts, excludes the idea of an implied promise to refund. *Morton v. Chandler*, 6 Me. (6 Greenl.) 142, 144.

A payment is a transfer of property from one person to another. While the delivery to the owner of his own property does not affect the property—that is, the right—but merely the possession, it cannot, without an abuse of terms, be regarded as a payment. Hence it is held that where lands are leased, reserving a part of the crops in lieu of rent, the contract takes effect by way of reservation, and the crops thus reserved remain the property of the landlord, and their delivery to him cannot be regarded as a payment. *Moulton v. Robinson*, 27 N. H. 550, 554.

"Payment," as well as "discharge," is used in two senses: First, performance of a contract to pay money according to its stipulation; second, extinguishment of a cause of action arising from breach of a contract. "Payment," as generally used in the books, has the latter meaning, and "the defense of payment" is usually of the same import, denoting a new, affirmative, and independent fact set up by the defendant in confession and avoidance, and not in denial of the breach. *Kendall v. Brownson*, 47 N. H. 186, 203.

Performance of an obligation for the delivery of money only is called "payment." Civ. Code Cal. 1903, § 1478; Rev. Codes N. D. 1899, § 3797; Civ. Code S. D. 1903, § 1149; Civ. Code Mont. 1895, § 2005.

By payment is meant, not only the delivery of a sum of money, when such is the obligation of the contract, but the performance of that which the parties respectively undertook, whether it be to give or to do. Civ. Code La. 1900, art. 2131.

#### Acceptance required.

Payment is a mode of extinguishing obligations. It is an act calling for the exercise of a will or consent. To constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for the same purpose. *Jenkins v. Mapes*, 41 N. E. 137, 138, 53 Ohio St. 110 (citing *Kingston Bank v. Gay* (N. Y.) 19 Barb. 459). The payment must be received, as well. *Bardsley v. Sternberg*, 52 Pac. 251, 252, 18 Wash. 612 (citing *Cushing v. Wyman*, 44 Me. 121).

To have the delivery of money by a debtor to a creditor operate as a payment of indebtedness, there must be an acceptance of the money by the creditor. When the debtor

delivers the money as payment, and the creditor accepts it as such, the minds of the parties meet, and a payment is effected. If the payment is made on Sunday, and is accepted, each party violates the statute prohibiting the doing of secular business on the Lord's day. Because of such prohibition a Sunday payment is illegal, and the law will not aid the parties either in enforcing or undoing it, but will leave them where it finds them. *Jameson v. Carpenter*, 36 Atl. 554, 68 N. H. 62.

It is an impeachment on the common sense of the jury and of mankind to suppose that they do not understand that payment in money or anything else by one party always implies an acceptance of the money or goods as payment by the other party. *Oliver v. Phelps*, 20 N. J. Law (Spencer) 180, 195.

#### As conveyance.

See "Conveyance."

#### Delivery required.

"Payment," as used in Code, § 2099, providing that, when a contract for labor or for the payment or delivery of property other than money does not fix a place of payment, the maker may tender it, etc., the word "payment" includes in its meaning both payment and delivery, as otherwise the section is meaningless. *Holtz v. Peterson*, 62 N. W. 19, 20, 98 Iowa, 741.

"Payment," as used in Act Va. Dec. 19, 1792, which provides a punishment for the passing of counterfeit money in payment of obligations, does not include a delivery of the counterfeit money to a person to be passed off generally for the benefit of the party so delivering it. *United States v. Venable* (U. S.) 28 Fed. Cas. 368.

"Payment," in its largest sense, is the actual accomplishment of the thing that the party obliges himself to give or to do, whatever that may be, although in our acceptance it is ordinarily confined to money engagements. It is therefore the natural manner in which obligations are extinguished. When the obligation is to give something, the payment is accomplished when the property in the thing to be given is actually transferred to the creditor; and of course, in order to constitute the transaction a payment, there must be both a delivery by the debtor and an acceptance by the creditor, with a purpose on the part of the former to part from and of the latter to accept of the immediate ownership of the thing passed from the one to the other. In a payment we ordinarily look only to the act of the party making it; but yet its legal import is an act in which the debtor tenders and the creditor accepts that which is offered. *Thompson v. Kellogg*, 23 Mo. 281, 285.

#### Debt implied.

Payment implies the existence of a debt, of a party to whom it is owed, and of a satisfaction of the debt to the party. *Tuttle v. Armstead*, 22 Atl. 677, 678, 53 Conn. 175.

The term "payment" implies a debt from him who pays to him who is to receive, and that when the payment is complete the debt will be discharged. In re Tennessee Bond Cases, 5 Sup. Ct. 974, 985, 114 U. S. 663, 29 L. Ed. 281.

#### Voluntary act implied.

The term "payment" *ex vi termini* implies that the act is voluntary on the part of the debtor, and, if so, he may annex such conditions to the act as he sees fit. *Robinson v. Doolittle*, 12 Vt. 246, 249.

#### Medium of payment.

"Payment" means the full satisfaction paid by money, and not by an exchange or compromise, or an accord and satisfaction, and it is only where the words used in connection with it plainly manifest a different intention that such legal import can be rejected. *Manice v. Hudson River R. Co.*, 10 N. Y. Super. Ct. (3 Duer) 426, 441.

The term "payment," in its legal import means the satisfaction of a debt by money, not by exchange or compromise, or an accord and satisfaction. *City Sav. Bank v. Stevens*, 15 N. Y. Supp. 139, 59 N. Y. Super. Ct. (27 Jones & S.) 549; *Manice v. Hudson River R. Co.*, 10 N. Y. Super. Ct. (3 Duer) 426, 441.

The term "payment" is now applied in a dual sense. In the restricted or common use it signifies a discharge in money of a sum due, and in such sense would not embrace a satisfaction of a debt otherwise than by the transfer of money from the payor to the payee; but in a broader or more general sense it is defined to be the performance of an agreement or the fulfillment of a promise or obligation, whether it consists in giving or doing, and would include the discharge of a contract or obligation in money, or its equivalent, by the assent of the parties. *Clay v. Lakeman*, 74 S. W. 391, 392, 101 Mo. App. 563.

Bouvier defines "payment" as the discharge in money of a sum due, and we understand it to be elementary law that it can be made only in money, or that which the creditor accepts as money or in lieu of it. *Scott v. Gilkey*, 49 Ill. App. 116, 122 (quoting *Bouv. Law Dict.*).

The word "payment" conveys the idea of a money transaction. *Howe v. Mittelberg*, 70 S. W. 396, 397, 96 Mo. App. 490.

Payments are not always made in money. Anything may be accepted as a pay-

ment. It is only necessary that the parties so agree. *Cleveland v. Rothschild* (Mich.) 94 N. W. 184, 186.

Payment of a debt is not necessarily a payment of money, but that is payment which the parties contract shall be accepted as payment. *In re Thompson* (N. Y.) 5 Dem. Sur. 393, 396.

Payment sometimes includes payment in other things than money. *And. Dict. Law*, tit. "Payment"; *Foley v. Mason*, 6 Md. 37. Yet the ordinary meaning of the word in commercial usage is the more restricted one of payment in money. *Para. Merc. Law*, 80. Thus the term "payment" in its legal import means the full satisfaction of a debt by money, not by an exchange or compromise, or an accord and satisfaction, and it is only where the words used in connection with it plainly manifest a different intention that the legal import of the term can be rejected. *Clafin v. Continental Jersey Works*, 85 Ga. 27, 43, 11 S. E. 721, 723 (citing *Manice v. Hudson River R. Co.*, 10 N. Y. Super. Ct. [3 Duer] 426).

"In *Huffmans v. Walker* (Va.) 26 Grat. 314, 316, the court held that payment of a debt is not necessarily a payment of money, but that is payment which the parties contract shall be accepted in payment." *Bantz v. Basnett*, 12 W. Va. 772, 780.

A payment is said to be a mode of extinguishing obligations. Where the contract calls for money, ordinarily it is money which must be paid, unless the creditor agrees to accept something else as its equivalent. *Bullock v. Horn*, 44 Ohio St. 420, 428, 7 N. E. 737.

A payment ordinarily implies the delivery and receipt of money by agreement of the parties to the transaction in extinguishment of an existing debt. *Coughtry v. Levine* (N. Y.) 4 Daly, 335, 337.

Payment may be in any mode which the parties agree shall be treated as the equivalent of a money payment. It may be by means of anything of value which by mutual consent is given and accepted on account of or in satisfaction of the debt. *Blair v. Harris*, 42 N. W. 790, 794, 75 Mich. 167; *Weir v. Hudnut*, 18 N. E. 24, 25, 115 Ind. 525.

Where defendant, in the ordinary course of business, passed to the plaintiff notes of a bank that had previously stopped payment, he was held liable to the plaintiff for the amount of the bill, though neither party knew that the bank had stopped. *Frontier Bank v. Morse*, 22 Me. (9 Shep.) 88, 99, 38 Am. Dec. 284; *Ontario Bank v. Lightbody* (N. Y.) 13 Wend. 101, 105, 27 Am. Dec. 179; *Thomas v. Todd* (N. Y.) 6 Hill, 340; *Westfall v. Braley*, 10 Ohio St. 188, 190, 75 Am. Dec. 509; *Harley v. Thornton* (S. C.)

2 Hill, Law, 509, note; *Wainwright v. Webster*, 11 Vt. 576, 578, 34 Am. Dec. 707. Contra, see *Lowrey v. Murrell* (Ala.) 2 Port. 280, 283, 27 Am. Dec. 651; *Imbush v. Mechanics' & Traders' Bank*, 1 Ohio Dec. 8, 1 West. Law J. 49; *Bayard v. Shunk* (Pa.) 1 Watts & S. 92, 95, 37 Am. Dec. 441; *Scruggs v. Gass*, 16 Tenn. (8 Yerg.) 175, 177, 29 Am. Dec. 114.

Payment in the bills of a failed bank is no discharge. *Magee v. Carmack*, 13 Ill. (3 Peck.) 289, 291; *Townsend v. Bank of Racine*, 7 Wis. 185, 195.

For every purpose in the ordinary transaction of business bank notes are considered as money. *Bradley v. Hunt* (Md.) 5 Gill & J. 54, 58, 23 Am. Dec. 597; *Morrill v. Brown*, 32 Mass. (15 Pick.) 173, 177; *Morris v. Edwards*, 1 Ohio (1 Ham.) 189, 204; *Edwards v. Morris*, Id. 524, 532.

The payment of a debt, in Confederate money, made and accepted in good faith, at the time and place where it was current, discharged the debt. *Ponder v. Scott*, 44 Ala. 241, 246; *Berry v. Bellows*, 30 Ark. 198, 209; *Vance v. Cooper*, 22 La. Ann. 508, 509; *Robinson v. International Life Assur. Soc. of London*, 42 N. Y. 54, 66, 1 Am. Rep. 400; *Mercer v. Wiggins*, 74 N. C. 48, 51; *Cross v. Sells*, 48 Tenn. (1 Helsk.) 83, 84; *Ritchie v. Sweet*, 32 Tex. 333, 335, 5 Am. Rep. 245.

Payment in counterfeit bank paper is a nullity. *Markle v. Hatfield* (N. Y.) 2 Johns. 455, 456, 3 Am. Dec. 446; *Thomas v. Todd* (N. Y.) 6 Hill, 340, 341; *Baker v. Bonesteel* (N. Y.) 2 Hill, 397, 399; *Hargrave v. Dusenberry*, 9 N. C. 326, 327; *Anderson v. Hawkins*, 10 N. C. 568, 571; *Ramsdale v. Horton*, 3 Pa. (3 Barr) 330.

Where payment of a note is made in counterfeit bank bills, the payee may recover the amount of such bills in an action for money had and received. *Mudd v. Reeves* (Md.) 2 Har. & J. 368; *Keene v. Thompson* (Md.) 4 Gill & J. 463, 466; *Young v. Adams*, 6 Mass. 182, 185; *Markle v. Hatfield* (N. Y.) 2 Johns. 455, 456, 3 Am. Dec. 446; *Hargrave v. Dusenberry*, 9 N. C. 326, 327.

#### Same—Bills or notes.

A note will not operate as a payment unless it is expressly stipulated that it shall have that effect. *Peter v. Beverly*, 35 U. S. (10 Pet.) 532, 563, 9 L. Ed. 522; *Baker v. Draper* (U. S.) 2 Fed. Cas. 458, 460; *Flickling v. Brewer*, 38 Ala. 685, 686; *Myatts v. Bell*, 41 Ala. 222, 231; *Archibald v. Argall*, 53 Ill. 307; *Watkins v. Hill*, 25 Mass. (8 Pick.) 522, 523; *Raymond v. Merchant* (N. Y.) 3 Cow. 147, 150; *Reed v. Van Ostrand* (N. Y.) 1 Wend. 424, 430, 19 Am. Dec. 529; *Lovett v. Dimond* (N. Y.) 4 Edw. Ch. 22; *Nightingale v. Chafee*, 11 R. L. 609, 619, 23 Am. Rep.

531; Costello v. Cave (S. C.) 2 Hill, 523, 27 Am. Dec. 404; McGuire v. Gadsby (Va.) 3 Call, 234, 236; Poole v. Rice, 9 W. Va. 73, 76. Contra, see Warring v. Hill, 89 Ind. 497, 501; Bunker v. Barron, 8 Atl. 253, 255, 79 Me. 62, 1 Am. St. Rep. 282; Strauss v. Trotter, 26 N. Y. Supp. 20, 23, 6 Misc. Rep. 77; Plankinhorn v. Cave (Pa.) 2 Yeates, 370, 373; Hutchins v. Olcott, 4 Vt. 549, 555, 24 Am. Dec. 634; Sayre v. King, 17 W. Va. 562, 571; Calk v. Orear, 4 T. Ky. (2 B. Mon.) 420, 422; The Charlotte v. Hammond, 9 Mo. 59, 63, 43 Am. Dec. 536.

The receipt of a promissory note extinguishes a pre-existing debt if such was the intention of the parties. Pasewalk v. Bollman, 29 Neb. 519, 45 N. W. 780, 783, 26 Am. St. Rep. 399; New York State Bank v. Fletcher (N. Y.) 5 Wend. 85, 88; Seltzer v. Coleman, 32 Pa. (8 Casey) 493, 501. A negotiable promissory note will operate as an extinguishment of a prior existing debt, if it is so intended by the parties. Sheehy v. Mandeville, 10 U. S. (6 Cranch) 253, 264, 3 L. Ed. 215; Risher v. The Frolic (U. S.) 20 Fed. Cas. 826, 827; Abercrombie v. Mosely (Ala.) 9 Port. 145; Pope v. Tunstall, 2 Ark. (2 Pike) 209, 225; Harlan v. Wingate's Adm'r, 25 Ky. (2 J. J. Marsh.) 138, 140; Newall v. Hussey, 18 Me. (10 Shep.) 249, 250, 36 Am. Dec. 717; Comstock v. Smith, 23 Me. (10 Shep.) 202, 208; Hotchin v. Secor, 8 Mich. 494, 499; Slocumb's Adm'r v. Holmes' Adm'r, 2 Miss. (1 How.) 139, 144; Cave v. Hall, 5 Mo. 59, 61; Wilbur v. Jernegan, 11 R. I. 113, 114; Watson v. Owens, 1 Rich. Law, 111, 113.

The giving by a partner of his individual note, after dissolution of the partnership, for an indebtedness owed by the firm, does not extinguish such indebtedness. Yarnell v. Anderson, 14 Mo. 619, 624; Thompson v. Briggs, 28 N. H. (8 Fost.) 40, 43; Wilson v. Jennings, 15 N. C. 90; Mebane v. Spencer, 28 N. C. 423, 425; Keating v. Sherlock (Ohio) 1 Cin. R. 257; Mason v. Wickersham (Pa.) 4 Watts & S. 100, 102; Seward v. L'Estrange, 36 Tex. 295, 296. Contra, see In re Parker (U. S.) 11 Fed. 397, 402; Arnold v. Camp (N. Y.) 12 Johns. 409, 410, 7 Am. Dec. 328; Maler v. Canavan (N. Y.) 8 Daly, 272, 276; Isler v. Baker, 25 Tenn. (6 Humph.) 85, 86; Stephens v. Thompson, 28 Vt. (2 Williams) 77, 80.

The note of a third person is not payment of a debt, unless it is expressly so agreed. Allen v. King (U. S.) 1 Fed. Cas. 483, 484; Griffith v. Grogan, 12 Cal. 317, 322; Rawlings v. Robson, 70 Ga. 595, 597; Price v. Barnes (Ind.) 31 N. E. 809, 810; Bank of Monroe v. Gifford, 79 Iowa, 300, 44 N. W. 558; Patapsco Ins. Co. v. Smith (Md.) 6 Har. & J. 166, 169, 14 Am. Dec. 268; Caldwell v. Fifield, 24 N. J. Law (4 Zab.) 150, 152; Johnson v. Weed (N. Y.) 9 Johns.

310, 311, 6 Am. Dec. 279; Muldon v. Whitlock (N. Y.) 1 Cow. 290, 297, 13 Am. Dec. 533; Vail v. Foster, 4 N. Y. (4 Comst.) 312, 314; Vansteenburgh v. Hoffman (N. Y.) 15 Barb. 28, 31; Wehrlin v. Schmutz (N. Y.) 1 City Ct. R. 101; Murphy v. Eckel (Pa.) 1 Walk. 144; Barelli v. Brown (S. C.) 1 McCord, 449, 453, 10 Am. Dec. 683; Street v. Hall, 29 Vt. (3 Williams) 165, 167. Contra, see Rew v. Barber, 3 Cow. 272, 280; Chal-loner v. Boyington, 91 Wis. 27, 64 N. W. 422.

In the absence of an agreement to that effect, the acceptance of a debtor's note is not payment of a claim. Bank of the United States v. Daniel, 37 U. S. (12 Pet.) 32, 33, 9 L. Ed. 989; Lyman v. United States Bank, 53 U. S. (12 How.) 225, 245; Weed v. Snow (U. S.) 29 Fed. Cas. 572, 573; In re Oulmette (U. S.) 18 Fed. Cas. 913, 916; Lawrence v. United States (U. S.) 71 Fed. 228, 233; Mooring v. Mobile Marine Dock & Mut. Ins. Co., 27 Ala. 254, 258; Marshall v. Marshall's Ex'rs, 42 Ala. 149, 151; Keel v. Larkin, 72 Ala. 493; Lane & Bodley Co. v. Jones, 79 Ala. 156; Brugman v. McGuire, 32 Ark. 733, 737; Pendergrass v. Hellman, 50 Ark. 261, 7 S. W. 132; Smith v. Owens, 21 Cal. 11, 24; Brown v. Cronise, Id. 386, 388; Bill v. Porter, 9 Conn. 23, 29; McLaren v. Hall, 26 Iowa, 297; Patapsco Ins. Co. v. Smith (Md.) 6 Har. & J. 166, 169, 14 Am. Dec. 268; Glenn v. Smith, 2 Gill & J. 493, 20 Am. Dec. 452; Morgan v. Bitzenberger (Md.) 3 Gill, 350, 353; Vancleef v. Therasson, 20 Mass. (3 Pick.) 12, 13; The Charlotte v. Hammond, 9 Mo. 59, 61, 43 Am. Dec. 536; McMurray v. Taylor, 30 Mo. 263, 267, 77 Am. Dec. 611; Citizens' Bank v. Carson, 32 Mo. 191, 196; Howard v. Jones, 33 Mo. 583, 586; Block v. Dorman, 51 Mo. 31, 32; Riggs v. Goodrich, 74 Mo. 108, 110; Wiles v. Robinson, 80 Mo. 47; Bertiaux v. Dillon, 20 Mo. App. 603, 605; Young v. Hibbs, 5 Neb. 433; Smith v. Smith, 27 N. H. (7 Fost.) 244, 253; Coburn v. Odell, 30 N. H. (10 Fost.) 540, 553; Swain v. Frazier, 35 N. J. Eq. (8 Stew.) 326, 332; Muldon v. Whitlock (N. Y.) 1 Cow. 290, 303, 13 Am. Dec. 533; Porter v. Talcott, 1 Cow. 359, 383; Winsted Bank v. Webb, 39 N. Y. 325, 329; 100 Am. Dec. 435; Walke v. Moody, 65 N. C. 599, 601; Victoria Bldg. Ass'n v. Kelsey (Ohio) 11 Wkly. Law Bul. 38; Johnston v. Barrills, 27 Or. 251, 41 Pac. 656, 50 Am. St. Rep. 717; Lesser v. Lehman (Pa.) 2 Lack. Leg. N. 100; Sweet v. James, 2 R. I. 270, 292; Chastain v. Johnson (S. C.) 2 Bailey, 574; Bryce v. Bowers (S. C.) 11 Rich. Eq. 41, 49; Watson v. Owens (S. C.) 1 Rich. Law, 111; McGuire v. Bidwell, 64 Tex. 43, 45; Blunt v. Walker, 11 Wis. 334, 350, 78 Am. Dec. 709; Eastman v. Porter, 14 Wis. 42, 50; Nash v. Meggett, 89 Wis. 486, 61 N. W. 283. Contra, see Carlton v. Buckner, 28 Ark. 66, 68; Mills v. Mercer (Ga.) Dud. 158, 160; Krutsinger v. Brown,



72 Ind. 466, 469; *Nixon v. Beard*, 12 N. E. 131, 132, 111 Ind. 137; *Davis & Rankin Bldg. & Mfg. Co. v. Vice*, 15 Ind. App. 117, 43 N. E. 889; *Thacher v. Dinsmore*, 5 Mass. 299, 302, 4 Am. Dec. 61; *Johnson v. Johnson*, 11 Mass. 359, 361.

Where a debtor executes his note for a balance due, it will operate, *prima facie*, as a payment of the account. *Hill v. Sloan*, 59 Ind. 181, 187; *Scott v. Ray*, 35 Mass. (18 Pick.) 360, 366; *Ilisley v. Jewett*, 43 Mass. (2 Metc.) 168, 173. Contra, see *McCoy v. Hazlett*, 14 Kan. 430, 431; *Hornbrooks v. Lucas*, 24 W. Va. 493, 501, 49 Am. Rep. 277.

Taking a note from one of several joint debtors for a pre-existing debt is no payment, unless it be expressly agreed that it shall be so regarded. *Lingenfelter v. Simon*, 49 Ind. 82, 92; *Muldon v. Whitlock* (N. Y.) 1 Cow. 290, 303, 13 Am. Dec. 533; *Bowers v. Still*, 49 Pa. (13 Wright) 65, 71; *Schollenberger v. Seldonridge*, Id. 83, 85; *Rosseau v. Oull*, 14 Vt. 83, 84.

The taking of a debtor's note does not extinguish the debt, in the absence of any agreement to that effect, or of circumstances from which an intent to discharge the debt may be inferred. *May v. Gamble*, 14 Fla. 467, 493; *Davis & Rankin Bldg. & Mfg. Co. v. Montrose Butter & Cheese Co.*, 59 Ill. App. 573, 575; *Matteson v. Ellsworth*, 83 Wis. 488, 501, 14 Am. Rep. 766.

The taking of the debtor's or another's note for a pre-existing debt is not a payment of the debt, unless the creditor expressly so agreed to take it. *Higgins v. Wortell*, 18 Cal. 330, 333; *Medley v. Specker*, 58 Ill. App. 157, 158; *Gardner v. Gorham* (Mich.) 1 Doug. 507, 510; *Commiskey v. McPike*, 20 Mo. App. 82, 84; *Coxe v. Hankinson*, 1 N. J. Law (Coxe) 85; *Elwood v. Deifendorf* (N. Y.) 5 Barb. 398, 408; *Street v. Hall*, 29 Vt. (3 Williams) 165, 166; *Dunlap's Ex'rs v. Shanklin*, 10 W. Va. 662, 668.

A bill, acceptance, or promissory note, either of the debtor or a third person, is not a payment or extinguishment of a debt, unless accepted as such. *Wylly v. Collins*, 9 Ga. 223, 241; *Herring v. Sanger* (N. Y.) 3 Johns. Cas. 71, 72; *Tobey v. Barber* (N. Y.) 5 Johns. 68, 72, 4 Am. Dec. 326. Contra, see *Smith v. Bettger*, 68 Ind. 254, 256, 34 Am. Rep. 256.

Where selectmen give a person whose sheep have been injured by dogs an order on the town treasurer, which was given and received in satisfaction of the claim, it constitutes a payment within Sess. Laws 1878, p. 325, § 5, providing that, when damages done by dogs to sheep have been paid by the town, it may recover the same from the owner of the dog. *Town of Wilton v. Town of Weston*, 48 Conn. 325, 326.

The mere acceptance of a note of a subscriber for stock, to apply upon a stock subscription, does not constitute payment; and while the transaction is valid, the note is not a payment for the stock, but a mere evidence of the debt incurred by the subscription and of a contract postponing payment of such indebtedness till the due date of the note. *Williams v. Brewster*, 93 N. W. 479, 483, 117 Wis. 370.

#### Same—Checks.

The delivery of the debtor's check of face value equal to the amount of the debt does not discharge the debt. *Phillips v. Bullard*, 58 Ga. 256; *Cromwell v. Lovett*, 1 N. Y. Super. Ct. (1 Hall) 56, 78; *Franklin v. Vanderpool*, Id. 88, 91; *Collins v. Colmay*, 14 N. Y. St. Rep. 444, 446.

A payment is not shown by the mere receipt of a check, but it constitutes a payment if it is accepted as such and in due course actually paid. *Hunter v. Wetsell*, 84 N. Y. 549, 553, 38 Am. Rep. 544.

A check is not considered absolute payment of a debt unless it is expressly agreed to be taken as such, and in case of such agreement the creditor takes the risk of the payment of the check from the time he accepted it. Payment does not necessarily mean absolute payment. Where a check or note is accepted in payment of an antecedent debt, the presumption is that it is taken as conditional or provisional payment; that is, payment founded on condition that the check or note is paid. If the check is not paid when regularly presented, or the note is not paid when it matures, there is no payment of the debt. *Comptoir D'Escompte de Paris v. Dresbach*, 20 Pac. 28, 32, 78 Cal. 15.

#### Same—Goods.

Proof of payment of a note by delivery of wood is not admissible under an allegation of payment; but the delivery and acceptance of wood as satisfaction of the contract must be substantially alleged. *Ulsch v. Muller*, 9 N. E. 736, 737, 143 Mass. 379.

#### Mode of payment.

A debt is not extinguished by accepting an obligation of equal dignity. *Bowers' Adm'r v. State* (Md.) 7 Har. & J. 32, 36; *Clopper's Adm'r v. Union Bank* (Md.) 7 Har. & J. 92, 102, 16 Am. Dec. 294; *Yates v. Donaldson*, 5 Md. 359, 399, 61 Am. Dec. 283; *Morrison v. Welty*, 18 Md. 169, 176; *Hart v. Boller* (Pa.) 15 Serg. & R. 162, 163, 16 Am. Dec. 536.

Payment of collaterals held as security for a debt operates a satisfaction of the debt. *Reeves v. Plough*, 41 Ind. 204, 208; *Farnsley v. Anderson Foundry & Machine Works*, 90 Ind. 120, 121; *King v. Hutchins*,

28 N. H. (8 Fost.) 561, 574; *Bell v. Weir*, 8 N. Y. Supp. 661, 662, 55 Hun, 611.

Payment is the fulfillment of a promise, and it must be made to the creditor himself or his assigns, or to some person authorized by him to receive it, either expressly or by implication, and, when properly made, discharges the debtor from his obligation. *Exchange Bank v. Cookman*, 1 W. Va. 69, 77 (quoting *Bouv. Law Dict.*).

One cannot pay his own debt simply by paying a debt due to some one else by his creditor, which was not embraced in his own undertaking, or which his creditor should not agree might be discounted as payment. *Hill v. Austin*, 19 Ark. 230, 232.

Payment or tender, to be valid, must be made to the creditor, or to some person duly authorized to receive it, or to one who, although he may have no actual authority, has an apparent authority to act for the principal. *Hale v. Patton*, 60 N. Y. 233, 237, 19 Am. Rep. 168.

#### **Redemption distinguished.**

See "Redemption."

#### **Set-off distinguished.**

The distinction between a "payment" and a "set-off" is that a payment is, by consent of the parties, express or implied, appropriated to the discharge of the debt, whereas a set-off is an independent demand, calling for its own action, which the parties have not applied on the debt. *Kennedy v. Davisson*, 33 S. E. 291, 292, 46 W. Va. 433; *St. Louis & T. R. Packet Co. v. McPeters*, 27 South. 518, 520, 124 Ala. 451.

A payment is by consent of the parties, either expressed or implied, appropriated to the discharge of the debt. A set-off is a mutual pending claim, which still continues to exist as such, and one which the parties do not intend shall be appropriated to satisfy the existing demands, but that each shall have mutual causes of action, and, of course, mutual actions, if they please, against each other. *McDowell v. Tate*, 12 N. C. 249, 251.

#### **Evidence of payment.**

A mere indorsement of payment on a note does not amount to a payment, but is simply evidence thereof. *Bond v. Wilson*, 40 S. E. 182, 183, 129 N. C. 387.

#### **Time of payment.**

The term "payment," used with reference to commercial paper, means payment in due course, and not by anticipation. So it is said that a payment of a bill before it becomes due does not extinguish it, any more than if it was merely discounted. *Eckert v. Cameron*, 43 Pa. (7 Wright) 120, 127.

#### **Payment to attorney.**

Payment to the plaintiff's attorney, employed to collect a debt, is as effectual as payment to the plaintiff himself. *Wilson v. Russ*, 20 Me. 421, 424.

#### **PAYMENT DOWN.**

In construing a contract for the sale of land, in the absence of special words or circumstances indicating a different intent, a stipulation for "immediate payment," or "payment down," will be held to mean payment at the time when the deed is made out and executed. *Bruner v. Wheaton*, 46 Mo. 363, 367.

#### **PAYMENT IN NOTES.**

The words "payment in notes," in a writ whereby a vendor acknowledges receipt of the price of goods sold, "payment being satisfactory and in notes," did not imply an absolute payment, but the giving of notes merely to represent the price. *Adler v. Burton Lumber Co.*, 15 South. 158, 157, 46 La. Ann. 379.

#### **PAYMENT INTO COURT.**

A payment into court is an admission of an indebtedness to the extent of the payment. *Orth v. Zion's Co-op. Mercantile Inst.*, 5 Utah, 419, 423, 16 Pac. 590.

#### **PAYMENT MORE THAN ONCE.**

The phrase "payment more than once," in Pol. Code, § 3804, as amended by Act March 9, 1889, providing that any tax paid more than once may be refunded by the county treasurer by order of the board of supervisors, applies to taxes on property which has been paid by the owner, and the property afterwards erroneously sold therefor, and the taxes again paid by the tax sale purchaser. *Hayes v. Los Angeles County*, 33 Pac. 766, 99 Cal. 74.

#### **PAYMENT OF MONEY.**

See "Contract for Payment of Money Only"; "Instrument for the Payment of Money."

#### **PAYMENT UNDER PROTEST.**

See "Protest."

#### **PAYMENTS BY THE DEBTOR.**

Where a debtor makes an assignment, and in such assignment makes an express direction to his assignee to sell the property assigned and apply the same in payment of certain scheduled debts, and the assignee does as directed, the payments so made are

"payments by the debtor," and avoid the bar of the statute of limitations. *Letson v. Kenyon*, 1 Pac. 562, 564, 31 Kan. 301.

### PAYMENTS AND OFFSETS.

"Payments and offsets," as used in a claim filed by a mechanic for the purpose of establishing a mechanic's lien, which recites that the amount therein is a true statement of his demands after deducting all payments and offsets, is equivalent to all "credits and offsets," as used in a statute requiring such notice should show a true statement of the mechanic's demands after deducting all just credits and offsets. *Preston v. Sonora Lodge*, No. 10, I. O. O. F., 39 Cal. 116, 119.

### PE. CEN.

"Pe. cen.," when used in a note for a certain sum of money at 10 pe. cen., was construed to mean "per cent." *Gramer v. Joder*, 65 Ill. 314, 315.

### PEACE.

See "Against the Peace"; "Bill of Peace"; "Breach of the Peace"; "Conservator of the Peace"; "Public Peace."

A "time of peace," as defined by Lord Coke, is "when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all." *Skeen v. Monkeimer*, 21 Ind. 1, 3.

"Peace," as used in relation to a breach of the peace, means the tranquillity enjoyed by citizens of a municipality or community, where good order reigns among its members, and is the natural right of all persons in political society. *People v. Rounds*, 35 N. W. 77, 79, 67 Mich. 482; *Davis v. Durgess*, 20 N. W. 540, 542, 54 Mich. 514, 52 Am. Rep. 828.

Under a city charter authorizing it to enact such ordinances as shall secure the peace of the city and to punish peace breakers, authority is not given to prohibit the keeping open of a store or shop on Sunday for the purpose of labor or traffic. Such acts are not an offense against the public peace, but an offense against public policy, punishable under the laws of the state. The word "peace," in its legal signification, means quiet, orderly behavior of individuals to one another and toward the government. Any riotous, forcible, or unlawful conduct or proceeding is a breach of the peace. Offenses against the public peace include all acts affecting the public tranquillity, such as assaults and batteries, riots, unlawful assemblies, forcible entry and detainer, etc. *City*

of *Corvallis v. Carlile*, 10 Or. 139, 142, 45 Am. Rep. 134.

A clause in the charter of a town, authorizing the mayor and council to pass and enforce all ordinances "necessary for the peace, good order, health, and safety of the town," authorizes an ordinance prohibiting domestic animals from running at large within the town limits. *Cochrane v. City of Frostburg*, 31 Atl. 703, 81 Md. 54, 27 L. R. A. 728, 48 Am. St. Rep. 479.

### As cessation of war.

A bond stipulating that the money should be due "10 days after peace" between the United States and the Confederate States meant merely 10 days after the war is over, and not 10 days after the ratification of a treaty of peace. *Chapman v. Wacaser*, 64 N. C. 532, 533.

### PEACE OFFICER.

Constable as, see "Constable."

A peace officer is defined by Code Civ. Proc. § 154, to be the sheriff or undersheriff, the deputy, constable, marshal, police constable, or policeman of a city, town, or village. *Deyoe v. Ewen*, 24 N. Y. Supp. 372, 373, 70 Hun. 545; *People v. Clinton*, 51 N. Y. Supp. 115, 116, 28 App. Div. 478.

A peace officer is a sheriff of a county or subdivision, or constable, marshal, or policeman of a city, town, village, or township. *Rev. St. Okl.* 1903, § 5243.

A peace officer is a sheriff of a county or his deputy, or a constable, or a marshal or policeman of any incorporated city or town. *Rev. St. Utah* 1898, § 4609.

A peace officer is a sheriff of a county or his deputy, or a constable, marshal, or policeman of a township, city, village, or town. *Rev. Codes N. D.* 1899, § 7895; *Code Crim. Proc. S. D.* 1903, § 96.

A peace officer is a sheriff of a county, constable of a precinct, or marshal or policeman of a town. *Ann. Codes & Sts. Or.* 1901, § 1593.

The term "peace officer," as used in the Penal Code, signifies any sheriff, coroner, constable, policeman, watchman of an incorporation, city, or town, and such other officer or officers whose duty it is made to enforce and preserve the public peace. *Rev. Codes N. D.* 1899, § 7720; *Pen. Code S. D.* 1903, § 815.

Peace officers are sheriffs of counties, and constables, marshals, and policemen of cities and towns, respectively. *Comp. Laws Nev.* 1900, § 4079.

"Peace officer," as used in the Penal Code, signifies any sheriff, constable, coroner,

policeman, watchman of an incorporation, city or town, and such other officer or officers whose duty it is made to enforce and preserve the public peace. Rev. St. Okl. 1903, § 2693.

A peace officer is a sheriff of a county, or his undersheriff or deputy, or a constable, marshal, police constable, or policeman of a city, town, or village. Crim. Code N. Y. 1903, §§ 154, 960.

By the express provisions of Code Cr. Proc. art. 2520, the term "peace officer" includes a sheriff and his deputy. *State v. Brooks*, 42 Tex. 62, 72.

As used in a statute making it criminal to bribe or offer to bribe any sheriff or other peace officer, etc., the term "peace officer" includes "sheriffs, their deputies, jailors, constables, marshals of incorporated towns, and persons especially appointed to execute criminal processes." *O'Brien v. State*, 6 Tex. App. 665, 667; *Newburn v. Durham*, 32 S. W. 112, 115, 10 Tex. Civ. App. 655.

The following are peace officers: The sheriff and his deputies, constables, marshal, constable, and policemen of any incorporated town or city, and any proper person specially appointed to execute criminal process. Code Cr. Proc. 1893, art. 43. *Messer v. State*, 37 Tex. Cr. R. 635, 637, 40 S. W. 488, 489.

"Peace officer" is practically synonymous with "conservator of the peace," it being held that an exemption of peace officers from a statutory prohibition against carrying concealed weapons included one who was by law made a conservator of the peace. *Jones v. State (Tex.)* 65 S. W. 92.

## PEACE OF THE STATE.

See "In the Peace of the State."

## PEACEABLE ENTRY.

See, also, "Open and Peaceable Entry."

## PEACEABLE POSSESSION.

Peaceable possession is such as continues and is not interrupted by adverse suits to recover the estate. *Stanley v. Schwalby*, 13 Sup. Ct. 418, 420, 147 U. S. 508, 37 L. Ed. 259.

"Peaceable possession," within the meaning of a statute giving a right to file a bill in equity to quiet title when any person is in peaceable possession of the lands, claiming to own the same, applies to any possession where the defendant, though setting up a claim of title, has not interfered with complainant's possession by any act which is suable at law, by a suit which may or will involve the title of defendant. *Allaire v. Ketcham*, 35 Atl. 900, 901, 55 N. J. Eq. 168.

Peaceable possession means a possession which is acquiesced in by all others, including rival claimants, and need not be maintained by force or threats. If a person enter on land in the actual and peaceable occupation of another, the possession which he occupies cannot be deemed peaceable during the time when it has to be protected by firearms or other demonstrations of force against an attempted or threatened re-entry of the former occupant, who manifests to the intruder by his words and acts that he intended to re-enter at the earliest moment, when he can do so without violence, and who is only prevented from entering by an exhibition of firearms or threats or menaces. *Bowers v. Cherokee Bob*, 45 Cal. 495, 504.

The words "peaceable possession," in the fourth section of the dormant judgment act of 1822, providing that a purchaser or those claiming under him should have been in peaceable possession of real estate for seven years before levy shall have been made thereon, has a meaning very similar to, if not the same as, the words "quiet enjoyment"; and to constitute a breach of such peaceable possession there must have been an actual ouster, and a levy against a landlord is not an actual ouster of the tenant. *Gitten's Lessee v. Lowry*, 15 Ga. 336.

The peaceable possession of slaves for the space of five years, contemplated by the statute (Gould's Dig. c. 162, § 3), means a possession adverse to the owner, and not as his bailee, or under a loan from him. *Spencer v. McDonald*, 22 Ark. 466, 473.

"Peaceable possession," within the meaning of the chapter relating to limitations against actions to recover real estate against persons in peaceable and adverse possession, etc., is such as is continuous, and not interrupted by adverse suit to recover the estate. Rev. St. Tex. 1895, art. 3348.

## PEAKED ROOF.

A hipped or peaked roof is one running up from all four sides of the building to a peak or ridge in the center. *Hannen v. Pence*, 40 Minn. 127, 129, 41 N. W. 657, 658, 12 Am. St. Rep. 717.

## PEBBLES.

A quantity of spectacles made of glass and steel are dutiable under Act June 30, 1864 (13 Stat. 205, § 9), imposing a certain duty on pebbles for spectacles and all manufactures of glass, or of which glass shall be a component material. The terms "pebbles for spectacles" and "all manufactures of which glass shall be a component material" naturally connects the glass manufacture with the spectacles. There could be no spectacles without them. The colorless crystals

in spectacles termed "pebbles," and the manufactures of glass used in spectacles, embrace the same idea, to wit, all pebbles or glass for spectacles. Those substances used in the manufacture of spectacles to aid the sight are described as pebbles or as glass. The pebbles and the glass are the materials which enable spectacles to aid the sight. *Arthur v. Sussfield*, 96 U. S. 128, 130, 24 L. Ed. 772.

## PECULATION.

"Peculation," as used in the title of Act 1875 (Laws 1875, c. 19), to provide more effectually for the punishment of peculation and other wrongs affecting public moneys and rights of property, indicates that one of the purposes of the act, or perhaps its primary purpose, was to afford additional security against the betrayal of official trusts by imposing severer punishment for embezzlement or other frauds, when committed by public officers in misapplying public property, than was provided by existing laws. *Bork v. People*, 91 N. Y. 5, 16.

## PECULIAR.

In ecclesiastical law, a parish or church in England which has jurisdiction of ecclesiastical matters within itself, and independent of the ordinary, and is subject only to the metropolitan. *Black, Law Dict.*

## PECULIAR BENEFITS.

Peculiar benefits are any enhancement of or increase in the market value of the property condemned by reason of the improvement for which the power of condemnation is exercised. *Kansas City Suburban Belt Ry. Co. v. McElroy*, 61 S. W. 871, 872, 161 Mo. 584.

The benefits to be assessed to the owner of property on account of a change in grade in a street on which the property abuts are the peculiar and not the general benefits; that is, not benefits which the owner derives from the improvement in common with the public at large, but only such benefits in respect to his property as the law calls "peculiar benefits," since for the general benefits the owner pays taxes along with others. *Blair v. City of Charleston*, 43 W. Va. 62, 70, 26 S. E. 341-345, 35 L. R. A. 852, 84 Am. St. Rep. 837 (citing *James River Kanawha Co. v. Turner* [Va.] 9 Leigh, 313; *Grafton & G. R. Co. v. Foreman*, 24 W. Va. 662).

## PECULIAR CIRCUMSTANCES.

Code, § 2421, providing that all claims of a certain class against the estates of deceased persons, not filed and proved in 12 months after the giving of notice therefor by

the administrator, are forever barred, unless the claim is pending in the district or Supreme Court, or unless peculiar circumstances entitle the claimant to equitable relief, should be construed to include the claim of one based on partition proceedings, which were not settled and determined until after the time limited for presenting such claims for allowance. *Senat v. Findley*, 50 N. W. 575, 576, 51 Iowa, 20.

## PECULIAR DAMAGES.

"Peculiar damages," as used with relation to the individual injury necessary to entitle the party to sue to abate a public nuisance or for the obstructing of a highway, exist where complainant is deprived of access to the only public road leading to her market town, or where one had started upon a journey, and was compelled to go back by reason of an obstruction whereby he suffered loss. *Cabbell v. Williams*, 28 South. 405, 406, 127 Ala. 320.

## PECULIAR KNOWLEDGE.

The "peculiar knowledge" sufficient to constitute such experience and familiarity with a particular thing so as to render the person qualified to give expert testimony means with practical experience in the observation and use of an unusual and peculiar thing, which tends to give the person skill in respect to it. *Bemis v. Central Vermont R. Co.*, 3 Atl. 531, 534, 58 Vt. 636.

## PECULIAR NAME.

Hittell's Laws, art. 7134, provides that where a person uses any "peculiar name," etc., to designate an article as one manufactured or sold by him, it shall be unlawful for any other person, without his consent, to use such trade mark or name, etc. We do not understand it to mean the proper and established name by which the compound or goods are known in the market. It must be something new, not before in use; something of the manufacturer's own invention, or first put to use by him; something peculiar to him, and not common to him and others; not something indicating the actual kind, character, or quality of the compound—as, for instance, the ingredients of which, and the proportions in which, it is compounded, or the various uses to which it may be put, or the effects produced by it, but something extrinsic, not indicative; something intrinsically foreign to the compound itself, and which serves to designate it only because it has been fancifully put to that use, in disregard of all natural relations—as, for example: "Merrimack Prints," "Clubhouse Gln," "Old London Gln," "Genuine Yankee Soap." *Falkinburg v. Lucy*, 85 Cal. 52, 60, 95 Am. Dec. 76.

## PECULIAR USE.

A bequest to a widow for "her own proper use" is equivalent to "her own peculiar use," as essentially belonging to her, or to her own use strictly. *Snyder v. Snyder*, 10 Pa. (10 Barr) 423, 424.

## PECUNIARY.

Monetary; relating to money, consisting of money. *Black, Law Dict.*

## PECUNIARY ABILITY.

Rev. Laws, § 2362, provides that a divorce may be decreed on petition of the wife when the husband, "being of sufficient pecuniary ability to provide suitable maintenance for her, refuses or neglects to do so." Held, that the words "pecuniary ability," as so used, mean the possession of property with which to furnish her maintenance, and do not include his capacity for acquiring property by means of labor. *Farnsworth v. Farnsworth*, 5 Atl. 401, 58 Vt. 555; *Jewett v. Jewett*, 17 Atl. 734, 61 Vt. 370.

## PECUNIARY CONSIDERATION.

A verbal promise to pay a debt in full is a "pecuniary" consideration, within the meaning of St. 1848, c. 304, § 9, declaring any certificate of discharge in insolvency to be void if the assent thereto of any creditor is procured by any pecuniary consideration. *Phelps v. Thomas*, 72 Mass. (6 Gray) 327, 328.

A "pecuniary consideration or obligation," as used in the bankrupt laws, providing that if the bankrupt influences the action of any of the creditors named in the specifications by any "pecuniary consideration or obligation" his discharge shall be defeated, etc., includes a promise by a bankrupt to pay a certain creditor all he ever owed him when he got able on condition that he would assent to his discharge. In *re Ekings* (U. S.) 6 Fed. 170, 173.

## PECUNIARY DAMAGE.

The word "pecuniary," in the statute in reference to the giving of pecuniary damages in actions for wrongful death, is not to be construed in a strict sense. It will not exclude the loss of nurture of the intellectual, moral, and physical training which only a parent can give to children; nor is the same certainty of loss required to be shown as in ordinary actions. *Walker v. McNeil*, 50 Pac. 518, 522, 17 Wash. 582.

In an action for death the "pecuniary" damages recoverable by plaintiff are not limited to the losses actually sustained at the precise period of the death, but may also include prospective losses, provided they are

such as apparently would actually result to plaintiff as the proximate damages arising from wrongful death. *Searle v. Kanawha & O. Ry. Co.*, 9 S. E. 248, 251, 32 W. Va. 370.

The "pecuniary" damages which may be recovered under the statute for wrongful death of another do not embrace merely the loss of money. "Such a limitation would in many cases render the statute a mere mockery, because it would afford no substantial relief in the very cases in which it is most needed. The loss of the society of a deceased relative, the injury to the affections of those surviving, cannot be regarded as being within the remedy of the statute because in no sense can the loss be regarded as pecuniary. But to children the loss of a parent involves the loss of many other things of a pecuniary character;" and hence, where, in an action by children for the death of their mother, it appears that the children were away from home, probably of full age, and not immediately dependent on her for support, but the evidence also shows that they were not beyond the reach of a mother's care and bounty, and that out of her earnings, insignificant as they were, she provided small articles of clothing for them, the jury had a right to find that the mother's death involved pecuniary loss. *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287, 295, 35 How. Prac. 36, 41, affirming 47 Barb. 515, 519.

The "pecuniary damages" or loss of the widow and children or next of kin recoverable in an action for wrongful death are the pecuniary value of the life of the deceased as shown by his expectancy of life and his earning capacity. *Davidson Benedict Co. v. Severson*, 72 S. W. 967, 983, 109 Tenn. 572.

"Pecuniary" is a term of much narrower scope in the law of damages than the word "necessary." The latter embraces all those consequences of an injury usually denominated "general damages" as distinguished from "special damages," whereas "pecuniary" damages cover a smaller class of damages within the larger class of general damages. *Browning v. Wabash Western R. Co.* (Mo.) 24 S. W. 731, 746.

## PECUNIARY DEMONSTRATIVE LEGACY.

In order to constitute a pecuniary demonstrative legacy, two things are necessary: (1) There must be a gift of a certain sum of money; (2) with reference to a particular fund as a primary, but not exclusive, source of payment. *Rogers v. Rogers*, 45 S. E. 176, 178, 67 S. C. 168.

## PECUNIARY INJURY.

Injuries in the sense of wrongful invasions of a right may be pecuniary and non-

pecuniary. Pecuniary injuries are such as can be, and usually are, without difficulty estimated by money standard. Loss of real or personal property or of its use, loss of time, and loss of services are examples of this class of injuries. Nonpecuniary injuries are those for the measure of which no money standard is or can be applicable. As the books phrase it, damages in such cases are "at large." Bodily and mental pain and suffering are familiar examples of this class. Injury arising from loss of life as a right of action which survives to the personal representative falls within the latter class. *Broughel v. Southern New Eng. Telephone Co.*, 48 Atl. 751, 754, 73 Conn. 621, 84 Am. St. Rep. 176.

"Pecuniary injuries," as used in a statute providing that the damages resulting from the death of a person are such as the jury shall deem a fair and just compensation, not exceeding a certain sum, with reference to the "pecuniary injuries" resulting to the husband or widow and next of kin of the deceased person, has reference to prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from whom they would have proceeded. The word "pecuniary" is used in distinction to those injuries of the affection and sentiment which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes also those losses which result from the deprivation of the society and companionship of relatives, which are equally incapable of being defined by any recognized measure of value. *Bierbauer v. New York Cent. & H. R. R. Co.*, 15 Hun, 559, 562.

But infant children may sustain a loss from the death of their parent of a different kind. He owes them the duty of nurture, and of intellectual, moral, and physical training, and of such instruction as can only proceed from a parent. *Sternfels v. Metropolitan St. Ry. Co.*, 77 N. Y. Supp. 309, 315, 78 App. Div. 494.

Under a statute providing that the damages recoverable in an action for wrongfully causing death are to be assessed with reference "to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person," the amount of recovery has no regard to the needs of the persons designated, or to any moral obligation which may have rested upon the deceased to supply their wants. What the family would lose by the death would be what it was accustomed to receive, or had reasonable expectation of receiving, in his lifetime, and to show that the family was poor has no tendency towards showing whether this was or was likely to be large or small. One man contributes liberally in aid of his poor rela-

tives; another delights in contributing luxuries where comforts are already abundant; but when the contribution is cut off in either case the extent of the loss is not measured by the wealth or poverty of the recipient, but by the contribution itself. A dollar lost, whether by poor man or rich man, is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount must, when lost, be compensated to the same extent whether the loser be rich or poor. *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205, 214, 215.

The word "pecuniary," as used in the statute whereby children may have damages for pecuniary injuries owing to the death of a mother, includes loss of maternal education and care, notwithstanding that they have a father obliged to provide for them. *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, 476.

The pecuniary injuries for the death of a mother to which minor children are entitled in an action for wrongful death includes all pecuniary loss which the children sustain in reference to their mother's nurture and instruction, and moral, physical, and intellectual training. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252, 285, 86 Am. Dec. 297.

"Pecuniary injuries," as used in an instruction in an action for injuries causing death, that a recovery could be had for such amount as the jury deemed to be a fair and just compensation for the "pecuniary injuries" resulting from the decedent's death to the person or persons for whose benefit the action was brought, etc., is general and ambiguous, and it might be said to include mental suffering. Hence it was error on the giving of such instruction to refuse an additional charge that plaintiff could not recover for mental suffering. *Dorman v. Broadway R. Co.*, 1 N. Y. Supp. 334, 335.

#### As equivalent to necessary injury.

The phrase "pecuniary injury" in an instruction in a personal injury damage suit is equivalent to "necessary injury." *Goss v. Missouri Pac. Ry. Co.*, 50 Mo. App. 614, 629.

#### PECUNIARY INTEREST.

"Pecuniary interest," within the rule of law which disqualifies a person to serve as a juror if he has any pecuniary interest in the suit, would not include the interest which a member of the society of Free Masons has in the result of a suit brought against the society as a corporation. *Burdine v. Grand Lodge*, 37 Ala. 478, 481.

#### PECUNIARY LEGACY.

An annuity given by a will, whatever may be the direction as to the mode of its

payment, is a "pecuniary legacy." *Lang v. Ropke*, 10 N. Y. Leg. Obs. 70, 75.

A "pecuniary legacy" is a debt due from the estate, not a claim against a testator, which must be proved and paid in course of administration by a claim against the estate, imposed by will. In *re Williams' Estate*, 44 Pac. 808, 809, 112 Cal. 521, 53 Am. St. Rep. 224.

A bequest of a specified amount of gold and silver to be kept on investment by a trustee is not a specific legacy, but is a pecuniary legacy. *Mathis v. Mathis*, 18 N. J. Law (3 Har.) 59, 66.

A specific legacy is a bequest of a particular thing or of money specified and distinguished from all other property of the same kind, the title of which would vest in the legatee on the death of the testator with the assent of the executors. It differs from a general or pecuniary legacy in this respect: that if the thing, security, or money bequeathed is lost, paid, or destroyed in the lifetime of the testator, the legatee will not be entitled to any recompense or satisfaction out of his personal estate, whereas a general legacy is to be paid out of the assets of the testator when converted into money, if the same is sufficient for that purpose. *Humphrey v. Robinson*, 5 N. Y. Supp. 164, 166, 52 Hun, 200.

#### PECUNIARY LIABILITY.

"Pecuniary liability," as used in Gen. St. 1866, c. 11, § 78, prohibiting a county from incurring a pecuniary liability that will necessitate the levy of a tax exceeding a certain amount, includes an agreement by the county to issue county orders upon the completion of a jail. *Johnston v. Becker County*, 6 N. W. 411, 412, 27 Minn. 64.

#### PECUNIARY LOSS.

"Pecuniary," as used in the statement that a person suing for negligence causing death is only entitled to a pecuniary loss occasioned, is not construed in a very strict sense, the tendency being to include every element of injury that may be deemed to have any pecuniary value, although this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral, and physical training which a mother gives to her children, or the loss of the society of a near relative. *Webb v. Denver & R. G. W. Ry. Co.*, 24 Pac. 616, 618, 7 Utah, 17; *Florida Cent. & P. R. Co. v. Foxworth*, 25 South. 338, 348, 41 Fla. 1, 79 Am. St. Rep. 149.

In an action for damages for negligence causing death, an instruction defining "pecuniary loss" as the value in money, if any, of the life of the deceased, was upheld. *Hil-*

*lebrand v. Standard Biscuit Co.*, 73 Pac. 163, 164, 139 Cal. 233.

The word "pecuniary" in connection with the loss which a person sustains by the death of a parent or child is not construed in any very strict sense, and the tendency is to still greater liberality, and to include every element of injury that may be deemed to have a pecuniary value, though its value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, and of the intellectual, moral, and physical training which a mother can give to children. *Tilley v. Hudson River R. Co.*, 29 N. Y. 252, 287, 86 Am. Dec. 297. It may include the loss of expected services of children, who at the time of their death are too young to render any service. *Ihl v. Forty-Second St. & G. St. Ferry R. Co.*, 47 N. Y. 317, 7 Am. Rep. 450. But it does not include the mental suffering of the heirs of a deceased person. *Webb v. Denver, R. G. W. Ry. Co.*, 24 Pac. 616, 618, 7 Utah, 17.

A "pecuniary loss" for which lineal kindred may recover for the wrongful death of a relative from the cause of the negligence of another means what the life of the deceased was worth in a pecuniary sense to them. *Chicago, P. & St. L. R. Co. v. Woolridge*, 51 N. E. 701, 702, 174 Ill. 330.

A "pecuniary loss" is a loss of money or of something by which money or something of money value may be acquired. The loss of the society of a wife is not a pecuniary loss, for no pecuniary damage can be predicated on such loss. It is a case for which money cannot compensate, and cannot be estimated in money. *Green v. Hudson River R. Co.* (N. Y.) 32 Barb. 25, 33.

The word "pecuniary," when it occurs in statutes relating to death by wrongful act, is not used in the sense of the immediate loss of money or property. It looks to prospective advantages of a pecuniary nature which have been cut off by the premature death of the person from whom they would have proceeded. It is used in distinction to injuries to the sentiments which arise from the death of relatives, and excludes those losses which result from the deprivation of the society and companionship of relatives. *Duzan v. Myers*, 65 N. E. 1046, 1049, 30 Ind. App. 227, 96 Am. St. Rep. 341.

#### PECUNIARY OBLIGATION.

"Pecuniary obligation," as used in Insolvent Act, § 49, providing that no discharge shall be granted, etc., if a debtor has influenced the action of any creditor by any pecuniary obligation, includes verbal agreements as well as written. *Estudillo v. Megerstein*, 13 Pac. 869, 870, 72 Cal. 317.



"Pecuniary obligation," as the term is applied to a forged instrument in the statutory definition of forgery (Pen. Code, art. 437), means every instrument having money for its object, and every obligation for the breach of which a civil action for damages may be lawfully brought. The alleged forged instrument in this case was a telegram dispatch in the name of one M. at S. to one E. at A. announcing the death of one L., and asking a remittance of money for her remains. It was held that the instrument came within the statute, and was the subject of a forgery. *Dooley v. Syate*, 2 S. W. 884, 885, 21 Tex. App. 549.

The term "pecuniary obligation," as used in the definition of forgery, means every instrument having money for its object, and every obligation for the breach of which a civil action for damages may be lawfully brought. Pen. Code Tex. 1895, art. 536.

### PECUNIARY PROFIT.

1 Starr & C. Ann. St. par. 26, provides that no corporation established or maintained for pecuniary profit, shall purchase or hold real estate, except as provided for in this act. A charter of an educational institution, granted in a foreign state, defined the objects and powers of the corporation in very general terms, and made no provision as to stock, stockholders, or dividends. Held, that such a corporation is not a corporation for pecuniary profit within the meaning of the statute, notwithstanding such institution collected tuition from its pupils. What is meant by "pecuniary profit" is for the "pecuniary profit of its stockholders or members." In this case there was no pecuniary profit to the members of the corporation from this institution, there were no dividends declared, and no money given to any members. The trustees also derive no personal profit. The corporation is not conducted for any other purpose than educational and charitable purposes. *Santa Clara Female Academy v. Sullivan*, 6 N. E. 183, 188, 116 Ill. 380, 56 Am. Rep. 776 (citing *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529).

### PECUNIARY PROVISION.

A release by the husband to the wife, during coverture, of all his right, title, and interest by descent in her real estate, and of all claim he may have in her personal estate at her decease by allowance or otherwise, is not a "pecuniary provision" for her, within the meaning of Rev. St. c. 103, §§ 8, 9, and her release to him, in consideration thereof, of her right and interest by descent in his real estate, is invalid. *Pinkham v. Pinkham*, 49 Atl. 48, 49, 95 Me. 71, 85 Am. St. Rep. 392.

### PECUNIARY VALUE.

"Pecuniary value," as used in an instruction in an action to recover for the death of plaintiff's child, does not allow a consideration of the fact that plaintiff had been deprived of the happiness, comfort, and society of his daughter, nor can any physical or mental suffering incurred by the plaintiff or his family by reason of such death be considered, but only the value of the child's services from the time of her death until she would have attained her majority, less the cost of her support and maintenance. As to acts of kindness and attention, such as it would be expected a child would render to the members of the appellee's family, which would be of some pecuniary value, they are to be included. The nursing of sick members of the family and other favors and acts rendered, attending to the other children, all may be said to be acts of kindness and attention reasonably expected to be performed by a daughter, and they are of value to the father; for, if not performed by her, other help must necessarily be provided to perform them. *Louisville, N. A. & C. R. Co. v. Rush*, 28 N. E. 1010, 1011, 127 Ind. 545.

The loss of a parent's care in the education, maintenance, and support of children has, in addition to its moral value, an appreciable "pecuniary value," and therefore the jury in an action for the death of plaintiff's father is not necessarily restricted to nominal damages, though there was no showing as to the earnings of the father. *Stoher v. St. Louis, I. M. & S. Ry. Co.*, 4 S. W. 389, 393, 91 Mo. 509.

### PEDDLE.

For the purpose of the act relating to the licenses of transient merchants, etc., the word "peddle" is defined as meaning to sell or offer for sale manufactures, goods, wares, or merchandise directly to a consumer, either by one going from house to house for the purpose of selling and delivering such goods, or for the purpose of taking orders for the future delivery of such goods, or by one selling and delivering such goods from a pack or vehicle in any public road, street, square, or other public place. *Hornor's Rev. St. Ind. 1901*, § 5270g.

### PEDDLER.

See "Bogus Peddler"; "Traveling Peddler."

Hawker synonymous, see "Hawker."

Wedgwood, in his Dictionary of Etymology, says that "a ped in Norfolk is a pannier or wicker basket; a pedder or peddler a packman, one who carries on his back goods for sale." *Chambers' Cyclopædia*, in

the article entitled "Hawkers and Peddlers," says: "Hawkers, also called peddlers, or petty chapmen, are persons who go from town to town, or from door to door, selling goods, wares, and merchandise." Endicott, J., in a Massachusetts case, gives the following definition: "A hawker or peddler is an itinerant trader, who goes from place to place, and from house to house, carrying for sale and exposing the goods, wares, and merchandise which he carries. He generally deals in small, cheap articles, such as he can conveniently carry in a cart or on his person." And Stone, C. J., says: "The term 'peddler' has many definitions more or less full. \* \* \* Its popular definition is a small retail dealer, who, carrying his merchandise with him, travels from house to house, or from place to place, either on foot or horseback or in a vehicle drawn by one or more animals, exposing his goods for sale and selling them." *Randolph v. Yellowstone Kit*, 83 Ala. 472, 3 South. 706. From these definitions, which are but a few of many, the term becomes plain. A peddler, then, is a small retail trader of cheap articles who travels from house to house, without any fixed business domicile, carrying his entire stock of merchandise with him, either on his back or drawn after him. The main idea is that he is itinerant, ambulatory, without any fixed place of business, irresponsible. As a Pennsylvania judge says: "The peddler is a transient, with no fixed place of business, who, by the time he is wanted to answer for his representations and engagements, is out of sight and out of reach of process." In *re Wilson* (U. S.) 19 D. C. 341, 342 (citing *Commonwealth v. Gardner*, 19 Atl. 550, 551, 133 Pa. 284, 7 L. R. A. 666, 19 Am. St. Rep. 645, 25 Wkly. Notes Cas. 462); *Emmons v. City of Lewiston*, 24 N. E. 58, 59, 132 Ill. 380, 8 L. R. A. 328, 22 Am. St. Rep. 540; *City of Davenport v. Rice*, 39 N. W. 191, 192, 75 Iowa, 74, 9 Am. St. Rep. 454; *Commonwealth v. Farnum*, 114 Mass. 267, 270; *Commonwealth v. Ober*, 66 Mass. (12 Cush.) 493, 495; *Village of Stamford v. Fisher*, 35 N. E. 500, 501, 140 N. Y. 191; *Village of Cerro Gordo v. Rawlings*, 25 N. E. 1006, 1007, 135 Ill. 36; *Delisle v. City of Danville*, 36 Ill. App. 659, 660; *Higgins v. Rinker*, 47 Tex. 403; *Kennedy v. People*, 49 Pac. 373, 374, 9 Colo. App. 490; *Saulsbury v. State*, 63 S. W. 568, 569, 43 Tex. Cr. R. 90, 96 Am. St. Rep. 837; *City of Brookfield v. Kitchen*, 63 S. W. 825, 826, 163 Mo. 546; *State v. Hoffman*, 50 Mo. App. 585, 586; *City of Moberly v. Hoover* (Mo.) 67 S. W. 721; *Clements v. Town of Casper*, 35 Pac. 472, 474, 4 Wyo. 494; *State v. Fetterer*, 32 Atl. 394, 395, 65 Conn. 287; *Woolman v. State*, 32 Tern. (2 Swan) 353, 354; *Hewson v. Inhabitants of Englewood Tp.*, 27 Atl. 904, 905, 55 N. J. Law, 522, 21 L. R. A. 736; *Ballou v. State*, 6 South. 393, 87 Ala. 144.

A peddler is a dealer or trader in small wares, who has no permanent place of business, but carries his wares with him from place to place, or from house to house. He is one who buys to sell again, whose gains are the profits realized on small sales. In *re Wilson* (U. S.) 19 D. C. 341, 349, 12 L. R. A. 624.

"A peddler is an itinerant who goes from place to place and from house to house carrying for sale and exposing to sale the goods, wares, or merchandise he carries. He generally deals in small and cheap articles, such as he can conveniently carry in a cart or on his person." *Commonwealth v. Farnum*, 114 Mass. 267, 270.

The leading primary idea of a hawker and peddler is that of an itinerant or traveling trader who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader, who has goods for sale and sells them in a fixed place of business. *Commonwealth v. Ober*, 66 Mass. (12 Cush.) 493, 495; *Emert v. State of Missouri*, 15 Sup. Ct. 367, 369, 156 U. S. 296, 39 L. Ed. 430.

Some lexicographers create a distinction between the terms "peddlers" and "hawkers" by superadding to the elements used in the definition of a peddler that of public outcry, which is conceived by some to be intimated by the derivation of the word; but the words are usually treated both by dictionaries and courts as being synonymous, so that a law imposing a license tax upon hawkers and peddlers includes any traveling vender coming within either category. *Hall v. State*, 23 South. 119, 121, 39 Fla. 637; *Pegues v. Ray*, 23 South. 904, 905, 50 La. Ann. 574; *Hall v. State*, 23 South. 119, 121, 39 Fla. 637 (citing *Fisher v. Patterson*, 13 Pa. [1 Harris] 336; *City of South Bend v. Martin*, 142 Ind. 31, 41 N. E. 315, 29 L. R. A. 531; *Emmert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430); *Commonwealth v. Edson*, 2 Pa. Co. Ct. R. 377, 379.

The words "peddler" and "hawker" have a settled meaning, independently of statutory definition. The former is an itinerant trader, a person who sells small wares, which he carries with him in traveling about from place to place, while the latter is also a trader who goes from place to place, or along the streets of a town, selling the goods which he carries with him, although it is generally understood from the word that a hawker seeks for purchasers either by outcry, as the derivation of the word would seem to indicate, or by attracting notice and attention to the goods as being for sale, by actual exposure or exhibition of them by cards or labels or by conventional signals or signs. *Clements v. Town of Casper*, 4 Wyo. 494, 500, 35 Pac. 472.

A peddler is one who sells goods, wares, and merchandise by outcry on the streets or public places in a city, or by attracting persons to purchase goods exhibited for sale at such places by cards or signals, or by going from house to house selling or offering goods for sale at retail to individuals not dealers in such commodities, whether the goods be carried along for delivery personally, or whether the sales are made for future delivery. *Graffy v. City of Rushville*, 8 N. E. 609, 611, 107 Ind. 502, 57 Am. Rep. 128.

A peddler is primarily one who travels on foot, and the provision of the statute that any person carrying a wagon, cart, or buggy for the purpose of exhibiting or delivering any wares or merchandise shall be considered a peddler was not intended to restrict the signification, but to extend it to the additional class who sold the goods they carried around in cart, wagon, or buggy, and not on foot. *State v. Frank*, 41 S. E. 785, 130 N. C. 724, 89 Am. St. Rep. 885 (citing *State v. Franks*, 127 N. C. 510, 37 S. E. 70).

A peddler is one who sells anything having value, bought by him, and sold from place to place in small quantities. *Roy v. Schuff*, 51 La. Ann. 86, 24 South. 788. Or one who carries about with him the articles of merchandise which he sells; that is to say, the identical merchandise he sells he has with him, and delivers at the time of sale. *Tax Collector v. Roy*, 23 South. 904, 50 La. Ann. 574 (quoted and approved in *State ex rel. Graffina v. Finnegan*, 27 South. 564, 565, 52 La. Ann. 694).

The term "peddler" includes any one who goes from place to place to peddle or retail goods, wares, or other things, without regard to the distance between the different places visited in so selling. *West v. City of Mt. Sterling (Ky.)* 65 S. W. 120, 122.

The traveling from place to place, though within the same town, for the purpose of vending goods, wares, and merchandise, without having obtained a license therefor, is a violation of St. 1846, c. 200, and St. 1848, c. 63. *Andrews v. White*, 32 Me. 388, 389.

All itinerants, residents and nonresidents, selling goods, wares, and merchandise, wherever manufactured, are peddlers within Gen. St. Ky. c. 84, requiring peddlers to procure a license, etc. *Ex parte Davis (U. S.)* 21 Fed. 396, 397.

Rapalje defines a "peddler" to be a person who carries goods from place to place for sale, while Webster defines a peddler to be a traveling trader; one who carries about small commodities on his back or in a cart or wagon and sells them. By "peddling" we understand to go around from house to house, or from customer to customer, and sell goods.

*Du Bolstown v. Rochester Brewing Co.*, 9 Pa. Co. Ct. R. 442, 443.

One who goes from house to house selling his wares is a peddler. It is not necessary that he drive his goods upon the street. *People v. Baker*, 73 N. W. 115, 116, 115 Mich. 199.

A person who has no fixed place of business, but travels about from place to place, and carries with him a stock of goods, which he offers for sale, and delivers then and there, is a peddler. *In re Pringle*, 72 Pac. 864, 865, 67 Kan. 364 (citing *City of South Bend v. Martin*, 41 N. E. 315, 142 Ind. 31, 29 L. R. A. 531).

A peddler is a small retail dealer, who carries his merchandise with him, travels from house to house or place to place, either on foot or horseback, or in a vehicle drawn by one or more animals, exposing his goods for sale and selling them. *State v. Hoffman*, 50 Mo. App. 585, 589.

A peddler primarily means one who sells, but one who buys produce from licensed hucksters in a certain county to sell again at retail in another is not a peddler within the terms of a statute relating to peddling in the former county. *Lebanon County v. Kline*, 2 Pa. Co. Ct. R. 621, 622.

The legal primary idea of peddler is that of an itinerant or traveling tradesman, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader, who has goods for sale and sells them at a fixed place of business. *Commonwealth v. Myer*, 92 Va. 809, 814, 23 S. E. 915, 31 L. R. A. 379.

Rev. St. U. S. § 3244, subd. 11, defines peddlers of tobacco as being persons who sell or offer to sell manufactured tobacco, snuff, or cigars, traveling from place to place in the town or in the country. In quoting this definition the court says that when the Legislature saw fit to declare that a person who commits certain enumerated acts shall be considered a peddler, and treated as such, it is too late to resort to glossaries to ascertain whether the Legislature observed the dictionary definition of the occupation according to antecedent usage or strict etymological rules. *In re Wilson (U. S.)* 19 D. C. 350, 362, 12 L. R. A. 624.

Another employé of the defendant's employer had solicited and secured from citizens in the state orders for the enlargement of pictures. With each customer he left a contract, stating that the picture would be delivered in an appropriate frame, which the customer was advised, but not compelled, to buy. When the pictures were completed, they were returned to this state, accompanied by frames adapted to the size of the enlarged pictures. The defendant, in the

course of his employment, received the pictures and frames. He then delivered the pictures, going to each customer who had given an order, and taking to each his picture, which the defendant had placed in one of the frames which had accompanied the picture. At the time of delivery he offered for sale, exposed for sale, and endeavored to sell, a frame to each person who had ordered a picture. He called upon the other parties, and made no attempt to sell otherwise. He had no license to peddle in this state. Held, that the actions stated peddling picture frames without a license. *State v. Montgomery*, 92 Me. 433, 437, 439, 43 Atl. 13.

The term "peddler," as used in Act March 27, 1848, forbidding any person from selling goods as a peddler, means one who goes about with goods making sales; and it is not a violation of the act to travel from farm to farm exchanging the goods of a merchant for farm produce, but taking orders for goods while traveling through the country, and afterwards delivering the goods and taking pay, is a violation of the statute. *Commonwealth v. Edson*, 2 Pa. Co. Ct. R. 377, 379.

All itinerant persons vending lightning rods, patent rights, or territory for the sale, use, or manufacture of patent rights, goods, wares, merchandise, clocks, watches, jewelry, gold, silver, or plated ware, spectacles, drugs, nostrums, perfumery, and any other thing not specially exempt, shall be deemed peddlers. No persons shall be deemed peddlers for selling tinware, agricultura. implements, sewing machines, portable mills, books, pamphlets, papers, meat, stoneware, or farm or garden products, nor merchants nor their agents for selling by sample; but nothing herein shall exempt itinerant persons selling agricultural implements from paying license under the law. *Ky. St. 1903*, §§ 4216, 4218.

Whoever, except itinerant venders, commercial travelers, selling agents, or dealers in the usual course of business, and persons selling by sample for future delivery, goes from town to town, or from place to place in the same town, carrying for sale or exposing for sale goods, wares, and merchandise, shall be deemed a hawker or peddler within the meaning of the chapter relating to itinerant merchants, hawkers, and peddlers. *Rev. Laws Mass. 1902*, p. 598, c. 65, § 13.

A person going from town to town, or from place to place in the same town, carrying to sell, or exposing for sale, goods composed in whole or part of cotton, linen, wool, or silk, plated or gilded ware, jewelry, patent medicine, or a compound medicine the composition of which is kept secret from the public, watches or clocks, which are the manufacture of this state; and a person who transports such goods, wares, or merchandise

from town to town, or who comes from without the state into a town within the same, bringing such goods, wares, or merchandise, and in a town to which he transports or brings the same temporarily exposes such goods, wares, or merchandise for sale at auction or otherwise, at a public or private house, store, or other place—shall be deemed a peddler. *V. S. 1894*, 4731.

#### **Assistant to peddler.**

One who travels through the state with an unlicensed peddler, carrying his valises, and assisting him in making sales, and receiving therefor payment of his expenses, is a "peddler" within the meaning of a statute requiring peddlers to have a license. *Keller v. State*, 26 South. 323, 324, 123 Ala. 94.

#### **Book canvasser.**

Book canvassers who solicit subscriptions for books for future delivery are neither hawkers nor peddlers. *Rawlings v. Village of Cerro Gordo*, 32 Ill. App. 215, 217; *Emmons v. City of Lewistown*, 24 N. E. 58, 59, 132 Ill. 380, 8 L. R. A. 328, 22 Am. St. Rep. 540.

#### **Corporation.**

Under the statutes a peddler is a natural person, who itinerates for trading purposes, and there is no authority for issuing or enforcing against a trading corporation an execution for a special tax alleged to be due by it as a peddler. *Bohannon v. Wrought-Iron Range Co.*, 36 S. E. 907, 111 Ga. 860. See, also, *Commonwealth v. Morgan*, 10 Pa. Co. Ct. R. 292.

#### **Commercial traveler or drummer.**

See "Commercial Traveler"; "Drummer."

#### **Deliverer of goods.**

Where manufacturers of household goods of West Virginia sent their agents into North Carolina to sell goods by sample on the installment plan, the goods to be delivered to each purchaser by the agent afterwards, the fact that the goods were to be delivered by the agent does not make him liable to pay tax as a peddler, as prescribed by *Laws N. C. 1889*, c. 216, § 24. In *re Spain* (U. S.) 47 Fed. 208, 14 L. R. A. 97.

Under a city ordinance which provides that any person who shall sell, or offer for sale, barter, or exchange, any goods or other articles of value, in any street or alley or other public place, or in wagons or other vehicles, or at private or public houses, shall be deemed a peddler, a person who delivers goods previously sold by another is not a peddler. *City of Stuart v. Cunningham*, 55 N. W. 311, 312, 88 Iowa, 191, 20 L. R. A. 430.

A person whose business it is to make weekly or semiweekly visits to his custom-

ers, to solicit orders and deliver goods previously ordered, is neither an itinerant nor a peddler, within the meaning of the statute. *Brenner v. Commonwealth*, 9 Ky. Law Rep. 289.

It is not a violation of St. 1846, c. 244, § 1, requiring a license "from every hawker, peddler, or petty chapman, or other person going from town to town, or from place to place, or from dwelling house to dwelling house in the same town, either on foot or with one or more horses, or otherwise carrying for sale or exposing to sale any goods," etc., for an agent to deliver goods, made by his principal in Boston, to traders in the country who had previously ordered them from his principal, nor to deliver, at the same time and under the same circumstances, a larger quantity of the same goods than they had previously ordered. *Commonwealth v. Ober*, 66 Mass. (12 Cush.) 493, 495.

Under a township ordinance, requiring "hawkers, peddlers, and itinerant vendors of merchandise" to take out a license, an agent of a merchant in another state, who takes orders for goods in the township, and afterwards delivers the goods, cannot be required to take out a license. *Hewson v. Inhabitants of Englewood Tp.*, 27 Atl. 904, 905, 55 N. J. Law (26 Vroom) 522, 21 L. R. A. 736.

One who, having a place of business in another town, goes about delivering goods at the houses of his customers, in pursuance of orders previously taken, and takes orders for future delivery, is not a peddler, within the meaning of Laws 1883, c. 465, authorizing village trustees to regulate or prevent peddling in the streets. *Village of Stamford v. Fisher*, 35 N. E. 500, 501, 140 N. Y. 187, affirming 17 N. Y. Supp. 609, 610, 63 Hun, 123.

Delivering goods to those who had previously ordered them is not in violation of an act forbidding hawking and peddling without a license; but carrying goods under cover of such orders, for sale whenever and wherever one could find purchasers, without regard to any pre-existing arrangement, is a violation of such an act. *Commonwealth v. Edson*, 2 Pa. Co. Ct. R. 377, 379.

The mere delivery of beer in bottles on orders sent in by a soliciting agent is not a "peddling," within the meaning of a borough ordinance requiring a liquor license for "peddling with a wagon." *Du Boistown v. Rochester Brewing Co.*, 9 Pa. Co. Ct. R. 442, 443.

An agent, in delivering portraits which his principal manufactured under contracts requiring their delivery in frames, sold the frames to the portrait buyers, the option to purchase being given them by the contracts. He did not sell them to others than portrait buyers, or go anywhere to sell them except

where he had to deliver portraits. Held, that he was not within Act 1893, requiring "hawkers and peddlers" of goods to pay a license fee. *State v. Coop*, 30 S. E. 609, 52 S. C. 508, 41 L. R. A. 501.

#### **Lightning rod agent.**

A lightning rod agent who sells no rods without putting them up, and who charges by the foot for his work in putting up the rods or repairing them, is not a peddler, subject to pay the license required by Code, § 533, from those who peddle. *Ezell v. Thrasher*, 76 Ga. 817, 819.

A lightning rod man is a peddler, and his occupation a privilege which, under Acts 1873, § 46, cannot be exercised without a license. *State v. Wilson*, 70 Tenn. (2 Lea) 28.

#### **Farmer retailing crops.**

Farmers who sell products raised on their own farms by driving through the streets of a city and stopping at such times and places as their business and customers require are not hawkers and peddlers, within the meaning of an ordinance requiring a license for hawking and peddling. *Borough of Lansford v. Wertman*, 18 Pa. Co. Ct. R. 469, 470; *Commonwealth v. Gardner*, 19 Atl. 550, 551, 133 Pa. 284, 7 L. R. A. 666, 19 Am. St. Rep. 645, 25 Wkly. Notes Cas. 462; *Roy v. Schuff*, 24 South. 788, 789, 51 La. Ann. 86.

#### **Mode of conveyance.**

Hawkers, peddlers, or petty chapmen are defined to be persons traveling from town to town with goods and merchandise. The manner of traveling, whether on foot or horseback, in wagons, carts, sleighs, or canal boats, does not enter into the definition. They are considered hawkers, peddlers, and petty chapmen when they travel from town to town with goods or merchandise for sale, without regard to the mode of conveyance. Nor is it of the slightest consequence whether the conveyance or vehicle is drawn by horses, mules, oxen, or steam propeller. *Fisher v. Patterson*, 13 Pa. (1 Harris) 336, 338; *The Stella Block v. Parish of Richland*, 26 La. Ann. 642; *Cole v. Randolph*, 31 La. Ann. 535, 537.

#### **Ownership of goods.**

One who carries around goods from door to door and sells them is a peddler, within the license laws, whether the goods belong to him, or to another who employs him to sell upon a salary. In *re Wilson*, 19 D. C. 341, 349, 12 L. R. A. 624; *District of Columbia v. Wilson*, 19 Wash. Law Rep. 337; *State v. Smithson*, 17 S. W. 221, 222, 106 Mo. 149; *Commonwealth v. Gardner*, 19 Atl. 550, 551, 133 Pa. 284, 7 L. R. A. 666, 19 Am. St. Rep. 645, 25 Wkly. Notes Cas.

462; *Commonwealth v. Morgan*, 10 Pa. Co. Ct. R. 292.

**Permanent stand.**

A person who occupies a store or other permanent stand, and does not travel from place to place offering his goods for sale, is not a hawker or peddler. *Gould v. City of Atlanta*, 55 Ga. 678, 687; *Delisle v. City of Danville*, 36 Ill. App. 659, 662; *State v. Hodgdon*, 41 Vt. 139, 141.

A person who rented a vacant lot in the city, and erected thereon a large tent with numerous stands and benches, and gave free exhibitions, in which he frequently extolled the merits of his goods, and sold medicines and such like from stock in his tent, but neither made nor solicited sales outside of the tent, was not subject to Sess. Acts 1886-87, p. 37, § 5, subd. 18, requiring peddlers of medicines to have a license. *Randolph v. Yellowstone Kit*, 8 South. 706, 707, 83 Ala. 471.

**Sale at auction.**

Under Gen. St. c. 81, § 2, providing that any person going from town to town or from place to place in the same town, either on foot or otherwise, carrying to sell or exposing for sale certain goods, shall be deemed a peddler, one transporting from town to town the kind of goods mentioned, and temporarily exposing them for sale at auction and otherwise, was a peddler. *State v. Hodgdon*, 41 Vt. 139, 141.

**Sales to dealers.**

One who, as agent for a wholesale confectioner, makes regular periodical trips through certain towns, with a wagon loaded with packages of candy, calling on retail dealers only, taking orders and filling them from the wagon if he can, otherwise booking them to be filled by a subsequent delivery, is not a peddler, within Pub. Acts 1893, p. 271, c. 121, entitled "An act concerning sales of merchandise by itinerant peddlers," and providing for licensing persons to engage in the business of auctioneer, peddler, or hawker, or as travelling itinerant purchaser of second-hand goods; the statute contemplating the licensing of transient business for a brief period and only applying to small sales. *State v. Fetterer*, 32 Atl. 304, 395, 65 Conn. 287.

Though Ky. St. § 4216, provides that all itinerant persons vending anything not specially exempt shall be deemed peddlers, sales to merchants for the purposes of resale were not contemplated by the statute, but only sales directly to the public. *Standard Oil Co. v. Commonwealth*, 55 S. W. 8, 9, 107 Ky. 606.

**Sales on installment plan.**

One who goes from house to house with articles of commerce, there offering them for

sale on the installment plan, and delivering them as sold, is engaged in peddling. *City of South Bend v. Martin*, 41 N. E. 315, 317, 142 Ind. 31, 29 L. R. A. 531; *Commonwealth v. Harmel*, 30 Atl. 1036, 1037, 166 Pa. 89, 27 L. R. A. 388, 36 Wkly. Notes Cas. 1.

One whose business consists in going from house to house with rugs, making contracts of leasing at a stipulated amount weekly, the title passing to the party renting when the whole amount of the rental is paid, is a peddler within the meaning of the ordinance requiring peddlers to have a license. *People v. Sawyer*, 64 N. W. 333, 106 Mich. 428.

**Sales by order or sample.**

A solicitor employed by a mercantile establishment to call on citizens and solicit orders for goods kept for sale by it, and who usually carries samples, is not a peddler within the meaning of an ordinance imposing a fine for hawking and peddling goods without a license, though so declared by it. *City of Davenport v. Rice*, 39 N. W. 191, 192, 75 Iowa, 74, 9 Am. St. Rep. 454; *Kimmel v. City of Americus*, 31 S. E. 623, 625, 105 Ga. 694; *Clements v. Town of Casper*, 35 Pac. 472, 474, 4 Wyo. 494; *City of Brookfield v. Kitchen*, 63 S. W. 825, 826, 163 Mo. 546; *Village of Cerra Gordo v. Rawlings*, 25 N. E. 1006, 1007, 135 Ill. 36; *Hewson v. Inhabitants of Township of Englewood*, 27 Atl. 904, 905, 55 N. J. Law, 522, 21 L. R. A. 736.

Canvassing or taking orders for books, pictures, etc., is not peddling, within the meaning of a statute authorizing municipal corporations to license or prohibit the same, and persons so occupied are not peddlers. *Rawlings v. Village of Cerro Gordo*, 32 Ill. App. 215, 217 (quoting *Bouv. Law Dict.*; *Webst. Dict.*).

One who goes about monthly from house to house in a village delivering goods previously ordered, and at the same time taking orders for future delivery, but does not expose his goods for sale on the streets, is not engaged in peddling in the streets within the meaning of Laws 1883, c. 465, authorizing village trustees to regulate peddling on the public streets. *Village of Stamford v. Fisher*, 17 N. Y. Supp. 609, 610, 43 N. Y. St. Rep. 864, 869.

"Peddling" has been defined in *State v. Lee*, 113 N. C. 681, 18 S. E. 713, 37 Am. St. Rep. 649, as the occupation of an itinerant vender of goods who sells and delivers the identical goods he carries with him, and not the business of selling by sample and taking orders for goods to be thereafter delivered, and to be paid for wholly or in part upon their subsequent delivery. *State v. Ninestein*, 43 S. E. 936, 938, 132 N. C. 1039 (citing *State v. Frank*, 130 N. C. 724, 41 S. E. 785, 89 Am. St. Rep. 885).

One selling personal property by sample, taking orders for future delivery, to be paid for only on such delivery, and who does not deliver the goods sold, is a drummer, as contradistinguished from a peddler. *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; *State v. Emert*, 103 Mo. 241, 15 S. W. 81, 11 L. R. A. 219, 23 Am. St. Rep. 874. A peddler is an itinerant vender of goods, who sells and delivers the identical goods carried with him. He who sells by sample, taking orders for goods for future delivery, to be paid for wholly or in part on subsequent delivery, is not a peddler. It has never been understood, either by the profession or the people, that one who is ordinarily styled a drummer—that is, one who sells to retail dealers or others by sample—is either a hawker or peddler. *Potts v. State (Tex.)* 74 S. W. 31, 33 (citing *Emmons v. City of Lewistown*, 132 Ill. 380, 24 N. E. 58, 8 L. R. A. 328, 22 Am. St. Rep. 540).

A person who has a store and travels through the adjoining country soliciting orders, which he afterwards fills, is not a peddler, within the meaning of Act April 10, 1869 (P. L. p. 835), prohibiting sales without a license by "a hawker or peddler or traveling merchant." *Commonwealth v. Eichenburg*, 140 Pa. 158, 21 Atl. 258; *Commonwealth v. Horn*, 12 Pa. Co. Ct. R. 284, 285; *Horn v. Commonwealth*, 2 Pa. Dist. R. 178.

One who goes from house to house with samples of goods or merchandise, soliciting orders from persons not dealers, for future delivery, is a peddler, within the meaning of Rev. St. 1881, § 3106, subd. 23. *Graffy v. City of Rushville*, 8 N. E. 609, 611, 107 Ind. 502, 57 Am. Rep. 128.

An ordinance requiring peddlers to have a license does not apply to the traveling agents of wholesale houses, who sell goods by sample, and do not deliver them. *City of Olney v. Todd*, 47 Ill. App. 439, 440; *City of Kansas v. Collins*, 8 Pac. 865, 866, 84 Kan. 434; *McClelland v. City of Marietta*, 22 S. E. 329, 96 Ga. 749; *Commonwealth v. Jones*, 70 Ky. (7 Bush) 502, 503; *Burbank v. McDuffee*, 65 Me. 135, 136; *Ex parte Taylor*, 58 Miss. 478, 481, 38 Am. Rep. 336; *State v. Wells*, 45 Atl. 143, 144, 69 N. H. 424, 48 L. R. A. 99 (citing *Commonwealth v. Ober*, 66 Mass. [12 Cush.] 493, 495); *State v. Fetterer*, 32 Atl. 394, 395, 65 Conn. 287.

Taking orders for goods to be manufactured is not peddling, within the meaning of a town ordinance requiring peddlers to take out a license. *Incorporated Town of Spencer v. Whiting*, 28 N. W. 13, 14, 68 Iowa, 678.

One who goes about a village carrying samples and taking orders for a nonresident firm is not a hawker or peddler. *Emmons v. City of Lewistown*, 24 N. E. 58, 59, 132

Ill. 380, 8 L. R. A. 328, 22 Am. St. Rep. 540; *Village of Cerro Gordo v. Rawlings*, 25 N. E. 1006, 1007, 135 Ill. 36, affirming *Rawlings v. Village of Cerro Gordo*, 32 Ill. App. 215, 217.

A salesman who goes from house to house, carrying with him a sample stove, and who takes orders for stoves that are filled by the subsequent delivery of stoves other than the one carried as a sample, is not a peddler. *Ballou v. State*, 6 South. 393, 87 Ala. 144; *State v. Lee*, 18 S. E. 713, 714, 113 N. C. 681, 37 Am. St. Rep. 649; *State v. Gibbs*, 20 S. E. 172, 173, 115 N. C. 700; *Wrought-Iron Range Co. v. Carver*, 24 S. E. 352, 353, 118 N. C. 328.

A peddler is one who itinerates for trading purposes, and his employer, though owning the goods, team, and vehicle, will not be deemed a peddler, and will not be required to obtain a license nor be subjected to any penalty or forfeiture for failing to do so; and one who goes from place to place with a sample stove carried upon a wagon, which is exhibited as a sample, and who procures orders which his employer afterwards fills by delivering through other agents, will be deemed a peddler. *Wrought Iron Range Co. v. Johnson*, 11 S. E. 233, 234, 84 Ga. 754, 8 L. R. A. 273.

The term "peddler or hawker" in a village ordinance requiring the licensing of peddlers or hawkers, does not include a non-resident merchant tailor exhibiting samples of cloth and taking orders for suits of clothing to be made and delivered afterward. *Radebaugh v. Plain City*, 11 Ohio Dec. 612.

Soliciting orders and taking measurements for the making of shirts is not a violation of a city ordinance which prohibits selling, offering for sale, bartering, or exchanging any goods, wares, merchandise, or other articles of value without a license. *City of Elgin v. Picard*, 24 Ill. App. 340.

When one person travels through the country as an itinerant, exhibiting samples of goods and taking orders for goods of like character, and another follows in his wake delivering the goods thus sold, both should be regarded as peddlers, when it appears that the business was thus conducted in pursuance of a scheme to avoid the Georgia law requiring peddlers to register and pay taxes. *Duncan v. State*, 30 S. E. 755, 105 Ga. 457.

The salesman of a dry goods merchant in an adjoining county went from house to house in a buggy, carrying trunks and boxes containing samples of notions, dry goods, and clothing, for which he secured orders, and forwarded them to the store. The goods were shipped to the purchasers in care of the salesman, and were delivered by him without the use of a buggy, cart, or wagon. Held, that the salesman was a peddler with-

in Act 1899, c. 11, § 25, imposing a license tax on peddlers, and defining peddlers as any person carrying a wagon, cart, or buggy for the purpose of exhibiting or delivering any wares or merchandise. *State v. Franks*, 37 S. E. 70, 127 N. C. 510.

A person who traveled on foot making sale by sample, and afterwards delivering the goods, traveling on foot, not using a wagon, cart, or buggy in any manner, is not a peddler within the meaning of the statute. *State v. Frank*, 41 S. E. 785, 130 N. C. 724; 89 Am. St. Rep. 885.

A person who has a store and travels through the adjoining country soliciting orders, which he afterwards fills, is not a peddler within the meaning of Act April 10, 1869, prohibiting sales without a license by a peddler or traveling merchant. *Commonwealth v. Eichenberg*, 21 Atl. 258, 259, 140 Pa. 158.

The term "peddlers" in a municipal ordinance licensing peddlers includes a person who brings a small stock of merchandise to a city, which he deposits at his boarding house, and solicits orders from house to house, carrying samples with him, selling on the installment plan, and subsequently delivering the goods, if he does not have them with him, from his boarding house. *McDermott v. City of Lewistown*, 92 Ill. App. 474, 475.

#### **Sales to regular customers.**

Butchers, who deliver meat to their customers from a wagon to fill orders previously given, and also sell meat from said wagon to persons who have not previously ordered it, and whose driver is in the habit of going to houses and soliciting the inmates to buy when they do not see the wagon and come out on the street, are peddlers, though they only sell meat to regular customers. *Davis v. City of Macon*, 64 Ga. 128, 136, 37 Am. Rep. 60; *City of Duluth v. Krupp*, 49 N. W. 235, 236, 46 Minn. 435; *Village of Ballston Spa v. Markham*, 11 N. Y. Supp. 826, 827, 58 Hun. 238; *Borough of Elizabeth v. Braum*, 17 Pa. Co. Ct. R. 257, 258.

A milk dealer, who sells milk from door to door, is a peddler, although he has regular customers. *City of Chicago v. Barte*, 100 Ill. 57, 61.

#### **Single sale.**

A single sale does not amount to a violation of the law against hawking and peddling without a license. The act requires that there should be a system, and that accused should go into it as a business. *Incorporated Town of Spencer v. Whiting*, 28 N. W. 13, 14, 68 Iowa, 678; *Commonwealth v. Edson*, 2 Pa. Co. Ct. R. 377; *State v. Belcher* (S. C.) 1 McMul. 40, 42; *In re Houston* (U. S.) 47 Fed. 539, 541, 14 L. R. A. 719.

The fact that a drummer makes a single sale and delivery from his samples does not make him a hawker or peddler. *City of Kansas v. Collins*, 8 Pac. 865, 866, 34 Kan. 434.

Going from place to place to solicit by sample and fill orders for sewing machines is not a violation of Gen. St. c. 50, § 27, forbidding unlicensed hawking and peddling, although occasionally an order was filled by delivery of the sample. *Commonwealth v. Farnum*, 114 Mass. 267, 270.

Under Rev. St. § 7211, declaring any person who deals in goods by going from place to place to sell the same to be a peddler, one who, as agent of an establishment located in another state, takes one of the harrows which it has shipped into the state to an agent, and goes through the country with it, sometimes selling the single harrow outright, at other times taking a written order and then delivering the one with him, and at other times taking a written order and then going back to the agent to whom they had been shipped for one, is a peddler. *State v. Snoddy*, 31 S. W. 86, 128 Mo. 523.

A person who solicits orders, by sample, for sewing machines and their parts and attachments, for a foreign sewing-machine company which has a store and stock of goods in the state, from which such orders are filled, is not a hawker or peddler, though he occasionally sells a sample machine out of his wagon. *State v. Moorehead*, 20 S. E. 544, 545, 42 S. O. 211, 26 L. R. A. 585, 46 Am. St. Rep. 719; *Alexander v. Greenville County*, 27 S. E. 469, 49 S. O. 527.

## **PEDIGREE.**

The term "pedigree" means "the lineage, descent, or succession of families." It embraces "not only descent and relationship, but also the facts of birth, marriage, and death, and the time when these events happened." Pedigree may be proved by reputation or hearsay. *Swink v. French*, 79 Tenn. (11 Lea) 78, 80, 42 Am. Rep. 277; *American Life Ins. & Trust Co. v. Rosenagle*, 77 Pa. (27 P. F. Smith) 507, 516; *Hammond v. Noble*, 57 Vt. 193, 203 (citing Whart. Ev. § 208); *In re Hurlburt's Estate*, 35 Atl. 77, 68 Vt. 366, 35 L. R. A. 794; *Stein v. Bowman*, 38 U. S. (13 Pet.) 220, 10 L. Ed. 129; *People v. Koerner*, 48 N. E. 730, 795, 154 N. Y. 355; *Young v. Shulenberg*, 59 N. E. 135, 136, 165 N. Y. 385, 80 Am. St. Rep. 780; *Terwilliger v. Industrial Ben. Ass'n*, 31 N. Y. Supp. 938, 940, 83 Hun. 320; *Washington v. New York City Sav. Bank*, 63 N. E. 831, 833, 171 N. Y. 166, 89 Am. St. Rep. 800; *Putnam v. Lincoln Safe Deposit Co.*, 83 N. Y. Supp. 1091, 1093, 87 App. Div. 13; *Mutual Life Ins. Co. v. Blodgett*, 27 S. W. 286, 291, 8 Tex. Civ. App. 45; *Collins v. Grantham*, 12 Ind. 440, 442; *Hen-*



derson v. Cargill, 31 Miss. 367, 418. But the term does not include cases where the marriage is to be shown as a substantive independent fact. Overseers of Westfield v. Overseers of Warren, 8 N. J. Law (3 Halst.) 249, 251.

Pedigree includes facts of birth, marriage, and death, and the times when these events happened, but such facts do not of themselves constitute pedigree; and a case in which the age of an individual is the issue to be determined is not a case of pedigree, within the meaning of Code Civ. Proc. § 1870, pt. 4, providing that entries in Family Bibles, etc., are admissible as evidence of pedigree. People v. Mayne, 50 Pac. 654, 655, 118 Cal. 516, 62 Am. St. Rep. 256.

The term "pedigree," within the rule that questions of pedigree and ancestry may be proven by general reputation, is not limited to the pedigree or ancestry of the human race, but is equally applicable whether the question concerns horses, cattle, dogs, or men. Citizens' Rapid Transit Co. v. Dew, 45 S. W. 790, 100 Tenn. 317, 40 L. R. A. 518, 66 Am. St. Rep. 754.

## PEEP-ABO.

A statement in a letter addressed by a man to the wife of another, that she had played "peep-abo" with him long enough, meant that she had acted libidinally towards him, and invited him to an adulterous intercourse and connection with her, and sought opportunities to effect it. State v. Avery, 7 Conn. 268, 268, 18 Am. Dec. 105.

## PEN.

To "pen" means to confine in a small inclosure or narrow place. This need not necessarily be done by means of an artificial structure, but may also be done by means of or through the agency of men and dogs, either alone or in conjunction with natural or artificial barriers of an inanimate nature; and is so used in Pen. Code, § 374, as amended March 3, 1893, making it a misdemeanor to keep sheep penned or corralled on the border of a stream. People v. Borda, 38 Pac. 1110, 1112, 105 Cal. 636.

## PENAL.

"In the municipal law of England and America the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily they denote punishment imposed and enforced by the state for a crime or offense against its laws, but they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They

are so elastic in meaning as even to be familiarly applied to cases of private contracts wholly independent of statutes, as when we speak of the penalty of a bond." Kilton v. Providence Tool Co., 48 Atl. 1039, 1042, 22 R. I. 605; American Credit Indemnity Co. v. Ellis, 59 N. E. 679, 682, 156 Ind. 212; Blum v. Widdicombe (U. S.) 90 Fed. 220, 221; Plumb v. Griffin, 50 Atl. 1, 2, 74 Conn. 132 (citing Le Forrest v. Tolman, 117 Mass. 109, 19 Am. Rep. 400).

## PENAL ACTION.

Action at common law distinguished, see "Common-Law Action."

A penal action is an action on a statute which gives a certain penalty to be recovered by any person who will sue for the same. In re Barker, 56 Vt. 14, 20.

A penal action is one allowed in pursuance of justice under particular laws. If no special officer is authorized to be the plaintiff therein, the state, or the Governor, or the Attorney General, or the Solicitor General may be the plaintiff. Code, § 3254; Western Union Tel. Co. v. Taylor, 84 Ga. 408, 418, 11 S. E. 396, 8 L. R. A. 189.

A penal action is one allowed in pursuance of public justice under particular laws. Civ. Code Ga. 1895, § 4933.

An action for libel or slander is in the nature of a penal action, so that on motions for a new trial the same rules are applicable to both. Bailey v. Dean (N. Y.) 5 Barb. 297, 303.

An action by a creditor of an insolvent corporation against its officers under Gen. St. 1889, § 406, making the officers of a bank liable for the amount of deposits received after insolvency known to them, or that should have been known, is a penal action. Ashley v. Frame, 45 Pac. 927, 928, 4 Kan. App. 265.

Pub. St. c. 99, § 1, authorizing a third person to recover treble the value of money lost by gaming, is a penal suit. Cole v. Groves, 134 Mass. 471, 472.

Proceedings for the recovery of fines for the violation of borough or city ordinances, are not summary proceedings, but are properly of a civil nature, and must be regulated and decided by rules applicable to civil suits, although, being penal in their character, some of the principles relative to summary proceedings are applicable to them. City of Philadelphia v. Duncan (Pa.) 4 Phila. 145, 147, 17 Leg. Int. 373.

A suit by the United States under the contract labor act of February 26, 1885 [U. S. Comp. St. 1901, p. 1290], brought to recover a penalty, is not a penal action, but

a civil suit. *Moller v. United States* (U. S.) 57 Fed. 490, 495, 6 C. C. A. 450.

### PENAL BOND.

A "penal bond" conditioned to do a collateral thing is said by Prof. Minor in his *Institutes* (vol. 3, p. 355), to be "a bond promising to pay a named sum of money, with a condition underwritten that, if a stipulated collateral thing, something other than the payment of money, be done or omitted, the obligation shall be void." In this case also, as in the case of the bond with condition to pay money, the common law holds the whole penalty to be forfeited if the condition be not observed in every particular, however trivial; but, the court of equity having interposed upon the same principle as before to compel the obligee to accept a suitable compensation in damages in satisfaction of the bond, it was provided by St. 8 & 9 Wm. III, c. 11, A. D. 1697, in terms which the Virginia statute substantially reproduces, that a jury shall ascertain the damages sustained by reason of the breaches alleged, and judgment shall be entered for the penalty, to be discharged by the payment of the damages so ascertained, and such further sums as may be afterwards assessed or be found due on a *scire facias* assigning a further breach. *Burnside v. Wand*, 71 S. W. 337, 347, 170 Mo. 531, 62 L. R. A. 427.

No set form of words is necessary to make a "penal bond," and an agreement between a husband and wife, on their separating, whereby the husband bound himself to pay the wife a certain monthly sum so long as she maintained good behavior and should not remarry, "and this I bind myself to do under a penalty of five thousand dollars, to be recovered by her in any court of law," etc., was held a penal bond. *Carey v. Mackey*, 20 Atl. 84, 85, 82 Me. 516, 9 L. R. A. 113, 17 Am. St. Rep. 500.

### PENAL CLAUSE.

A penal clause in a contract is considered by the law in the nature of compensation for damages which the creditor sustains by the nonexecution of the principal obligation. Such a clause is defined by the Code to be a secondary obligation entered into for the purpose of enforcing the performance of a primary obligation, but, the penalty being stipulated merely to enforce the performance of the principal obligation, it is not incurred, although the principal obligation be not performed, if there be a lawful excuse for its nonperformance. *J. G. Wagner Co. v. City of Monroe*, 52 La. Ann. 2132, 2139, 28 South. 229.

A penal clause is a secondary obligation entered into for the purpose of enfor-

cing the performance of a primary obligation. Civ. Code La. 1900, art. 2117.

### PENAL INSTITUTIONS.

Laws 1888, c. 586, prohibiting the use of motive power machinery for manufacturing purposes in any of the "penal institutions of the state," and the employment of convicts therein at certain labor, should be construed to mean only the state prisons, and such other prisons and reformatories as are constructed by the state, and at its expense, and to exclude all county jails and penitentiaries erected and maintained at local county expense, and governed by local, and not state, officers. *Bronk v. Riley*, 2 N. Y. Supp. 266, 270.

### PENAL JUDGMENTS.

Rev. St. c. 81, p. 413, provides two modes for the removal of judgments from the district to the supreme court—by appeal and writ of error. Section 1 provides that a judgment or order in a civil or criminal action in any district court may be removed to the Supreme Court as provided in the statute. Section 2 provides that all penal judgments in the district courts may be examined, and affirmed, reversed, or modified, by the Supreme Court, or a new trial may be ordered; such examination to be had on a writ of error or appeal. Held, that the word "penal" was a typographical error, and the word "final" should be read instead thereof. *Moody v. Stephenson*, 1 Minn. 401, 402 (Gil. 289, 290).

### PENAL LAWS.

"Penal laws," strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against a wrongdoer are sometimes spoken of as penal in their nature, but in such cases neither the liability imposed, nor the remedy given, is strictly penal. *Huntington v. Att-rill*, 13 Sup. Ct. 224, 227, 146 U. S. 657, 36 L. Ed. 1123; *Kilton v. Providence Tool Co.*, 48 Atl. 1039, 1042, 22 R. I. 605; *Aylsworth v. Curtis*, 34 Atl. 1109, 1111, 19 R. I. 517, 33 L. R. A. 110, 61 Am. St. Rep. 785; *American Credit-Indemnity Co. v. Ellis*, 59 N. E. 679, 682, 156 Ind. 212; *Hutchinson v. Young*, 80 N. Y. Supp. 259, 261, 80 App. Div. 246; *People v. Wells*, 65 N. Y. Supp. 319, 323, 52 App. Div. 583; *Manhattan Trust Co. v. Davis*, 58 Pac. 718, 720, 23 Mont. 273; *Plumb v. Griffin*, 50 Atl. 1, 2, 74 Conn. 132; *Levy v. Superior Court of City and County of San Francisco*, 38 Pac. 965, 966, 105 Cal. 600, 29 L. R. A. 811.

A penal statute is one which provides a penalty for some offense of a public na-

ture. The statute of Gloucester giving an action of waste against a tenant for life for the recovery of the place wasted and treble damages is not a penal statute, it merely giving an effective remedy for a private injury. *Sackett v. Sackett*, 25 Mass. (8 Pick.) 309, 320.

A penal statute is defined to be one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited. *Woolverton v. Taylor*, 23 N. E. 1007, 1008, 132 Ill. 197, 22 Am. St. Rep. 521; *Mitchell v. Hotchkiss*, 48 Conn. 9, 19, 40 Am. Rep. 146; *Ross v. New England Mortg. Security Co.*, 13 South. 564, 565, 101 Ala. 362.

Penal statutes are statutes imposing penalties for some violation of public right. *Kilton v. Providence Tool Co.*, 48 Atl. 1039, 1041, 22 R. I. 605.

Penal statutes are acts whereby a forfeiture is inflicted for transgressing the provisions therein enacted. *People v. Bennett* (N. Y.) 6 Abb. Prac. 343, 348.

Penal statutes are those by which punishments are imposed for transgression of a law. *Hall v. Norfolk & W. R. Co.*, 28 S. E. 754, 756, 44 W. Va. 36, 41 L. R. A. 609, 67 Am. St. Rep. 757 (citing *Suth. St. Const.* 208).

Penal laws are defined to be "those laws which prohibit an act, and impose a penalty for the commission of it." They are of three kinds—*pœna pecuniaria*, *pœna corporalis*, and *pœna exitii*. *Rap. & L. Law Dict.* p. 945. Thus, if we may translate freely, three kinds of penalties are recognized, which affect the pocketbook, the person, or the political status of the individual. *State v. Hardman*, 45 N. E. 345, 346, 16 Ind. App. 357.

The term "penal laws" is more generally used to indicate a law which imposes a fine for its breach, but in a strict sense a penalty is the punishment and retribution of crime. Shakespeare speaks of "the penalty for the forfeit of my bond," and Milton speaks of "penal fire and the penalty of death," and our statute prescribes "an oath under the pains and penalties of perjury." *Drew v. Russell*, 47 Vt. 250, 253.

The term "penal law" is more generally used to indicate a law which imposes a fine for its breach. A statute in which the penalty is imprisonment is not strictly a penal statute. *Drew v. Russell*, 47 Vt. 250, 252.

A penal statute imposes a penalty upon the commission of the prohibited offense, which is recovered by an action of debt, in the name of the informer, for his own use, or *qui tam*. The statute fixes the amount of the penalty, and hence the action of debt is

appropriate. *Baylies v. Curry*, 30 Ill. App. (20 Bradw.) 105, 109.

There are two sorts of penal statutes which create offenses—one where the statute enjoins or forbids an act, without declaring the omission or commission of the act indictable, and the other where the omission or commission is made specially indictable. *United States v. Chapel* (U. S.) 25 Fed. Cas. 395 (citing *Whart. Cr. Laws*, § 10).

No statute is considered penal when the action is given to the party aggrieved, but a statute subjecting one person to pay to another, whom he has not actually injured by his offense, an amount of money, limited only by the amount which one may owe another, is a penal statute; and Acts 1821, c. 61, § 12, providing that any person summoned as trustee, who shall, upon his examination, knowingly and willfully answer falsely, shall be guilty of perjury, and shall also be liable to pay to the plaintiff in the action the full amount of such judgment, or such part of it as may remain due, with interest and double costs, is a penal statute. *Mansfield v. Mard*, 16 Me. (4 Shep.) 433, 436.

It is the effect and not the form of the statute that is to be considered in determining whether it is a penal statute or not, and when its object is clearly to inflict a punishment on the party violating it—that is, doing what is prohibited, or failing to do what is commanded, to be done—it is penal in its character; and the circumstances that, in punishing, remedy is likewise afforded to those having an interest in the observance of the statute, is important. *Diversey v. Smith*, 103 Ill. 378, 390, 42 Am. Rep. 14; *Globe Pub. Co. v. State Bank* (Neb.) 59 N. W. 633, 636.

The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. *Cullinan v. Burkhard*, 84 N. Y. Supp. 825, 827, 41 Misc. Rep. 321.

Penal statutes are not passed to enable parties to make money by accumulating penalties. They are generally passed to compel the performance of some duty, public or private, and ordinarily one penalty will secure the end as effectually as many. *Cox v. Paul*, 67 N. E. 586, 587, 175 N. Y. 328.

A statute properly designated as penal is one which inflicts a forfeiture of money or goods by way of penalty for breach of its provisions, and not by way of fine for a statutory crime or misdemeanor. *Butler v. Butler*, 40 S. E. 138, 142, 62 S. C. 165.

A statute may be penal in one part and remedial in another, and in such case, when it is sought to enforce the penalty, it is to be considered as a penal statute, and, when it

is sought to enforce the civil remedy provided, it is to be considered as remedial in its nature. *Gardner v. New York & N. E. R. Co.*, 24 Atl. 831, 832, 17 R. I. 790; *Ordway v. Central Nat. Bank of Baltimore*, 47 Md. 217, 257, 28 Am. Rep. 455; *Bell v. Farwell*, 52 N. E. 346, 347, 176 Ill. 489, 42 L. R. A. 804, 68 Am. St. Rep. 194; *Adams v. Fitchburg R. Co.*, 30 Atl. 687, 688, 67 Vt. 76, 48 Am. St. Rep. 800.

The term "penal laws," in Const. art. 13, § 12, requiring all fines assessed and collected in the several townships for any breach of the penal laws to be applied to the support of libraries, refers to the laws of the state for the preservation of the public order, and which are enforced by the state authorities, and does not extend to the numerous forfeitures and penalties growing out of breaches of duty that partake of the nature of a civil grievance or merely local wrong, and do not come within the category of criminal conduct. *People v. Common Council of Bay City*, 36 Mich. 186, 189.

The words "penal laws," as used in Const. art. 6, § 6, providing that the proceeds of fines for any breach of the penal laws shall be exclusively applied, in the several counties in which the money is paid or fines collected, to the support of common schools, evidently mean laws for the breach of which a penalty is imposed; and, if this penalty is imposed merely as a punishment, the penalty is a fine. The Legislature may give damages wherever loss has been sustained, but these are damages because of loss sustained, and not merely punishment for some breach of the penal laws. *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1, 15.

Statutes which compel men to maintain their bastard children are not penal. *Commonwealth v. Withers*, 20 Ky. (4 T. B. Mon.) 510, 511.

A statute which gives a remedy for an injury against him by whom it is committed to the person injured, and to him alone, and limits the recovery to the mere amount of the loss sustained, belongs to the class of remedial statutes, and not to that of penal statutes. *Boice v. Gibbons*, 8 N. J. Law (3 Halst.) 324, 330.

The statute giving creditors a remedy against corporate officers for official defaults is said to be a penal statute. *Grand Rapids Sav. Bank v. Warren*, 18 N. W. 356, 358, 52 Mich. 557.

Code, art. 26, § 52, providing that, if a corporation contract debts before the capital stock is paid in, stockholders at such time shall become severally and individually liable therefor, is not penal in its nature. *Norris v. Wrenschall*, 34 Md. 492, 500.

An act imposing a penalty upon any officer who has served a writ for indorsing

thereon or receiving more than his lawful fees is a penal act. *Stoddard v. Couch*, 23 Conn. 238, 240.

The prime object of every statute strictly penal is to enforce obedience to the mandates of the law by inflicting punishment upon those who disregard them, and in statutes primarily and properly penal the provision for punishment never rests in uncertainty—is never based upon a contingency. The general public is supposed to be injured by the violation of every penal statute, whether any special injury results to any particular individual, or class of individuals, or not. The punishment is provided as a sanction to the law, and is imposed for the public good, to deter others from the commission of like offenses. It would therefore be palpably incongruous to call a statute penal which did not contain a definite and certain provision for punishment in every case where the duties enjoined by it were ignored. Penal statutes, in the strict and proper sense, are not statutes creating private rights and remedies. *Nebraska Nat. Bank v. Walsh*, 59 S. W. 952, 953, 68 Ark. 433, 82 Am. St. Rep. 301.

#### City ordinances.

A city ordinance punishing by fine and imprisonment the commission of acts which are breaches of law, wherever committed, is a penal law, within the constitutional provision that all fines collected for breach of the penal laws shall be applied to the support of public libraries. *Wayne County v. City of Detroit*, 17 Mich. 390, 399.

Penalties imposed for the violation of municipal ordinances are not fines collected for a breach of the penal laws. *Village of Platteville v. Bell*, 43 Wis. 488, 492.

"Penal laws," as used in Const. art. 9, § 3, providing that all fines assessed for the breach of the penal laws shall be applied to county seminaries, means criminal laws—that is, those in relation to crimes and misdemeanors—and does not include an action of debt under a city charter for vending spirituous liquors without a license. *Common Council of Town of Indianapolis v. Fairchild*, 1 Ind. (1 Cart.) 316, 318.

#### PENAL SUM.

A penalty or penal sum is a sum of money payable as an equivalent for an injury. *Eason v. Witcofskey*, 29 S. C. 239, 246, 7 S. E. 291.

A penal sum is an amount greater than the value of the consideration—a forfeiture. *Nelson v. Ford*, 5 Ohio (5 Ham.) 473, 475.

The words "penal sum," in that part of a contract or bond providing for the consequences of a breach thereof, are ordinarily to be construed strictly, and as meaning a

penalty, and nothing more, and in that case actual damage must be shown; and it is also understood that its ordinary import may be overborne by other parts of the contract which demonstrate that the words were used as meaning liquidated damages. *City of Madison v. American Sanitary Engineering Co.*, 95 N. W. 1097, 1105, 118 Wis. 480.

### **PENALTY.**

See "Action for Penalty or Forfeiture"; "Bill of Pains and Penalties"; "Under a Penalty."

A penalty is a punishment inflicted by a law for its violation. *People v. Nedrow*, 13 N. E. 533, 535, 122 Ill. 363; *Torbett v. Godwin*, 17 N. Y. Supp. 46, 47, 62 Hun, 407, 27 Abb. N. C. 444; *Western Union Telegraph Co. v. Cobbs*, 1 S. W. 558, 559, 47 Ark. 344, 58 Am. Rep. 756; *United States v. Mathews* (U. S.) 23 Fed. 74, 75.

A penalty is a punishment and retribution for crime. *Drew v. Russell*, 47 Vt. 250, 252.

A penalty is defined as a temporary punishment or sum of money imposed by statute, to be paid as a punishment for the commission of a certain offense. *Merchants' Bank of Newhaven v. Bliss*, 24 N. Y. Super. Ct. (1 Rob.) 391, 403, 21 How. Prac. 365, 370, 13 Abb. Prac. 225, 236.

A penalty or penal sum is a sum of money payable as an equivalent for an injury. *Eason v. Witcofskey*, 29 S. C. 239, 246, 7 S. E. 291. A punishment imposed by statute as the consequence of the commission of a certain specified offense; a pecuniary punishment; a sum of money imposed by statute, to be paid as a punishment for the commission of a certain act. *State of Iowa v. Chicago, B. & Q. R. Co.* (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554 (citing *Burrill*, *Law Dict.* 286).

A penalty is a punishment imposed by law or contract for doing or failing to do something that it was the duty of a party to do. *Haskins v. Dern*, 56 Pac. 953, 956, 19 Utah, 89.

A penalty is in the nature of a punishment for the nonperformance of an act, or the performance of an unlawful act, and in the former case stands in lieu of the act to be performed. *San Luis Obispo County v. Hendricks*, 11 Pac. 682, 683, 71 Cal. 242, 245; *City of Sacramento v. Dillman*, 36 Pac. 385, 386, 102 Cal. 107.

A penalty is in the nature of punishment for the nonperformance of an act, or for the performance of an unlawful act. It involves the idea of punishment, whether enforced by civil or criminal procedure. *Woolverton v. Taylor*, 23 N. E. 1007, 1008,

132 Ill. 197, 22 Am. St. Rep. 521 (quoting *Anderson*, *Law Dict.* 763); *Hall v. Norfolk & W. R. Co.*, 28 S. E. 754, 756, 44 W. Va. 36, 41 L. R. A. 669, 67 Am. St. Rep. 757.

A penalty is a sum of money in gross to be paid for the nonperformance of an agreement, the legal operation of which is to cover the damages which the party in whose favor the stipulation is made may have sustained from the breach of the contract by the opposite party. *Tayloe v. Sandford*, 20 U. S. (7 Wheat.) 13, 15, 5 L. Ed. 384.

A penalty is a sum stipulated to be paid in gross in the event of a breach of a contract, the articles of which covenant for the performance of several things, or where a large sum is agreed to be paid on the nonpayment of a smaller sum, or the nonperformance of a duty, the damages resulting from which may be ascertained with reasonable certainty, and which is much less than the sum expressed. *Watt's Ex'rs v. Shepard*, 2 Ala. 425, 445.

A stipulation in a mortgage for reasonable attorney's fees in case of foreclosure by action is not within Civ. Code, §§ 829, 830, declaring provisions of a contract for penalties or liquidated damages for any nonperformance to be void. A penalty is defined to be a clause in an agreement by which the obligor agrees to pay a certain sum of money if he shall fail to fulfill the contract contained in another clause of the same agreement. A penal obligation differs from an alternative obligation, for it is but one in its essence, while a penalty always includes two distinct engagements, and when the first is fulfilled the second is void. When a breach has taken place, the obligee has his option to require the fulfillment of the first obligation, or payment of the penalty, but not before. He cannot compel compliance with the conditions, and then pursue the penalty or fine therefor. He must elect. *Danforth v. Charles*, 46 N. W. 576, 577, 1 Dak. 285.

#### **As a contract.**

See "Contract."

#### **Costs included.**

The terms "fine" and "penalty" signify a mulct for an omission to comply with some requirement of law, or for a positive infraction of law, and do not include the costs which accrue from the prosecution. *Lord v. State*, 37 Me. 177, 179.

#### **As a debt.**

See "Debt"; "Debt Founded on Contract."

#### **Fine synonymous.**

"Penalty," as used in Gen. Laws 1891, c. 11, § 1, providing that any one who sells

any article made in imitation of butter, or as a substitute for butter, and not wholly made from milk or cream, and that is of any other color than bright pink, shall be subject to the payment of a penalty, is synonymous with "fine," and may be recovered by a criminal prosecution. *State v. Horgan*, 56 N. W. 688, 689, 55 Minn. 183.

The word "penalty" is used in law as including fines, which are pecuniary penalties. So that a statute providing that penalties imposed upon vessels shall be a lien upon such vessels applies to those sections which declare a fine for the violation of its provisions. *The Strathairly*, 8 Sup. Ct. 609, 612, 124 U. S. 558, 31 L. Ed. 580.

While the word "penalty" has a broader meaning than the word "fine," still a fine, in a judicial sense, is always a penalty, although a penalty may sometimes not be a fine, or even a criminal punishment. Where a statute forbids or commands certain acts, its violation constitutes a public offense, punishable as such by a criminal prosecution in the courts, notwithstanding the punishment imposed by such statute is denominated a penalty. *United States v. Nash* (U. S.) 111 Fed. 525, 528.

"Penalty" and "fine" are not the same in law. A penalty is always recoverable in a civil action. A fine never is. A penalty, when recovered, goes to the party suing; a fine, to the people. A fine is defined in law to be a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor. This definition is wholly inapplicable to a judgment in a civil suit. So that a proceeding for the violation of a city ordinance, where the punishment is fine or imprisonment, is criminal in character. *City of Hudson v. Granger*, 52 N. Y. Supp. 9, 10, 23 Misc. Rep. 401.

Punishment under a statute by fine or imprisonment, or both, is not a penalty, within the legal definition of that term. A penalty is a sum of money which the law exacts the payment of by way of punishment for doing some act which is prohibited, or omitting to do some act which is required to be done. A fine is a sum of money exacted of a person guilty of a misdemeanor or crime, the amount of which may be fixed by law, or left in the discretion of the court. Imprisonment is not in any legal sense a penalty. *Village of Lancaster v. Richardson* (N. Y.) 4 Lans. 136, 139.

#### Forfeiture synonymous.

See, also, "Forfeited—Forfeiture."

"Penalty" or "forfeiture" does not necessarily imply a fixed sum, but anything imposed as a punishment, whether specific, or measured by the value of the interest affected by the act complained about. To deter-

mine whether a liability to which a person is subjected is by way of penalty or forfeiture, it is not necessary that the statute, in the language imposing it, should denominate it a penalty or forfeiture. *Merchants' Bank of New Haven v. Bliss*, 24 N. Y. Super. Ct. (1 Rob.) 391, 403, 406, 13 Abb. Prac. 225, 236, 21 How. Prac. 365, 370.

The noun "penalty" is defined "forfeiture," or a sum to be forfeited for noncompliance with an agreement; a fine. *Worcester's Dict.* These definitions show that the words "forfeited" and "penalty" are substantially synonymous, so that, when the owners of a ship agreed that in a certain contingency they would forfeit \$1,000, their meaning was that the penalty for nonperformance should be that sum. The contract provided for a penalty to cover actual damages, and did not stipulate for liquidated damages. *Taylor v. The Marcella* (U. S.) 23 Fed. Cas. 782, 783.

The word "penalty" and the word "forfeiture," as used in statutes, are generally used synonymously. A statute properly designated as penal is one which inflicts a forfeiture of money or goods by way of penalty for breach of its provisions, and not by way of fine for a statutory crime or misdemeanor, and, with reference to penal actions, the word "penalty" means a forfeiture inflicted by a penal statute. *Butler v. Butler*, 40 S. E. 138, 142, 62 S. C. 165.

Under an act requiring a person licensed to sell liquor to give a bond, with sureties, conditioned that he shall faithfully fulfill all the duties relating to the business, and shall pay all fines or forfeitures that may be recovered against him, it is held that a bond conditioned that the licensee shall pay all penalties is a substantial compliance with the act; the words "penalties" and "forfeitures" being synonyms, each signifying, in the sense in which it is used, a liability to pay a certain sum of money. *Crawley v. Commonwealth*, 16 Atl. 416, 417, 123 Pa. 275.

"Penalty" is not synonymous with "forfeiture," as used in a contract stipulating that a certain amount should act as a forfeiture in the event of the abandonment of a certain trade, though the two words may be used to mean the same thing, for a forfeiture is usually a penalty, though a penalty is not necessarily a forfeiture. *Eakin v. Scott*, 7 S. W. 777, 779, 70 Tex. 442.

#### Interest distinguished.

Interest is merely compensation for the use or forbearance of money, and is distinguished from penalty, which is a punishment. Thus a statute providing that taxes shall bear interest at the rate of 7 per cent. per annum does not constitute a penalty,

such rate being the legal rate. *Sparks v. Lowndes County*, 25 S. E. 426, 427, 98 Ga. 284.

In the tax laws, the words "penalty" and "interest" have well-defined meanings, and have never been used interchangeably. Thus, in Sess. Laws 1889-90, p. 565, § 97, providing that taxes shall become delinquent on the 1st day of January; that a penalty of 10 per cent. shall immediately accrue, and shall thereafter be charged up against such delinquent taxes, and such unpaid taxes shall bear interest at the rate of 10 per cent. per annum until paid or forfeited. So, also, in the Laws of 1891, 1893, and 1895, containing similar provisions to those in Act 1899, p. 290, c. 141, § 6, providing that the interest and penalties and delinquent taxes shall be paid into the current expense fund of the county, and the tax laws then in force did not provide for a penalty, the word "penalty" was not synonymous with "interest," but related to the penalty effected under the prior statutes. *City of New Whatcom v. Roeder*, 61 Pac. 767, 769, 22 Wash. 570.

"A penalty is an agreement to pay a greater sum to secure the payment of a less sum. It is conditional, and can be avoided by the payment of the less sum before the contingency agreed on shall happen. It is immaterial by what name it is called. If it accrues in a gross amount on the maturity of a note, it is penalty, and not interest." *Henry v. Thompson* (Ala.) Minor, 209, 227.

A penalty has been defined to be an agreement to pay a greater sum to secure the payment of a less sum. A note payable in five years, bearing interest at 7 per cent. per annum, was secured by a mortgage which provided that in case default was made in the payment of the principal or interest, or in the payment of taxes or insurance, the debtor should pay interest at the rate of 12 per cent. per annum, computed on the principal from the date of note until payment thereof. Held, that the provision for 5 per cent. extra interest in case of default was in the nature of a penalty, and could not be enforced in equity. *Krutz v. Robbins*, 40 Pac. 415, 417, 12 Wash. 7, 28 L. R. A. 676, 50 Am. St. Rep. 871.

A penalty is a sum named as damages to be recovered for violating an agreement or promise, in lieu of damages. An agreement that, if the interest on a note is not paid when due, the whole note—principal and interest—shall become due and payable, is not in the nature of a penalty or forfeiture, and one against which equity, by reason thereof, will not enforce its terms. There are no penalties, no damages called for. Merely altering the day of payment is neither forfeiture of any property, nor penalty in damages for the breach of such agreement. *Adams v. Rutherford*, 8 Pac. 896, 902, 13 Or. 78.

#### **Liquidated damages distinguished.**

See "Liquidated Damages."

#### **Personal punishment included.**

The Imperial Dictionary defines penalty as the suffering, in person or property, which is annexed by law to the commission of a crime, an offense, or a trespass, as a punishment. It is true that the word "penalty" is frequently used to designate a pecuniary punishment or liability, and has sometimes been declared to be limited to that class alone, and not to include imprisonment. We are satisfied, however, that the word is susceptible of, and is frequently used in, a broader sense than this, and as a general term including both pecuniary and personal punishment. *State v. Hardman*, 45 N. E. 345, 346, 16 Ind. App. 357.

The words "penal" and "penalty" strictly and primarily denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. *Gunning v. People*, 86 Ill. App. 174, 178 (citing *Huntington v. Attrill*, 146 U. S. 657, 667, 13 Sup. Ct. 224, 36 L. Ed. 1123, and quoting *Cent. Dict.*); *Plumb v. Griffin*, 50 Atl. 1, 2, 74 Conn. 132 (citing *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400).

A penalty or forfeiture is either a punishment, or something nearly approaching to it, and in the nature of a punishment, imposed as a consequence of the violation of some law or municipal regulation. *Taylor v. Matchell*, 2 Miss. (1 How.) 596, 599.

The term "penalty" is used very loosely in statutes in some cases, and might, without being much strained from its ordinary meaning, be held to embrace all the consequences visited by law on the heads of those who violate police requirements. *Grover v. Huckins*, 26 Mich. 476, 483; *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 602, 64 N. W. 501, 507, 29 L. R. A. 468.

Penalty is the punishment inflicted by law for its violation. The term is mostly applied to a pecuniary punishment, but it is not exclusively so, and as used in Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], providing that the repeal of any statute shall not extinguish the penalty, forfeiture, or liability incurred under such statute, covers a prosecution under a statute which authorizes imprisonment as well as fine. *United States v. Mathews* (U. S.) 23 Fed. 74, 75; *Same v. Reisinger*, 9 Sup. Ct. 99, 101, 128 U. S. 398, 32 L. Ed. 480; *Same v. Ulrici* (U. S.) 28 Fed. Cas. 328, 329.

Rev. St. § 1047 [U. S. Comp. St. 1901, p. 727], which provides that no suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under laws of the United States, shall be maintained, unless commenced within five years from the time when the penalty or forfeiture accrues, refers to

penalties and forfeitures incurred by infractions of the law, and applies as well to suits as to other forms of prosecutions therefor. It does not relate to a penal sum named in a bond. *Raymond v. United States* (U. S.) 20 Fed. Cas. 337.

The word "penalty," in the municipal law of England and America, has been used in various senses, but strictly and primarily it denotes punishment, whether corporeal or pecuniary, imposed or enforced by the state for a crime or offense against its laws; but it is also commonly used as including any extraordinary liability to which the law subjects a wrongdoer, in favor of the person wronged, not limited to the damages suffered. *American Credit Indemnity Co. v. Ellis*, 59 N. E. 679, 682, 156 Ind. 212.

"Penalties," in a legal sense, are suffering in person or property annexed by law to the commission of crimes or offenses against the government imposing them, as a punishment of the criminal offender. *Ordway v. Central Nat. Bank of Baltimore*, 47 Md. 217, 257, 28 Am. Rep. 455.

#### **Punishment synonymous.**

"Penalty" is synonymous with "punishment," in connection with crimes of the highest grades, and is fixed by the law defining and inhibiting the criminal act. *Featherstone v. People*, 62 N. E. 684, 687, 194 Ill. 325; *United States v. Reisinger*, 128 U. S. 398, 9 Sup. Ct. 99, 101, 32 L. Ed. 480; *Beggs v. State*, 23 N. E. 693, 694, 122 Ind. 54.

#### **Quasi criminal nature of proceeding.**

The imposition of a penalty is in the nature of a quasi criminal proceeding, as it only follows from the violation of some law. *Harbor Com'rs of Port Eureka v. Redwood Co.*, 26 Pac. 375, 88 Cal. 491, 22 Am. St. Rep. 321.

#### **As vested right.**

See "Vested Right."

#### **Liability for fires from sparks.**

The word "penalty" as used in the title of an act requiring steamers using wood for fuel to be provided with spark arresters, and making a vessel's owner liable for loss by fire occasioned by neglect to comply with the act, is intended to include the liability to be imposed for damages, as well as a liability for fine and imprisonment. *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 602, 64 N. W. 501, 507, 29 L. R. A. 468.

#### **Liability for half pilotage.**

The sum of money given by statute as half pilotage to a pilot who first tenders his services to a vessel coming into a port and is refused is not a penalty. There was a tender of services upon which the law raises

an implied promise to pay the amount specified in the statute. *Ex parte McNiel*, 80 U. S. (13 Wall.) 238, 20 L. Ed. 624.

#### **Liability for nonpayment of tax.**

"Penalty," as used in Code Civ. Proc. § 340, subd. 1, requiring an action on a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, to be brought within one year after the cause of action accrues, means one which an individual is allowed to recover against a wrongdoer as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained, or one which is given to an individual and the state as a punishment for some act which is in the nature of a public wrong. The 5 per cent. on the amount of the delinquent tax which the tax collector is directed to collect in addition to such delinquent tax is not such a penalty as is contemplated by the statute. *Los Angeles Co. v. Ballerino*, 32 Pac. 581, 582, 99 Cal. 593.

#### **Liability for statutory damages.**

Section 3910, Comp. Laws, provides that every person whose message is refused or postponed by a telegraph company shall recover actual damages, and \$50 in addition. Held, that the \$50 is in the nature of a penalty. *Kirby v. Western Union Tel. Co.*, 57 N. W. 202, 203, 4 S. D. 463.

A penalty is the punishment inflicted by law for its violation. A provision in a statute that no common carrier shall do certain acts, and that for a violation of such provision the offending carrier shall be liable to the person injured in damages treble the injury sustained, makes the statute one for a penalty. *Langdon v. New York, L. E. & W. R. Co.*, 9 N. Y. Supp. 245, 247.

Gen. St. 1878, c. 66, tit. 2, limiting the time for bringing an action upon a statute for a penalty given in whole or in part to a person who prosecutes for the same, embraces penal statutes which involve the feature of affording a private remedy to the party aggrieved, by giving to him, in whole or in part, the penalty which is imposed for the violation of the law. *Merchants' Nat. Bank of Chicago v. Northwestern Mfg. & Car Co.*, 51 N. W. 117, 118, 48 Minn. 349.

#### **Liability of corporate officer or stockholder.**

A penalty is in the nature of a punishment for the nonperformance of an act, or for the performance of an unlawful act. It involves the idea of punishment, whether enforced by civil or criminal procedure. So it is held that the provisions of Rev. St. c. 32, § 16, which makes the directors and officers of a corporation whose indebtedness exceeds the amount of its capital stock personally liable for such excess if they assent



thereto, was not penal, within the meaning of Rev. St. c. 83, § 14, which makes the lapse of two years a bar to an action for a statutory penalty. *Woolverton v. Taylor*, 23 N. E. 1007, 1008, 132 Ill. 197, 22 Am. St. Rep. 521.

A penalty or a penal sum is a sum of money payable as an equivalent or punishment for an injury. 2 Rap. & L. Law Dict. p. 945. A statute providing that officers of certain corporations shall be personally liable for the debts of the corporation, in case they fail to file the annual certificates of their condition, imposes a penalty. *Rogers v. Bonnett*, 37 Pac. 1078, 1080, 2 Okl. 553.

Act April 28, 1880, providing that a stockholder may recover \$1,000 as liquidated damages from the director of a mining corporation for failure to produce monthly balance sheets as required by the act, imposes a penalty. *Anderson v. Byrnes*, 54 Pac. 821, 822, 122 Cal. 272.

A penalty, of a character which will not be enforced outside the jurisdiction, implies some wrong done, and that the money claimed is compensation or by way of punishment. Where a statute declared that a corporation should not transact business until certain specified things had been done, and, if it did so in violation of the statute, the trustees and corporators should be liable in a specified amount, this amount was held to be a penalty. But there is a clear distinction between such an obligation and one where the liability is primary, or is based on contract. Where a stockholder has not violated any statute or committed any wrong, and the wrong of the corporation is not the violation of any positive duty enjoined by law, but the failure to make a success of its business, the individual liability of a stockholder for the debts of the corporation is not for a penalty. *Kulp v. Fleming*, 62 N. E. 334, 336, 65 Ohio St. 321, 87 Am. St. Rep. 611.

When a statute subjects an officer of a company, as such officer, to a liability to pay money either for omitting to perform a duty enjoined, or for doing an act prohibited, and does this in a case where, but for such omission of duty or wrongful act, he would be under no liability, he is thereby subjected to a forfeiture of the sum which he is made liable to pay, and, so far as he is concerned, the imposition of liability is by way of punishment. *Merchants' Bank of New Haven v. Bliss* (N. Y.) 13 Abb. Prac. 225, 236, 24 N. Y. Super. Ct. (1 Rob.) 391, 403, 406, 21 How. Prac. 365, 370.

An action by a creditor of an insolvent corporation against its directors to enforce a liability created by statute for failure to comply with the same is an action for a penalty, within the meaning of that term, as used in the statute of limitations. *Mer-*

*chants' Nat. Bank v. Northwestern Mfg. & Car Co.*, 51 N. W. 117, 48 Minn. 349.

#### **Liability on official bonds.**

Actions brought on official undertakings are not for the recovery of "fines, penalties, or forfeitures," within the meaning of Code Civ. Proc. § 1041, subd. 4, allowing district attorneys 10 per centum of the sum recovered. The actions provided for in that subdivision are actions brought to collect fines, penalties, and forfeitures for offenses, where by law such fines, penalties, and forfeitures may be collected by civil actions. It also includes forfeited recognizances. *In re Ison*, 6 Or. 469, 471.

Act June 22, 1874 [U. S. Comp. St. 1901, p. 2018], allowing compensation to informers out of "fines, penalties, or forfeitures" inflicted, does not apply to sums recovered on forfeited bail bonds. *In re Brittingham* (U. S.) 5 Fed. 191.

#### **PENALTY OF DEATH.**

When the words "penalty of death" are used, they are understood, in a somewhat figurative sense, to signify the forfeiture of life. It is less usual to say the penalty of imprisonment, or the penalty of whipping. *State v. Fields* (S. C.) 2 Bailey, 554, 557.

#### **PENCIL.**

A pencil is an instrument with which we write without ink. *Clason v. Bailey* (N. Y.) 14 Johns. 484, 491.

#### **PENDENCY OF ACTION.**

See "During Pendency of Action or Proceedings."

#### **PENDENTE LITE.**

See "Administrator Pendente Lite"; "Receiver in Pendente Lite."

A purchaser pendente lite is one who by purchase acquires an interest in the matter in litigation pending the suit. *Whiting v. Beebe*, 12 Ark. (7 Eng.) 421, 564.

#### **PENDING.**

See "Freight Pending."

The term "pending" means nothing more than undecided. *Wentworth v. Town of Farmington*, 48 N. H. 207, 210; *Clindenin v. Allen*, 4 N. H. 385, 386; *Buswell v. Babbitt*, 18 Atl. 748, 65 N. H. 168.

"Pending" is defined to mean depending, remaining undecided; not terminated. *Sanford v. Sanford*, 28 Conn. 6, 20.

**Appeal.**

Code Cr. Proc. art. 845, providing that if the defendant, "pending an appeal" in a felony case, shall escape from custody, the jurisdiction of the Court of Appeals shall no longer attach in the case, means that sentence must have been pronounced on the defendant as required by law, and, where sentence was not pronounced on the defendant until after he had made his escape, but was perfected after such escape, and while the defendant was in custody, it cannot affect the jurisdiction of the Court of Appeals. *Walters v. State*, 18 Tex. App. 8, 11.

**Bankruptcy proceedings.**

A proceeding in involuntary bankruptcy was pending, within the meaning of the act of June 7, 1878, repealing the bankrupt law, when that act went into force, although the required number and amount had not then joined as petitioning creditors, and the court had power thereafter to permit other creditors to join as petitioning creditors. In re *Henderson* (U. S.) 9 Fed. 196, 197.

The word "pending," in the bankruptcy act of 1867, providing that the circuit court for the district where bankruptcy proceedings shall be pending shall have a general superintendence and jurisdiction of all cases and questions arising under the act, does not mean that the circuit court can take jurisdiction of a petition for revision only while proceedings are actually pending, and before a final decree in the district court, but the circuit court may review a final decree. *Littelfield v. Delaware & H. Canal Co.* (U. S.) 15 Fed. Cas. 627, 628.

**Bill in Legislature.**

The word "pending," in an indictment for bribery, in connection with a bill pending in the Legislature, is sufficient to convey the proper meaning of the charge, without stating whether the bill is pending in the Senate or in the House. *State v. Gear*, 5 Ohio S. & C. P. Dec. 569.

**Civil action or suit.**

An action is considered as pending from the time of its commencement of the writ. *Clindenin v. Allen*, 4 N. H. 385, 386.

At common law the suit was considered as pending from the issuance of the writ. In equity the writ was issued after bill filed, and the suit regarded as commenced from the time of the service of the writ. Under our statute the suit in equity may be commenced before the bill is filed, and is treated as a suit commenced from that time. *Handlan v. Handlan*, 16 S. E. 597, 598, 37 W. Va. 486.

"Pending," as used in Act April 6, 1881, exempting pending actions from its provisions, should be construed, not in the tech-

nical sense of the Latin word "pendens," but rather in the sense of the word "commenced," in our language, in which it is more generally understood. *Rice v. McCauley* (Del.) 31 Atl. 240, 244, 7 Houst. 226.

The term "pending in court," as used in a statute relative to causes which exempts from its operation causes then pending in court, means causes on the docket. *Tilden v. Johnson*, 52 Vt. 628, 630, 36 Am. Rep. 769.

"Pending," as used in 25 Stat. 676, providing for the state governments of certain territories, and declaring that all cases, proceedings, and matters pending, etc., are transferable to the court, which by such act is made the successor of the territorial court, embraces all cases, proceedings, and matters initiated in the territorial courts, and in which at the time of the actual transformation of the territorial judicial system into the state and national systems there should be yet any vitality, force, or virtue, including an injunction for the protection of a continuing right. *United States v. Taylor* (U. S.) 44 Fed. 2, 3.

An action did not cease to be a pending action, so as to prevent the operation of the statute of limitations, because the clerk of the court had failed for several terms to place it upon the docket or court calendar. *Lawrence v. Belger*, 31 Ohio St. 175, 182.

A case which has been dismissed from the docket simply to relieve the same is pending, within the meaning of St. 1887, c. 332, § 5, providing that the act which gives the superior court exclusive original jurisdiction of all causes in divorce shall not affect any case pending in the Supreme Judicial Court when it takes effect. *Darraw v. Darraw*, 34 N. E. 270, 271, 159 Mass. 262, 21 L. R. A. 100.

Act March 30, 1875 (72 Ohio Laws, p. 161), which took away the right to appeal from a judgment of a justice of the peace where the amount involved was less than \$100, but which provided that it should not affect actions or proceedings then pending, did not apply to actions in which judgment had been rendered, and which were at that time appealable within a certain period, under the statute regulating appeals. *Bode v. Welch*, 29 Ohio St. 19, 21.

A suit is pending until final judgment is rendered. *Turner v. Norris*, 35 Me. 112, 115.

An action is pending until the judgment is fully satisfied. *State v. Tugwell*, 52 Pac. 1056, 1063, 19 Wash. 238, 43 L. R. A. 711, (citing *Ulshafer v. Stewart*, 71 Pa. [21 P. F. Smith] 170; *Holland v. Fox*, 3 El. & Bl. 977; *Wegman v. Childs*, 41 N. Y. 159; *Gates v. Newman*, 46 N. E. 654, 656, 18 Ind. App. 392.

A cause is pending in court until the judgment or decree is performed. And under a statute providing that the court ordering a judicial sale may, on motion, after 10 days' notice, enter judgment as soon as the money may become due, where an administrator sold land on credit pursuant to the judgment of the probate court the cause was pending in that court, and at the expiration of the credit the administrator was then entitled to a judgment for the amount of the purchase price on 10 days' notice. *Mauney v. Pemberton*, 75 N. C. 219, 221.

An action is pending the entire time from the beginning of the action until final judgment has been pronounced and entered up, for until final judgment there cannot be said to be a termination of the action, and it is therefore still pending. *Holland v. Fox*, 3 El. & Bl. 977, 985.

Acts 1881, c. 297, § 3, provides that, "in every case for divorce for incurable insanity in pursuance of the provisions of this act, the court may at any time after rendering judgment therein revise and alter such judgment" in certain named provisions. Acts 1882, c. 230, declares that such chapter 297 "is hereby repealed. \* \* \* This act shall not affect any actions pending March 25, 1882." Held, that an action in which a decree of divorce was rendered prior to March 25, 1882, was an action pending, within the meaning of the repealing act, and was unaffected thereby; the court being invested under the former act with full power over the custody and support of the insane party, and to revise and alter the original judgment of divorce in those respects at any time after its rendition. Hence the original judgment, in so far as it affects such custody and support, is not final, in any correct sense of that term. As to those matters, a divorce action is pending as long as the parties thereto survive. *Hicks v. Hicks*, 48 N. W. 495, 496, 79 Wis. 465.

When a suit is once instituted, it is thenceforward pending in every instant of time until finally disposed of. As expressed by the Supreme Court of New Hampshire, the term "pending" means nothing more than remaining undecided. In Maine it was held that a case was pending, so as to authorize the taking of depositions, even where a non-suit had been entered, with leave to have it taken off if the plaintiff would appear on the first day of the succeeding term. Said the court, the suit must be regarded as pending from its first institution until its final determination. *Brown v. Foss*, 16 Me. (4 Shep.) 257. In an English case the complainant's bill was dismissed, and yet the suit was held to have been still pending because some time afterwards an appeal was taken to the House of Lords. *Ex parte Munford*, 57 Mo. 603, 606.

"Pending," as used in the new Constitution, providing that on the first Monday in July, 1847, jurisdiction of all suits and proceedings then pending in the present Supreme Court and Court of Chancery, and all suits or proceedings originally commenced and then pending in any court of common pleas, except in the city and county of New York, shall become vested in the Supreme Court hereby established, intended all suits originally commenced in the old courts of common pleas, whether the same have proceeded to final judgment or not, provided no other judicial action is to be had thereon—for instance, as a motion for a new trial upon a case, or motions to set aside a report of referees, to amend the record, or to set aside the judgment for irregularity. *O'Malley v. Reese* (N. Y.) 1 Barb. 643, 647.

#### **Charges against police officer.**

Within Laws 1895, c. 569, requiring the retirement of a police officer after 25 years' service, against whom no charges are pending, means against whom accusations made to and entertained by the body having jurisdiction to act upon and investigate them are hanging. *People v. Roosevelt*, 34 N. Y. Supp. 228, 229, 12 Misc. Rep. 622.

#### **Criminal prosecution.**

A prosecution will not be deemed pending where no indictment has been filed, but only preliminary proceedings begun before a magistrate. *State v. Arlin*, 39 N. H. 171, 180.

A cause is pending against one as early as his arrest and commitment for a crime for which he is afterwards indicted. *Hartnett v. State*, 42 Ohio St. 568, 576.

#### **Freight.**

Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], relating to the liability of an owner of a vessel for embezzlement or destruction of property on the vessel, and providing that it shall in no case exceed the value of the interest of the owner in the vessel and "her freight then pending," means the earnings of the voyage contingent on its completion, whether for the carriage of passengers or merchandise. *In re La Bourgogne*, 117 Fed. 261, 265.

#### **Hearing.**

Where a clerk was ordered to issue a restraining order "pending such hearing," this means the same as if the words had been "until and pending such hearing," and the intention was to limit the operation of the order until such time as the parties could be heard upon the issue whether, under the allegations in the petition and answer, should one be filed, an injunction should be granted, and remains in force until the final disposi-

tion of such issue. *Riggins v. Thompson*, 71 S. W. 14, 16, 96 Tex. 154.

#### **Petition for highway.**

A petition for a highway, as soon as filed with the clerk of the proper court, is pending. *Wentworth v. Town of Farmington*, 48 N. H. 207, 210.

#### **Proceeding.**

The levy of an execution and other ministerial acts to effect the sale are not "pending proceedings," within Code, § 4183, providing that bills shall be filed in the county of the residence of the defendant except in cases of injunctions to stay pending proceedings. *Rounsaville v. McGinnis*, 21 S. E. 123, 124, 93 Ga. 579.

The issuance and levy of a distress warrant, when no counter affidavit or other proceeding is filed to arrest their progress, is not a "pending proceeding," within Civ. Code 1895, § 4950, providing that all petitions for equitable relief shall be filed in the county of the residence of one of the defendants, except in cases of injunction to stay pending proceedings. *Dade Coal Co. v. Anderson*, 30 S. E. 640, 641, 103 Ga. 809.

A proceeding before the railroad commissioners, in which application to them had been made, but no notice given to the other party, was not pending. *City of Burlington v. Burlington Traction Co.*, 41 Atl. 514, 515, 70 Vt. 491.

Improvement Act 1897, § 66, as amended by Laws 1901, provides that, on an application for judgment of sale of property for an unpaid subsequent installment of a special assessment, no defense "except as to the legality of the pending proceeding" shall be made. Held, that the phrase "as to the legality of the pending proceeding" applied only to the proceedings in the application for judgment of sale. *Downey v. People*, 68 N. E. 807, 808, 205 Ill. 230.

The act concerning insane persons (Pub. Acts 1889, p. 88) provides that, when any person is supposed to be insane, complaint may be made to any judge of probate; that after receiving said complaint the judge shall appoint a time for a hearing on reasonable notice; and that "pending the proceedings for the hearing and examination" the judge may make such reasonable orders for the custody of the person complained of as he shall deem proper. The proceeding under the statute is pending as soon as the complaint is filed in court, and before service of notice on the person complained of. *Porter v. Ritch*, 39 Atl. 169, 177, 70 Conn. 235, 39 L. R. A. 353.

#### **Settlement.**

Where an estate represented insolvent has turned out to be solvent, and the ad-

ministration account has been presented to the court of probate and accepted, the estate is no longer to be regarded as "pending for settlement," within the meaning of a statute which provides that no suit shall be brought against the administrator while the estate is in settlement. *Bacon v. Thorp*, 27 Conn. 251.

### **PENETRATION.**

"Penetration," as used in the rule that penetration only is necessary to be proved on a trial for rape, is a limitation upon and qualification of the meaning of the term "carnal knowledge" as used in Pen. Code, § 528, defining the offense of rape. In limiting the "carnal knowledge" mentioned in the definition of "rape" to "penetration" only, the Legislature intended to eliminate the question of "emission" in such cases. *Lujano v. State*, 24 S. W. 97, 32 Tex. Cr. R. 414.

### **PENITENTIARY.**

See "State Jail or Penitentiary."

"Penitentiary," is an English word in common use, denoting a prison or place of punishment, and means the place of punishment in which convicts sentenced to confinement and hard labor are confined by the authority of the law. *State v. Nolan*, 29 Pac. 568, 571, 48 Kan. 723; *Miller v. State*, 2 Kan. 174, 183.

A penitentiary is a prison for the compulsory confinement of convicts from criminal courts. In Pennsylvania and the Southern States these prisons are called "penitentiaries," but in nearly all the Northern States the term "state prison" is used synonymously with the word "penitentiary." *United States v. Smith* (U. S.) 40 Fed. 755, 759.

The fact that the jury fixed defendant's punishment at imprisonment in the penitentiary instead of in the state's prison is an objection of so technical a character as to constitute no ground for the reversal of a conviction. *Cross v. State*, 31 N. E. 473, 132 Ind. 65.

Under an act requiring the sheriff to deliver the convict to the warden of the penitentiary, there to be safely kept until the term of his confinement expires or he is pardoned, it is held that the word "penitentiary" does not mean the place, geographically limited, which at the moment of the sentence may be legally designated or in use for the confinement of criminals, but refers to the place or places which, for the time being, the Legislature may provide for the incarceration of criminals. *State v. Peters*, 43 Ohio St. 629, 649, 4 N. E. 81.

The state reformatory, established by Hurd's Rev. St. 1893, c. 118, § 12, requires

male criminals between the ages of 16 and 21, on conviction of a crime not capital, which was theretofore punishable in the penitentiary, to be sentenced to the reformatory, unless shown to have been previously sentenced to the penitentiary or state prison in this or some other state or country, is different in its objects and purposes from the penitentiary, established by the state, and it cannot be called a penitentiary; and therefore a previous sentence to the reformatory does not authorize a penitentiary sentence in such a case. *Henderson v. People*, 165 Ill. 607, 608, 46 N. E. 711.

The word "penitentiary" whenever the same is used in any of the laws of the state as a place of punishment for crime, shall be construed to mean and refer to the state prison. *Rev. St. Fla. 1892, § 3034.*

## PENNSYLVANIA.

Current money of, see "Current Money."

## PENSION.

A pension is a bounty for past services rendered to the public. It is mainly designed to assist the pensioner in providing for his daily wants. *Price v. Society for Savings*, 30 Atl. 139, 64 Conn. 362, 42 Am. St. Rep. 198.

A pension is a mere bounty or gratuity given by the government in consideration or recognition of meritorious past services rendered by the pensioner or by some kinsman or ancestor. *Manning v. Spry*, 96 N. W. 873, 874, 121 Iowa, 191.

A pension is a periodical allowance of money granted by a government for services rendered, in particular to a soldier or sailor in connection with a war or with a military operation. *Morse v. Robertson*, 9 Hawaii, 195, 197 (quoting *And. Law Dict.*).

Pensions are not granted in consequence of a deficiency of pay while in service, but they are gratuitous for honorable service when the party in most cases is unable to render further service. *Burton's Ex'r v. Burton's Adm'r (Va.)* 10 Leigh. 597, 599.

Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall at its discretion. *Walton v. Cotton*, 60 U. S. (19 How.) 355, 358, 15 L. Ed. 658; *Frisbie v. United States*, 15 Sup. Ct. 586, 588, 157 U. S. 160, 39 L. Ed. 657.

A pension is in the nature of a gift intended for the personal benefit of him who is or those who are beneficiaries of it, and under Code Civ. Proc. § 1393, providing that a pension granted by the United States shall be exempted from seizure for nonpayment of taxes, property purchased by the widow of

a soldier with pension money is exempt. *People v. Williams*, 27 N. Y. Supp. 23, 25, 6 Misc. Rep. 185.

Under Code Civ. Proc. § 1393, providing that a pension granted for military services is exempt from levy and sale under execution and from seizure for nonpayment of taxes or in any other legal proceedings, land purchased as a place of residence for the purchaser and his family with pension money is exempt from sale for nonpayment of taxes. *Toole v. Oneida County Sup'rs*, 37 N. Y. Supp. 9, 10, 25 Civ. Proc. R. 267, 16 Misc. Rep. 653.

## PENSION AGENT.

As United States officer, see "United States Officer."

## PENSION MONEY EXEMPTIONS.

Pension money exemptions within the meaning of Rev. St. § 4747 [U. S. Comp. St. 1901, p. 3279], providing that no sum of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains in the pension office, or any officer or agent thereof, or is in the course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of the pensioner, is an exemption which only exists till the pension money is actually received by the pensioner. *Beecher v. Barber (N. Y.)* 6 Dem. Sur. 129, 131.

## PENSIONER.

The word "pensioner," as used in the chapter relating to state and military aid and soldiers relief, shall be held to include a commissioned officer. *Rev. Laws Mass. 1902, p. 702, c. 79, § 4.*

## PENT ROAD.

A "pent road" is a highway within Rev. St. c. 20, §§ 3, 5, providing that the selectmen may lay out cross-roads or lanes as pent roads, and that they shall be deemed highways. *Town of Whitingham v. Bowen*, 22 Vt. 317, 318.

A pent road is a road which is shut up or closed at its terminal point, and is a highway for the use of the public, though they are not open highways. *Wolcott v. Whitcomb*, 40 Vt. 40, 41.

Pent roads are public, but not open, highways. *Carpenter v. Cook*, 30 Atl. 998, 999, 67 Vt. 102.

A pent road is one that may be inclosed by gates or bars, and is not an open highway. *Bridgeman v. Town of Hardwick*, 31 Atl. 33, 34, 67 Vt. 132; *French v. Holt*, 53 Vt. 364, 366.

**PEON.**

A peon is a species of serf, compelled to work for his creditor until his debts are paid. In *re Lewis* (U. S.) 114 Fed. 963, 967.

**PEONAGE.**

At the time of the passage of the act of Congress now embraced in sections 1990 and 5526 of the Revised States [U. S. Comp. St. 1901, pp. 1266, 3715] a system of service popularly called "peonage" existed in New Mexico, though not so termed in the laws of the territory, which spoke of the relation as that of master and servant. It derived the institution from Mexico, which in turn inherited it from Spain. Peonage was not slavery as it formerly existed in this country. The peon was not a slave. He was a freeman, with political as well as civil rights. He entered into the relation from choice, for a definite period, as the result of mutual contract. The relation was not confined to any race. The child of a peon did not become a peon and the father could not contract away the services of his minor child except in rare cases. The peon, male or female, agreed with the master upon the nature of the service or length of its duration and compensation. The peon then became bound to the master "for an indebtedness founded upon an advancement in consideration of service." In the earlier stages of the institution there, the person agreeing to perform service could put an end to the relation by paying whatever he owed to the employer at any time. If the peon wished to change masters or service, he could find a new employer who would advance enough to pay the peon's debt to his then master, and the peon would then become bound in the new employer's service. So, also, the master could sell the service of the peon for the term to any one who had paid his debts and assumed the duties and obligations of the master. Under later laws the party could not abandon the contract except by mutual consent, or "by some sufficient motive given by one party to another, such as having grievously injured him, or where the master kept the accounts in an ambiguous manner, so that the servant could not understand them." In these cases the contract could be rescinded by paying the amount due by one party to the other. If no such motive "should be proven, the contract must be complied with, and the judge or court would order it carried into effect by imposing upon the party failing to comply with the contract, and who shall persevere in doing so, that he should indemnify the other party for the injuries resulting therefrom; and all resistance was punished by a fine or imprisonment, as the gravity of the circumstances and resistance may require." If the servant refused to comply, and owed any money to the master, and he refused and could not pay it,

the court would compel him to pay the principal and interest to the other, and might order the sheriff to contract the services of the peon to the highest bidder. The same proceedings could be had against the master if he failed to pay what he owed. "It seems clear," as declared by the highest court of the territory in reviewing the legislation on the subject, "that the Legislatures were determined that by no means should either of the parties escape the consequences of their own voluntary agreement." The agreement once made, the employé or person for whom the advance was made, except in the cases stated, became irrevocably bound to service. Under section 5526 of the Revised Statutes [U. S. Comp. St. 1901, p. 3715], which makes it an offense to hold, arrest, or return, or to cause or aid in the arrest or return, of any person to a condition of peonage, it is immaterial to such offense whether or not the condition of peonage exists by virtue of a local law or custom creating a system of peonage, or whether it exists in violation of or without the sanction of law. The "condition of peonage" is a condition of enforced servitude, by which the servitor is restrained of his liberty, and compelled to labor in liquidation of some debt or obligation, either real or pretended, against his will; and any agreement giving another the right to exact such servitude is invalid under the law, and treated as though made involuntarily, and affords the creditor or master no protection. What influence, force, or threats to compel a person to render service to another in liquidation of an obligation amounts to coercion, such as, if effective, will render the service involuntary, and create a condition of peonage, must be determined by taking into consideration in each case the relative inferiority of the person performing the service to the person exercising the force or influence to compel its performance. A person who hires another, or induces him to sign a contract by which he agrees during the term to be imprisoned or kept under guard, and under cover of such agreement afterward holds the party to the performance of the contract by threats or punishment or undue influence, subduing his free will when he desires to abandon the service, is guilty of holding such person to a condition of peonage. A person who falsely pretends to another that he is accused of crime, and offers his good offices to prevent his conviction if he will pay a sum of money thereby to satisfy the prosecutor, and thus induces such party to sign a contract obligating himself to work to reimburse the amount paid out or pretended to be paid out for this purpose, and to submit to restraint and deprivation of his liberty while he is performing the contract, is guilty of holding such person or causing him to be held to a condition of peonage, whenever such person having so entered on performance of the contract desires to leave it, but is compelled to remain and per-

form it by threats or punishment subduing his freedom of will; and any third person for whose benefit such a contract is made, who, knowing such facts, becomes the custodian of the person so held to servitude and enforced performance of the contract, is also guilty of the offense. If one person carries another before a magistrate, informing him that he is accused of crime, and the magistrate induces the accused, who is of weak mind, or little intelligence, or confiding, to believe that he has been sentenced to hard labor for a fine, when in fact no offense was charged, no warrant issued, and no judgment entered, and such person is induced by such fraudulent means to submit to restraint of his liberty, the persons so concerned are guilty of causing the accused to be held to a condition of peonage. Peonage Cases (U. S.) 123 Fed. 671, 673.

The word "peonage," as used in Rev. St. § 5526 [U. S. Comp. St. 1901, p. 3715], providing that every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage shall be punished, etc., includes cases of involuntary servitude to work out a debt. In re Lewis (U. S.) 114 Fed. 963, 967.

## PEOPLE.

The word "people" is a comprehensive one, and is subject to many different meanings, depending always upon the connection in which it is used and the subject-matter to which it relates. The definition given in Anderson's Law Dictionary is "ordinarily, the entire body of the inhabitants of a state; in a political sense, that portion of the inhabitants who are intrusted with political power"; and in Rap. & L. Law Dict., among other definitions, "the state or nation in its collective or political capacity." Lord Kenyon, in *Nesbitt v. Lushington*, 4 Term R. 787, said that the word "people" means the "ruling power of the country." *The Itata* (U. S.) 56 Fed. 505, 511, 5 C. C. A. 608.

Judge Cooley, in his work on Constitutional Limitations, after stating that the power to amend or revise our Constitution resides in the great body of the people of the states as an organized body politic, says: "The people, in a legal sense, must be understood to be those who, by the existing Constitution, are crowned with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic will be expressed." *Kochler v. Hill*, 15 N. W. 609, 615, 60 Iowa, 543.

It is the whole, and not a part, of the people who make the Constitution and speak its language, and wherever it employs the term "people" it means the whole, and not a fraction, of the people. This is the meaning of the term in a constitutional provision

providing that all officers whose election is not otherwise specified shall be elected by the people or appointed as the Legislature may direct. *People v. Draper*, 15 N. Y. 532, 558.

The "vote of the people," as used in Const. art. 11, § 5, directing that no act of the General Assembly creating banking associations shall go into effect unless the same shall be submitted to a vote of the people, means the vote of the people of the whole state, and not of particular localities in the state. *Dupree v. Swigert*, 21 N. E. 622, 623, 127 Ill. 494.

"People," when not used as the equivalent of "state" or "nation," must apply to a body of persons less than a state or nation, and this meaning would be satisfied by considering it as applicable to any consolidated political body. *The Three Friends*, 17 Sup. Ct. 495, 500, 166 U. S. 1, 41 L. Ed. 897.

### Citizen synonymous.

"In the federal Constitution the words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the sovereign people, and every citizen is one of these people, and a constituent member of this sovereignty." *Dred Scott v. Sandford*, 60 U. S. (19 How.) 393, 404, 15 L. Ed. 691.

The words "people of the United States" are synonymous with "citizens," both describing the political body who form the sovereignty, and who hold the power and conduct the government through their representatives. *Boyd v. Nebraska*, 12 Sup. Ct. 375, 381, 143 U. S. 135, 36 L. Ed. 103.

### Government.

"People," as used in a policy insuring against the takings at sea, arrest, and detentions of all kings, princes, and people, means the governmental power of the country, according to the rule *noscitur a sociis*. *Nesbitt v. Lushington*, 4 Term R. 783, 787.

Act Cong. April 20, 1818, provides a punishment for the offense of knowingly fitting out a vessel for the service of any foreign prince or state, or of any colony, district, or people, to be used against another nation with whom the United States were at peace. "An indictment under the act charged the defendant with fitting out a vessel to be employed in the service of a foreign people. It was in evidence that the United Provinces of Rio de la Plata, for which the vessel was intended, had been regularly acknowledged as an independent nation by the executive department of the government of the United States prior thereto. It was argued that the word 'people,' as used in the indictment, was

not properly applicable to that nation or power. The objection was one purely technical, and, we think, not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed, being one of the denominations applied by act of Congress to a foreign power." *United States v. Quincy*, 31 U. S. (6 Pet.) 445, 467, 8 L. Ed. 458.

To come within the meaning of "people," as used in Rev. St. § 5283 [U. S. Comp. St. 1901, p. 3599], prescribing a punishment for any person concerned in furnishing, fitting out, or arming any vessel with intent that she shall be employed in the service of any foreign state or people to cruise or commit hostilities against any foreign state or people with whom the United States are at peace, the vessel must be intended to be employed in the service of some foreign prince, state, colony, district, or people to cruise or commit hostilities against the subjects, citizens, or property of another with which the United States are at peace, and a party of insurgents in a foreign country, engaged in carrying on war against the government thereof, do not constitute a people. *United States v. Trumbull* (U. S.) 48 Fed. 99, 106.

#### **Inhabitants.**

"People of a town," as used in town bonds reciting that they were issued in pursuance of a vote of the "people of a town," in popular signification is the same as "inhabitants of a town," as used in the statute under which the bonds were issued, requiring the approval of the "inhabitants of the town" to such issue. *Walnut v. Wade*, 103 U. S. 683, 693, 26 L. Ed. 526.

#### **Public synonymous.**

"People" ordinarily means the entire body of the inhabitants of a state, and is synonymous with "public." *Wyatt v. Larimer & W. Irr. Co.*, 29 Pac. 906, 911, 1 Colo. App. 480 (citing *Bouv. Law Dict.*).

#### **Voters.**

"People," as used in Const. art. 8, § 15, providing that in all elections by the people the vote shall be personally and publicly given viva voce, means those only who possess the qualification of voters required by Const. art. 2, § 8. *Rogers v. Jacob*, 11 S. W. 513, 514, 88 Ky. 502.

"People," as used in Comp. St. 1895, p. 203, c. 13a, art. 1, § 67, subd. 21, authorizing a city to issue bonds for funding indebtedness when the same shall have been authorized by a vote of the people, means electors or voters. *Bryan v. City of Lincoln*, 70 N. W. 252, 50 Neb. 620, 35 L. R. A. 752 (citing *Walnut v. Wade*, 103 U. S. 693, 26 L. Ed. 526, where in a similar act the word "inhabitants" was held to mean voters).

"People," as used in a proclamation stating that by order of the board of supervisors a special election will be held in a certain county for the purpose of submitting a certain question to the "vote of the people" of the county, means the vote of only those people who are qualified voters or electors. *People v. Counts*, 26 Pac. 612, 614, 89 Cal. 15.

"People," as used in the Declaration of Rights embodied in the Constitution, providing that all political power is vested in and derived from "the people," is not used in its ordinary sense as meaning the entire body of the inhabitants of the state, but is used in its political sense, in which it means that portion of the inhabitants of the state who are intrusted with political powers for political purposes. The word must be construed as synonymous with "qualified voters," and excludes those who have not the right of suffrage. *Blair v. Ridgely*, 41 Mo. 63, 64, 75, 97 Am. Dec. 248.

"People," as used in Act Cong. May 30, 1850, authorizing the people of the territory of Nebraska, etc., to form for themselves the Constitution and state government, etc., means the free white male inhabitants above the age of twenty-one years, actual residents of the territory, citizens of the United States and those who have declared on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States. *State v. Boyd*, 48 N. W. 739, 750, 31 Neb. 682.

The word "people" in the school law of 1857, providing that taxes for the erection of schoolhouses must be voted by the people, means voters. *Beverly v. Sabin*, 20 Ill. 357, 362.

The word "people" in a will making a charitable bequest to a school district, and providing that the property bequeathed shall be under the control of one person, elected by the people of the district, must be understood in the political sense, and means those, and only those, with whom the elective power is deposited. *Heuser v. Harris*, 42 Ill. 425, 432.

"People," as used in Const. art. 4, § 13, requiring the consent of the people to the incurring of state debts over a certain amount, should be construed to include registry voters as well as taxpayers. In re Incurring of State Debts, 37 Atl. 14, 15, 19 R. I. 610.

#### **PEOPLE OF THE COUNTRY.**

"People of the country," when used in relation to the introduction of a custom, is "the union or assemblage of persons of all descriptions of the country where they are collected." *Strother v. Lucas*, 37 U. S. (12 Pet.) 410, 446, 9 L. Ed. 1137.



**PEOPLE OF THE COUNTY.**

"People of the county," as used in an act of the Legislature providing that the title to land condemned for a public park shall vest in the people of the county, means the county. *St. Louis County Court v. Griswold*, 58 Mo. 175, 201.

The "people of a county" have not the capacity to take by grant. They are not a corporate body known in law, and as a grant, to be valid, must be to a corporation, or some person certain must be named who can hold either in his own right or in his right as trustee, a grant of a lot to the people of the county is invalid. *Jackson v. Cory* (N. Y.) 8 Johns. 385, 388.

**PEOPLE OF THE STATE.**

The phrase "people of the state," as used in the Colorado statutes requiring certain proceedings to be brought in the name of the people of the state, should be construed as equivalent to "the state," so that a complaint brought in the name of the state of Colorado is, in effect, a suit in the name of the people of the state. *Brown v. State*, 5 Colo. 496, 499.

In an action on an official bond the court said: "The first assignment of error is that the bond is payable to the people of the state of California, whereas it is insisted the act requires it to be made payable to the state of California. All that is requisite to constitute a good bond on this point is that it should have a good obligee, so that there will be no mistake as to the one to whom the service or duty is owing. Either of the names is descriptive of the same sovereignty, and may be indifferently used, as they are in various statutes." *Tevis v. Randall*, 6 Cal. 632, 635, 65 Am. Dec. 547; *People v. Love*, 19 Cal. 676, 681.

**PEPPER.**

Shells of pepper, which, when ground, make a low grade of black pepper, are within the provisions for the entry free of duty of "pepper, white or black, \* \* \* when unground," in Free List, par. 667, Tariff Act July 24, 1897, c. 11, § 2, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688]. *United States v. Leggett* (U. S.) 124 Fed. 1015.

**PEPSIN.**

Chymosin and pepsin are ferments found in the rennets or stomachs of calves and hogs, the former predominating in calf rennet and the latter in hog rennet; but they are unlike in their properties, chymosin being a coagulating agent and pepsin a digestive agent. *Blumenthal v. Burrell* (U. S.) 43 Fed. 667.

**PEPTONE.**

Peptone is a sirupy liquid resulting from a process consisting in finely cutting up the mucous membranes, or the whole stomachs, of animals, placing the same in a vessel containing acidulated water, and subjecting the mixture to heat, whereby an artificial digestion takes place akin to the action in the natural stomach. *Carl L. Jensen Co. v. Clay* (U. S.) 59 Fed. 290.

**PER.**

See "As Per."

The use of the word "per" in a policy of insurance countersigned "W., Agent, per K.," is sufficient to put the insured upon inquiry as to the authority of K. *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 148, 157.

**PER AGREEMENT.**

"Per agreement," in the items of a bill of particulars for services as "per agreement," does not restrict the claimant to proof of a special agreement fixing the price. *Robinson v. Weil*, 45 N. Y. 810, 811.

**PER ACRE.**

The phrase "per acre," as used in a commissioner's statement of the valuation of land to be taxed, the land being under water, adjacent to upland owned by the party taxed, and the statement being in the following form: "Thirty acres of land at \$17,500 per acre, \$525,000," does not indicate the value of each acre by itself, but only a basis of calculation on which the value of the owner's rights in the whole tract may be computed. *New York, L. E. & W. R. Co. v. Yard*, 43 N. J. Law, 121, 124.

**PER ANNUM.**

Strictly speaking, the words "per annum" mean by the year, or through the year, as used in a promissory note made payable on or before a certain time, with interest at a certain per cent. per annum after date until paid. *Ramsdell v. Hulett*, 31 Pac. 1092, 1093, 50 Kan. 440.

A note reading, "Five years after date I promise to pay, \* \* \* with interest from date at the rate of 8 per cent. per annum," means that the interest and principal will be paid five years after date. The words "with interest at the rate of 8 per cent. per annum" only fixed the rate of interest to be calculated on the note, and have nothing to do with the time that it shall be paid, and evidence to show that the parties intended by the use of the words "per annum" to declare that the interest should be paid annually

was held inadmissible. *Koehring v. Muemlinghoff*, 61 Mo. 403, 407, 21 Am. Rep. 402.

"Per annum," as used in Rev. St. § 1211, requiring applications for a railway license under it to the State Treasurer to contain a statement of the gross earnings of the respective roads for the preceding calendar year, of the number of miles of road operated by each company or person, and the gross earning per mile "per annum" during such year, implies the idea of a rate, one of the factors in the ascertainment of which would be the length of time during the preceding year the roads had been operated. The term may mean by the year, which seems to imply a rate or proportion, but it may also mean in the year, which excludes the idea of rate, and requires the computation of earnings per mile to be made upon the two factors alone of mileage and gross earnings during the year. *State v. McFetridge*, 24 N. W. 140, 143, 64 Wis. 130.

Where a servant was hired by the week, and paid wages weekly, a resolution of the corporation employing him that his salary be "increased \$104 per annum, thus making his salary \$14 instead of \$12 per week," did not transform his contract of hiring into a contract by the year, the words "increase per annum" being used only as a mode of computation, and not to extend the hiring for a year. *Stanford v. Fisher Varnish Co.*, 43 N. J. Law (14 Vroom) 151, 153.

"Per annum," as used in a contract for services specifying a salary of \$2,500 per annum, but not fixing the duration of the contract, construed as only fixing the rate of compensation, and not to specify any time for the duration of the relation of master and servant. *Haney v. Caldwell*, 35 Ark. 156, 168.

#### PER CAPITA.

"Per capita," as used in articles 12 and 15 of the United States Cherokee treaty of 1835, declaring that all the Cherokees shall receive their due proportion of all the personal benefits accruing under the treaty for their claims, improvements, and "per capita," means the proportionate amounts given to each Cherokee not choosing to migrate, or the money received on the cession of the lands east of the Mississippi, after deducting certain expenditures mentioned in article 15. *Eastern Band of Cherokee Indians v. United States*, 6 Sup. Ct. 718, 728, 117 U. S. 288, 29 L. Ed. 880.

#### PER CENTUM.

See "Per Cent."

#### PER CURIAM.

A "per curiam" is the opinion of the court in a case in which the judges are all

of one mind, and the question involved is so clear that it is not considered necessary to elaborate it by an extended discussion; so it is said that a "per curiam" opinion does not carry less weight because of the form in which it is written. *Clarke v. Western Assur. Co.*, 23 Atl. 248, 249, 146 Pa. 561, 15 L. R. A. 127, 28 Am. St. Rep. 821.

#### PER DAY.

A contract provided that plaintiff was to have 12 shillings "per day" for every man employed by him to work on defendant's house. Held, that the words "per day," in that connection, meant a certain portion of a natural day during which persons in the carpenter trade usually work, and hence that evidence of a custom that 10 hours' labor constituted a day's work, and therefore that the plaintiff was entitled to charge proportionately extra for each natural day during which the men worked twelve hours and a half, was competent and properly admitted. *Hinton v. Locke* (N. Y.) 5 Hill, 437, 439.

#### PER DIEM.

As fees, see "Fees."

#### PER LEGEM TERRÆ.

The words "per legem terræ" translated to mean "by the law of the land" was said by Lord Coke to mean "by due process of law." *United States v. Kendall* (U. S.) 26 Fed. Cas. 702, 748.

The words "per legem terræ" mean by due process of law, and being brought into court to answer according to law. *Appeal of Ervine*, 16 Pa. (4 Harris) 256, 263.

The words "per legem terræ," "by the law of the land," as used in Magna Charta in reference to the liberty of the subject, are understood to mean "due process of law"—that is, by indictment or presentment of a jury of good and lawful men; "and this," says Lord Coke, "is the true sense and exposition of these words." *Rhinehart v. Schuyler*, 7 Ill. 473, 519 (citing 2 Coke's Inst. 50).

#### PER MILE.

A state granted a certain amount of land to a railroad for the construction of 345 miles of road. Thereafter the grantee's plans were modified and changed, and only 271 miles were constructed under the modified plans, and the state made another grant to such company in the following terms: "The said company shall be entitled for such modified plan to the same lands and to the same amount of lands per mile, and for such connecting branch the same amount of land per mile as originally granted to aid in the construction of its main line." It was held that the words "per mile" were words of limita-

tion and control, and qualified the words "same lands" and "same amount of lands," so that the clause in question should read and be construed as if written: "The said company shall be entitled to the same lands per mile and to the same amount of lands per mile as originally granted to aid in the construction of its main line." *Cedar Rapids & M. R. R. Co. v. Herring*, 52 Iowa, 687, 689, 3 N. W. 786.

A contract to build a railroad between certain points at a specified sum per mile, according to specifications, and providing, among other things, for the building of side tracks and turnouts, imports nothing less than "by the mile of road," not a mile of track. A mile of road is no more because it has more or less additional side tracks at stations or turnouts. If plaintiffs had stipulated to pay for every mile of track, they would no doubt have been fairly entitled to measure the side tracks and turnouts. *Barker v. Troy & R. R. Co.*, 27 Vt. 766, 776.

#### PER MITTER LE DROIT.

One of the modes in which releases at common law were said to inure was "per mitter le droit," as where a person who had been disseised released to the disseisor his heir or feoffee. There, by the release, the right which was in the releaser was added to the possession of the releasee, and the two combined perfected the estate. *Miller v. Emans*, 19 N. Y. 384, 387.

#### PER MITTER L'ESTATE.

Where two or more are seised, either by deed, devise, or descent, as joint tenant or coparceners of the same estate, and one of them releases to the other, this is said to inure by way of "per mitter l'estate." *Miller v. Emans*, 19 N. Y. 384, 388.

#### PER QUOD CONSORTIUM AMISIT.

The husband's right known as "per quod consortium amisit" arises out of the physical injury done the wife by trespass. The development of the law has led to include in this class causes of injury to the wife's person arising from mere negligence. *Crocker v. Crocker* (U. S.) 98 Fed. 702, 703.

#### PER QUOD SERVITIUM AMISIT.

An action for damages "per quod servitium amisit" pertains to the relation of master and servant, and not to the mere relation of parent and child. *Callaghan v. Lake Hopatecong Ice Co.*, 54 Atl. 223, 69 N. J. Law, 100.

#### PER SE.

See "Actionable Per Se"; "Negligence Per Se"; "Negligent Per Se"; "Nuisance Per Se."

#### PER STIRPES.

When issue are said to take per stirpes it is meant that the descendants of a deceased person take the property to which he was entitled or would have been entitled if living. *Rotmanskey v. Heiss*, 39 Atl. 415, 86 Md. 633.

#### PER THOUSAND FEET.

A contract by which a party agreed to saw lumber at the price of two dollars "per thousand feet" does not imply that the measurement should be by the log scale. *Smith v. Aikin*, 75 Ala. 209, 210.

#### PER YEAR.

"Per year," as used in a contract requiring plaintiff to deliver one thousand tons of ground bark per year for the term of five years, is equivalent to the word "annually." *Curtiss v. Howell*, 39 N. Y. 211, 213.

#### PER CENT.

"Per cent." is an abbreviation of the Latin term "per centum," and means "by the hundred." It is so used and understood by mathematicians, accountants, and all English-speaking persons having occasion to use it. In construing a will giving to testator's two sons 10 per cent. each of the income of his personal estate, to four daughters 6 per cent. each, and to three daughters 4 per cent. each, thus disposing altogether of but 56 per cent. of the fund, it is held that the term "per cent." should be construed to mean "shares," so that the devisees would each take  $\frac{10}{56}$ ,  $\frac{6}{56}$ , and  $\frac{4}{56}$  of the fund, respectively. *Blakeslee v. Mansfield*, 66 Ill. App. 116, 119.

The words "per cent." shall be equivalent to the words "per centum." Code Va. 1887, § 5.

#### PERAMBULATION.

"Perambulation," as used in Act 1872, providing for the perambulation of towns, or, as it might be more correctly called, a circumambulation, is the custom of going around the boundaries of the manor or parish with witnesses to determine and preserve recollection of its extent, and to see that no encroachment had been made upon it, and that the landmarks have not been taken away. It is a proceeding commonly regulated by the steward, who takes with him a few men and several boys, who are required to particularly observe the boundary lines traced out, and thereby qualify themselves for witnesses in the event of any dispute about the landmarks or extent of the manor at a future day. *Town of Greenville v. Town of Mason*, 57 N. H. 385, 391.

## PERCEIVE.

Rev. St. p. 222, § 29, providing that the canal commissioners shall, under certain circumstances, make such repairs as they "shall perceive to be necessary," means "deem" or "judge" to be necessary. The necessity of such repairs is almost always a mere matter of opinion, and such necessity must be determined by the judgment of the commissioner to whom the statute has confided it. *Griffith v. Follett* (N. Y.) 20 Barb. 620, 625.

## PERCENTAGE.

The "percentage of" a sum means a portion of that sum, and is not synonymous with "percentage on." *Southern Boulevard R. Co. v. People's Traction Co.*, 39 N. Y. Supp. 266, 269, 5 App. Div. 330.

The "percentage on" a sum signifies the measure of what the sum in question will yield, and in no sense whatever imports a portion of such sum, or "percentage of." *Southern Boulevard R. Co. v. People's Traction Co.*, 39 N. Y. Supp. 266, 269, 5 App. Div. 330.

## PERCH.

The term "perch" is very common as applied to erections in masonry, whether more or less free from interstices, and it is a solid measure as much as a cubic yard or any other term of solidity. *Wood v. Vermont Cent. R. Co.*, 24 Vt. 608, 610.

"Perch," as used in a contract to furnish stone at a certain price per perch, is indefinite. Webster says  $16\frac{1}{2}$  feet make a perch. The new American Encyclopedia says 25 feet. In some arithmetics  $16\frac{1}{2}$  feet, in others 25, while in others again  $24\frac{3}{4}$  are given as a perch. In Haswell's *Engineers' and Mechanics' Book*  $24\frac{3}{4}$  feet are given as a perch of stone. *Baldwin Quarry Co. v. Clements*, 38 Ohio St. 587, 590.

Under Iowa statutes providing that "the perch of masonry or stone is hereby declared to consist of twenty-five feet, cubic measure," and "contracts in which no other scale or standard is expressed shall be taken to mean the above," evidence was held inadmissible to show that in a contract to build a rock house of certain dimensions at a specified price per "perch" sixteen and one-half cubic feet were meant by the term "perch." The court said: "It was especially proper that the Legislature should fix or define a perch of masonry, for aside from statute the amount is not only uncertain, but this uncertainty is of a most material character. Webster's Dictionary defines it: 'In solid measure, a mass sixteen and one-half feet long and a foot each in height and in breadth, or sixteen and one-half cubic feet.' Many of

the arithmetics fall to define a perch, but one of the latest says: 'A perch of stone or of masonry is sixteen and one-half feet long, and one and one-half feet wide, and one foot high, or twenty-four and three-quarters cubic feet.' The new American Encyclopedia, after giving other definitions, adds: 'In masonry a perch is equal to twenty-five cubic feet.' To obviate this uncertainty, and to secure uniformity throughout the state, were the objects of the statute." *Harris v. Rutledge*, 19 Iowa, 388, 390, 391, 87 Am. Dec. 441.

A perch is the standard of measure of stone masonry, and contains sixteen and one-half solid feet. *Pol. Code Idaho 1901*, § 612.

A perch of Paris is eighteen feet. *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

## PERCOLATE.

The word "percolate" designates any flowage of subsurface water other than that of a running stream, open, visible, clearly to be traced. *Mosier v. Caldwell*, 7 Nev. 363, 367.

## PERCOLATING WATERS.

Percolating waters are those which pass through the ground beneath the surface of the earth without definite channels. *Wyandot Club v. Sells*, 9 Ohio S. & C. P. Dec. 106, 107; *Herriman Irr. Co. v. Keel*, 69 Pac. 719, 725, 25 Utah, 96; *Deadwood Cent. R. Co. v. Barker*, 86 N. W. 619, 621, 14 S. D. 558.

Percolating waters are a part of the soil, and belong to the owner of the soil. It is essential to the nature of percolating waters that they do not form part of the body or flow, surface or subterranean, of any stream. They may be either rain waters, which are slowly infiltrating through the soil, or they may be waters seeping through the banks or bed of a stream, which have so far left the bed and the other waters as to have lost their character as part of the flow. *Vineyard Irr. Dist. v. Azusa Irr. Co.*, 126 Cal. 486, 494, 58 Pac. 1057, 46 L. R. A. 820.

Percolating water is all such water as may be present in the soil of the land, and which does not constitute a part of the water of the water course. *City of Los Angeles v. Pomeroy*, 57 Pac. 585, 593, 124 Cal. 597.

## PEREMPTORY.

Imperative, absolute, not admitting of question, delay, or reconsideration; positive, final, decisive, not admitting of any alternative; self-determined, arbitrary, not requiring any cause to be shown. *Black, Law Dict.*

**PEREMPTORY CHALLENGE.**

Peremptory challenges are those which are made to the jury without assigning any reason, and which the courts are bound to respect. *Turpin v. State*, 55 Md. 462, 464.

A peremptory challenge is a challenge without showing any cause at all. *Leary v. North Jersey St. Ry. Co.*, 54 Atl. 527, 69 N. J. Law, 67.

The right to peremptory challenge is not of itself a right to select, but a right to reject, jurors. *State v. Cady*, 14 Atl. 940, 941, 80 Me. 413; *United States v. Marchant*, 25 U. S. (12 Wheat.) 480, 483, 6 L. Ed. 700; *Biddle v. State*, 10 Atl. 794, 67 Md. 304; *Rogers v. State*, 43 Atl. 922, 89 Md. 424.

A peremptory challenge is one allowed to the prisoner in criminal, or at least in capital, cases, to challenge a certain number of jurors without showing any cause therefor. *State v. Hays*, 23 Mo. 287, 292.

A peremptory challenge in civil cases is a high privilege, and one which should be exercised in strict accordance with the technical meaning of the term. The adjective "peremptorious," from "perimere," to cut off, joined with a substantive, as "action" or "exception," signifies a final and determinate act without hope of renewing or altering. *Furman v. Applegate*, 23 N. J. Law (3 Zab.) 28, 29 (citing Jacob's Law Dict.).

A peremptory challenge is an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause. *Lewis v. United States*, 13 Sup. Ct. 136, 138, 146 U. S. 370, 36 L. Ed. 1011.

A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court must exclude him. *Rev. St. Utah 1898*, § 4829; *Cr. Code N. Y.* 1903, § 372; *Pen. Code Cal.* 1903, § 1069; *Ann. Codes & Sts. Or.* 1901, § 118; *People v. Hughes*, 32 N. E. 1105, 1106, 137 N. Y. 29.

**PEREMPTORY MANDAMUS.**

A "peremptory writ of mandamus" is an extraordinary remedy to coerce the performance of a pre-existing duty or a clear and specific legal right. In *State v. Washington County Sup'rs* (Wis.) 2 Pin. 555, 2 Chand. 247, it was held that the writ only issues in cases where there is a specific legal right to be enforced, or where there is a positive duty to be, and which can be, performed, and where there is no other specific legal remedy. In *State v. Larrabee* (Wis.) 3 Pin. 166, 3 Chand. 179, the court said that all the authorities concur in sustaining the position that a mandamus will not be granted to a relator except where he has a specific legal right to be affected by it. In *Schend v. St. George's*

*German Aid Soc.*, 49 Wis. 237, 5 N. W. 355, Judge Lyon said: "If a respondent is heard in opposition to the application, and there is no dispute about the facts, the application being well founded in law, a peremptory mandamus may be granted in the first instance." *State v. City of Manitowoc*, 52 Wis. 423, 426, 9 N. W. 607.

"A peremptory mandamus is not a judicial writ founded on a record, but a mandatory writ, which the court of B. R. issues when it is satisfied of the prosecutor's right." *Tapping*, 437. In its exercise there, the question of whether or not the act is ministerial is not always a test of the grant of it. Thus the court will not grant a writ where a matter is left to the discretion of the individual or body of men, which discretion has been exercised, and no ground appears that it has been done wrongfully. Where the discretion is given by it, it is understood a sound discretion. It must be a public duty, the performance of which is enforced, for where it is private other remedies are adequate. A mandamus will lie to compel the commissioners of the general land office to perform a mere ministerial duty, such as the issuing of a patent on a certificate and survey. *Kuechler v. Wright*, 40 Tex. 600, 608, 682.

The "writ of peremptory mandamus" is an extraordinary remedy. Like all other extraordinary remedies, it can be applied only under exceptional conditions, and must, to a certain extent, be subject to judicial discretion. A street railway company, in locating its track in a city, did not follow the plan approved by the court of common council as to the location of a cross-over switch, and the language of the vote of the council approving the location was doubtful. It appeared that the track as located served, rather than injured, public interests, and that it was located in pursuance of the directions of the city officials charged with the execution of the orders of the council. Under such circumstances a refusal to issue mandamus to compel the company to move the switch in compliance with an order of the court of common council was not such a plain abuse of discretion as would reverse the judgment. *City of Hartford v. Hartford St. Ry. Co.*, 50 Atl. 393, 74 Conn. 194.

**PEREMPTORY NONSUIT.**

A "peremptory nonsuit" is in the nature of a judgment for defendant on demurrer to evidence. *Jacques v. Fourthman*, 137 Pa. 428, 429, 20 Atl. 802, 803.

**PERFECT.**

In a charter of a railroad company authorizing certain persons to call the first meeting of the stockholders whenever \$100,-

000 or more of the capital stock, which was \$500,000, should have been subscribed for, to choose directors and perfect the organization of such corporation, the term "perfect the organization" refers to the duty of the directors to choose a president and to make and prescribe by-laws, or to their power to choose a clerk and treasurer and other officers, for those are duties and powers usually performed and exercised by directors. The words "perfect the organization" cannot be limited and applied simply to the matter of procuring further subscriptions to the stock. *Newhaven & D. R. Co. v. Chapman*, 38 Conn. 58, 65.

#### PERFECT CONDITION.

The phrase "perfect condition" in a statement of the rule that, when two claims exist in perfect condition between two persons, either may insist on a set-off, means that state of a demand when it is of right demandable by its terms. *Taylor v. City of New York*, 82 N. Y. 10, 17.

#### PERFECT DEED.

See "Good and Perfect Deed."

#### PERFECT EQUITY.

The term "perfect equity" in a statute subjecting to levy and sale a perfect equity, the defendant having paid the purchase money, means the equity of a purchaser who has paid the entire purchase money, and the statute does not apply to the interest of a defendant in execution, whose lands are sold under a power in a mortgage while the execution is in the hands of the sheriff, and bought in for him by a third person, to whom he does not refund the money until after the subsequent sale under the execution. *Shaw v. Lindsey*, 60 Ala. 344, 350.

The perfect equity which Code, § 3209, declares subject to levy and sale under execution at law, is the equity of a purchaser who has made full payment of the purchase money, but who has not received a conveyance, and does not extend to the interest of the purchaser who, having paid the purchase money, takes a conveyance of the title to his wife. *Smith's Ex'r v. Cockrell*, 66 Ala. 64, 75.

#### PERFECT GRANT.

A Mexican grant of land was not a "perfect grant" until affirmed by motion of the court and a patent issued upon such confirmation. Until so affirmed by the proper authorities, no valid title vests, and title could not be acquired by adverse possession until the lapse of 15 years after the patent issued under such a grant. *Tuffree v. Polhemus*, 108 Cal. 670, 675, 41 Pac. 806, 807.

#### PERFECT HORSE.

To say that a horse is perfect must mean that he is at least kind and all right. *Thompson v. Morse*, 47 Atl. 900, 901, 94 Me. 359.

#### PERFECT INTERVAL.

By a "perfect interval" in respect to a person who is insane is not meant a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure, but an interval in which the mind, having thrown off the disease, has recovered its general habit. *Attorney General v. Parnter*, 3 Brown, Ch. 368, 370.

#### PERFECT LIST.

"Perfect list," as used in Rev. St. c. 6, § 92, which requires a taxpayer to bring to the assessors a "true and perfect list" of his taxable estate as a condition precedent to a right of appeal to the county commissioners for any abatement of taxes, means a true enumeration, description, and specification of the property. It does not mean that there must be an appraisal or estimation of the value of the property. *Inhabitants of Orland v. County Com'rs*, 78 Me. 460, 461.

#### PERFECT MACHINE.

A "perfect machine," in the sense of the word "perfect" as applied to inventions, means a perfected invention; not a perfectly constructed machine, but a machine so constructed as to embody all the essential elements of the invention, in a form that would make them practical and operative so as to accomplish the result. It is not necessary that it should accomplish that result in the most perfect manner, and be in a condition where it was not susceptible of a higher degree of perfection in its mere mechanical construction. *American Hide & Leather Splitting & Dressing Mach. Co. v. American Tool & Machine Co. (U. S.)* 1 Fed. Cas. 647, 652.

#### PERFECT OBLIGATION.

A "perfect obligation" is that which gives to the opposite party the right of compulsion. *Aycock v. Martin*, 37 Ga. 124, 128, 92 Am. Dec. 56.

The obligation of a contract is perfect when the duty assumed by the contracting parties, respectively, to perform the stipulations, is a duty which is recognized and enforced by municipal law. *Barlow v. Gregory*, 31 Conn. 261, 265.

#### PERFECT ORDER.

"Perfect order," as used in a lease providing that it was understood and agreed

that the owner should not be called on or liable for any repairs whatsoever on the premises during the term, the house being now in "perfect order," has respect to its condition as an edifice in perfect repair, and not to the present or future state of the air within it. *Foster v. Peyser*, 63 Mass. (9 Cush.) 242, 246, 57 Am. Dec. 43.

### PERFECT OWNERSHIP.

Ownership is perfect when it is perpetual, and when the thing is unincumbered with any real right towards any other person than the owner. Civ. Code La. 1900, art. 490; *Maestri v. Board of Assessors*, 34 South. 658, 661, 110 La. 517.

### PERFECT RIGHT.

A "perfect right" is that which is accompanied by the right of compelling those who refuse to fulfill the corresponding obligation. *Aycock v. Martin*, 37 Ga. 124, 128, 92 Am. Dec. 58.

It is said that the right of self-defense may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only be obtained where the party pleading it acted from necessity, and was wholly free from wrong or blame. If, however, he was in the wrong; if he was himself violating or in the act of violating the law, but on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against attack superinduced or created by his own wrong, then the law makes it his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of the case may be said to illustrate and determine what in law would be denominated an imperfect right of self-defense. *Wallace v. United States*, 16 Sup. Ct. 859, 863, 162 U. S. 466, 40 L. Ed. 1039.

### PERFECT TITLE.

See "Good and Perfect Title."

A perfect title is a grant of land which requires no further act from the legal authority to constitute an absolute title to the land taking effect in present. *Hancock v. McKinnney*, 7 Tex. 384, 457.

To constitute a perfect title to real estate there must be the union of actual possession, the right of possession, and the right of property. *Converse v. Kellogg* (N. Y.) 7 Barb. 590, 597.

Roughly speaking, there are no such titles as "perfect titles." The contract in suit is to be regarded as a contract of sale, conditioned on the vendor exhibiting to the vendee a perfect title. This does not mean a perfect title in the strict sense of the word

"perfect." But we suppose that it means a title that is perfect and safe to a moral certainty; a title which does not disclose a patent defect which suggests the possibility of a lawsuit to defend it; a title such as a well-informed and prudent man paying full value for the property would be willing to take. *Birge v. Bock*, 44 Mo. App. 69, 77.

Under Civ. Code, § 4927, dispensing in cases of actions to enjoin the cutting of timber with the necessity of alleging or proving insolvency or that the damages will be irreparable when the petitioner has perfect title to the land on which the timber is situated, and shall attach an abstract of his title, any paper title which does not show both the right of possession and the right of property in the plaintiff is not sufficient, nor is a title resting in parol. *Wilcox Lumber Co. v. Bullock*, 35 S. E. 52, 53, 109 Ga. 532.

Within the meaning of Civ. Code, § 4927, providing that an applicant for an injunction to restrain the cutting of timber need not aver the insolvency of the defendant, or that the damage will be irreparable, where he attaches to his petition an abstract showing a perfect title, the term "perfect title" means a duly executed paper title consisting of papers capable of being recorded. *Dixon v. Monroe*, 37 S. E. 180, 112 Ga. 158.

A perfect title always carries with it, in legal contemplation, lawful seisin in possession. Such seisin in possession is co-extensive with the right, and deemed to continue until ouster by actual possession of another under claim of right. *Altschul v. O'Neill*, 35 Or. 202, 207, 58 Pac. 95, 96.

To constitute a perfect title there must be union of possession, right of possession, and right of property. *Donovan v. Pitcher*, 53 Ala. 411, 417, 25 Am. Rep. 634.

### As good both in law and equity.

A perfect title imports one that is good both in law and in equity. *Warner v. Middlesex Mut. Ins. Co.*, 1 Am. Law Rep. 569.

### As good and valid beyond reasonable doubt.

A perfect title is one which is good and valid beyond all reasonable doubt. *Reynolds v. Borel*, 25 Pac. 67, 69, 86 Cal. 538; *Turner v. McDonald*, 18 Pac. 262, 263, 76 Cal. 177, 9 Am. St. Rep. 189.

A perfect title must be one that is good and valid beyond all reasonable doubt. It must be free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles, and should be fairly deducible of record. Under a contract to convey a perfect title the grantee need not accept the conveyance of a title which rests in parol. *Sheehy v. Miles*, 93 Cal. 288, 292, 28 Pac. 1046, 1047.

**As free from incumbrances.**

A perfect title is a title which is free from incumbrances; an absolute title; and hence a deed of premises on which there was an outstanding mortgage would not convey a perfect title, within the meaning of a contract of a vendor of land to have in readiness on a given day a deed conveying a perfect title. *Lewis v. White*, 16 Ohio St. 444.

**As marketable title.**

The phrase a "perfect title," as used in negotiations for the purchase of real estate, as follows: "Have H. make contract. R. will sign for me as agent. Have it read 'Deal subject to perfect title, and interest on incumbrance, insurance, and rents in each case to be adjusted to date of contract,'" means a marketable title. *Ross v. Smiley* (Colo.) 70 Pac. 766, 767.

An agreement to convey a perfect title to realty is held to be satisfied by the conveyance of a merchantable title. *McCleary v. Chipman*, 68 N. E. 320, 828, 82 Ind. App. 489.

**PERFECT USUFRUCT**

Perfect usufruct is that which is of things which the usufructuary can enjoy without changing their substance, though their substance may be diminished or deteriorate naturally by time or by the use to which they are applied, as a house, a piece of land, furniture, and other movable effects. Civ. Code La. 1900, art. 534.

**PERFECT WAR.**

A perfect war is that which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility. The Resolution, 2 U. S. (2 Dall.) 1, 19, 1 L. Ed. 263; *Id.*, 2 U. S. (2 Dall.) 19, 21, 1 L. Ed. 271.

Every contention by force between two nations in external matters under authority of their respective governments is war. If it be declared in form, it is called solemn, and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other in every place and under every circumstance. In such a war all the members acted under general authority, and all the rights and consequences of war attach to their condition. But hostilities may exist between two nations, more confined in their nature and extent, being limited as to places, persons, and things; and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act-

ed under the special authority, and can go no further than the extent, of their commission. Still, however, it is a public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. *Bas v. Tinay*, 4 U. S. (4 Dall.) 37, 38, 42, 1 L. Ed. 731.

**PERFECTING.**

"Perfecting," as used in the New York act of Feb. 27, 1806, granting authority to a turnpike company to take the gravel, sand, etc., from the bottom of the river Raritan that may be necessary for perfecting its road, is not more extensive than the word "completing" would have been, and the right could not extend beyond the period for completing the road. *Whitenack v. Tunison*, 16 N. J. Law (1 Har.) 77, 79.

**PERFECTING PRESS.**

A printing press is said to be a perfecting press when at the same time it prints on both sides of the paper. *Duplex Printing Press Co. v. Campbell Printing Press & Mfg. Co.* (U. S.) 69 Fed. 250, 253, 16 C. C. A. 220.

**PERFECTLY SAFE.**

The words "perfectly safe," when applied to a person seeking credit in mercantile transactions, mean that such person is in such solvent condition that the debt in contemplation can be made, if necessary, by process of law. *Felix v. Shirey*, 60 Mo. App. 621, 623, 1 Mo. App. Rep'r, 240.

**PERFORATION.**

The common meaning of "perforation" is a hole or aperture passing through a body, but the word may also have a meaning synonymous with "cavities" or "cells," and hence may mean a hole not passing entirely through, but into the center or interior. *Brush Electric Co. v. Jullen Electric Co.* (U. S.) 41 Fed. 679, 690; *Michigan Cent. R. Co. v. Consolidated Car Heating Co.* (U. S.) 67 Fed. 121, 127, 14 C. C. A. 232.

The word "perforation" conveys the idea of a hole through an article, and cannot with propriety be held to describe a space between two articles. *Onderdonk v. Fanning* (U. S.) 9 Fed. 106, 108.

**PERFORM.**

See "Substantial Performance."

**Award.**

An agreement to arbitrate, in which the parties stipulate to "abide by and perform the award," means that the parties will not



in any wise revoke or prevent the making or publication of the award, and that when made and published it shall be final, and that they will perform any act required by the award which is within the scope of the authority conferred on the arbitrators by the submission. *Weeks v. Trask*, 16 Atl. 413, 415, 81 Me. 127, 2 L. R. A. 532.

#### **Covenant.**

Where defendant sold his store and good will to the plaintiff, covenanting not to carry on the same business within a specified district, and that, if he should, he would pay a certain sum as liquidated damages, in an action therefor the plea by the defendant of covenants performed applied only to the breach of the first covenant, not to engage in business. *Stewart v. Bedell*, 79 Pa. (29 P. F. Smith) 336, 339.

#### **Dramatic composition.**

Act Aug. 18, 1856 (11 Stat. 138), confers on the author or proprietor of a copyrighted dramatic composition, suited for public representation, the sole right to "act, perform, or represent" it in the state. Held, that the words "act, perform, or represent" mean representation in dialogue, and actions by persons who represent the composition as real, by performing or going through the various parts or characters severally assigned to them. *Daly v. Palmer*, 6 Fed. Cas. 1132, 1136.

The imitation or mimicry of a performance of an actress, which originally consisted in the singing of a certain topical song, accompanied with appropriate gestures and postures, by another actress, possessed of considerable powers of mimicry—the imitation consisting in the mimicry of the postures and gestures of the original actress, and the chorus of the song being used only as a vehicle for the imitation—does not constitute a "performance or representation," within the meaning of such words as used in Rev. St. § 4966, as amended in 1897 (U. S. Comp. St. 1901, p. 3415), which makes any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of such dramatic or musical composition, liable for damages therefor, etc. *Bloom & Hamlin v. Nixon* (U. S.) 125 Fed. 977, 978.

#### **Judgment.**

A condition to obey and perform the judgments of the court, in a bond conditioned so to do in case the principal obligee is not arrested by plaintiff, is sufficient to require the payment of the judgments. *Clafin v. Ball*, 43 N. Y. 481, 486.

#### **Mechanic's lien.**

"Performed," as used in Code, c. 75, § 7, giving a mechanic or laborer a lien on the

property of any corporation for the value of any work or labor performed for such company, "and such lien shall have priority over any lien created by deed or otherwise on such real estate or personal property, subsequent to the time when the said labor was performed," means "commenced"; and, the laborer, after he has commenced to labor on his contract, has a lien for the full amount of his contract, whenever performed, superior to any lien created by deed or otherwise subsequent to such commencement. *Griffith v. Blackwater Boom & Lumber Co.*, 33 S. E. 125, 46 W. Va. 56 (citing *Cushwa v. Improvement Loan & Bldg. Ass'n*, 32 S. E. 259, 45 W. Va. 490, in which case *Dent, J.*, in a dissenting opinion, held that "performed" means completed, furnished, or finished, but not commenced, and must be so construed in a statute giving a lien to persons who have performed labor, etc.).

Comp. Laws, § 1221, provides that any "person who shall perform any work or labor" on any mine, or furnish any material therefor, in pursuance of any contract made with the owner or owners of such mine, etc., shall have a lien thereon for the payment thereof, etc., which may be enforced as a mechanic's lien. A. was employed by a corporation to direct the work in its mine, with authority to employ and discharge miners, and procure and purchase supplies for working the mine; and it was also the duty of A., by virtue of such employment, to plan, oversee, and direct the work in the mine, direct the shipments of ore, and generally to contract and direct the actual working and development of the same. Held, that the words "person who shall perform any work or labor," as used in the statute, should be construed to include A. The lien given by the statute was not intended for the poorer class of laborers only, but was for the benefit of all persons who could bring themselves within its provisions. *Cullins v. Flagstaff Silver Min. Co.*, 2 Utah, 219, 221.

#### **Statute of frauds.**

The term "performed," as used in the statute of frauds, relating to contracts to be performed within a year, means a full and complete performance. *Bracegirdle v. Heald*, 1 Barn. & Ald. 722, 726; *Marcy v. Marcy*, 91 Mass. (9 Allen) 8, 10; *Squire v. Whipple*, 1 Vt. 69, 73; *Sharp v. Rhiehl*, 55 Mo. 97, 99; *Kendall v. Garneau*, 75 N. W. 852, 853, 55 Neb. 403; *Hinckley v. Southgate*, 11 Vt. 428, 429; *Treadway's Ex'r v. Smith*, 56 Ala. 345; *Boydell v. Drummond*, 11 East, 143.

A contract to be performed within a year is one that may be performed within a year. *Souch v. Strawbridge*, 2 C. B. 808, 814; *Russell v. Slade*, 12 Conn. 455, 460; *McLees v. Hale* (N. Y.) 10 Wend. 426, 428; *Kent v. Kent*, 62 N. Y. 560, 564, 20 Am. Rep. 502; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, 307; *Plimpton v. Cur-*

tiss (N. Y.) 15 Wend. 336; *Esty v. Aldrich*, 46 N. H. 127, 129; *Peters v. Inhabitants of Westborough*, 36 Mass. (19 Pick.) 364, 367, 31 Am. Dec. 142; *Lyon v. King*, 52 Mass. (11 Metc.) 411, 412, 45 Am. Dec. 219; *Houghton v. Houghton*, 14 Ind. 505, 507, 77 Am. Dec. 69; *Sword v. Keith*, 31 Mich. 247, 255; *Linscott v. McIntire*, 15 Me. (3 Shep.) 201, 33 Am. Dec. 602; *Railway Co. v. Whitley*, 15 S. W. 465, 466, 54 Ark. 199; *White v. Hanchett*, 21 Wis. 415, 416 (citing *Roberts v. Rockbottom Co.*, 48 Mass. [7 Metc.] 46; *Kent v. Kent*, 35 Mass. [18 Pick.] 569; *Wells v. Horton*, 4 Bing. 40); *Blanchard v. Weeks*, 34 Vt. 589, 592.

To bring a contract within the statute of frauds, relative to parol agreements not to be performed within a year, it must be one necessarily incapable of performance within that time. *Artcher v. Zeh* (N. Y.) 5 Hill, 200, 203; *Hill v. Hooper*, 67 Mass. (1 Gray) 131, 133.

Whether a contract comes within the statute of frauds, as not to be performed within a year, does not depend solely upon the intention of the parties. They may contemplate as probable a much longer continuance of the contract, or a suspension of it, and revival after a longer period; it may in itself be liable to such continuance and revival, and it may in this way be protracted so far that it is not in fact performed within a year; but if, when made, it was in reality capable of a full and bona fide performance within the year, without the intervention of extraordinary circumstances, then it is to be considered as not within the statute. Contracts not to be performed within a year are divided by Parsons into three classes: (1) Where by the express agreement of the parties the performance of the contract is not to be completed within one year; (2) where it is evident from the subject-matter of the contract that the parties had in contemplation a longer period than one year as the time for its performance; (3) where the time for the performance of the contract is made to depend upon some contingency which may or may not happen within one year. *Blakeney v. Goode*, 30 Ohio St. 350, 362.

If an agreement be such that the time for its performance may arrive within the year, even though it be highly improbable that it will arrive, the agreement is not within the statute of frauds. *Lockwood v. Barnes* (N. Y.) 3 Hill, 128, 129, 38 Am. Dec. 620.

To bring a contract within the statute of frauds, as one not to be performed within one year, it must be one which cannot, by its terms, be completed within one year from the making of it, and if, by any contingency contemplated in the contract, it may be performed within one year, the statute does not apply. *Sherman v. Champlain Transp. Co.*,

31 Vt. 162, 169; *Dresser v. Dresser* (N. Y.) 35 Barb. 573, 575; *Thompson v. Gordon* (S. C.) 3 Strob. 196, 198; *Woodall v. Davis-Creswell Mfg. Co.*, 48 Pac. 670, 671, 9 Colo. App. 198; *Burney v. Ball*, 24 Ga. 505, 515; *Woolbridge v. Stern* (U. S.) 42 Fed. 311, 312, 9 L. R. A. 129.

A contract does not come within the statute of frauds, as one not to be performed within a year, unless by its express terms or by reasonable construction it is not to be performed—that is, incapable in any event of being performed—within one year from the time it is made. If by its terms or by reasonable construction the contract can be duly performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party, or the person referred to in the contract, the statute has no application, and no writing is necessary. *Gault v. Brown*, 48 N. H. 183, 189, 2 Am. Rep. 210; *King's Ex'rs v. Hanna*, 48 Ky. (9 B. Mon.) 369; *Blanding v. Sargent*, 33 N. H. 239, 245, 66 Am. Dec. 720; *Richardson v. Pierce*, 7 R. I. 330, 334.

A contract which by its terms is to be performed at the death of one of the parties is not within the provision of the statute of frauds, which requires contracts not to be performed within a year from the making thereof to be in writing. *Frost v. Tarr*, 53 Ind. 390; *Riddle v. Backus*, 38 Iowa, 81, 83.

A promise to pay for the past and future raising of a child does not necessarily imply that the agreement is not to be performed within a year, since the child may die within a year; hence the promise is not within the statute of frauds. *Wiggins v. Kelzer*, 6 Ind. 252, 254.

A contract to deliver a crop raised the present year, and that of two succeeding years which may be raised by vendor, is a contract not to be performed within a year, and within the statute of frauds. In deciding whether or not a contract is one to be performed within a year, the question is whether, according to the terms of the agreement, and the intention of the parties as thereby indicated, the performance is or is not to be within the year. It has been decided that if the time of the performance depends, by the contract, on a contingency which may happen within the year, the case is not within the statute, because, although the contingency may not happen within the year, yet, as it may happen within that period, the agreement cannot be said to be one which is not to be performed within the year. *Holloway v. Hampton*, 43 Ky. (4 B. Mon.) 415, 416.

An agreement, within the statute of frauds, not to be performed within one year, must be an agreement not to be performed

within a year, as expressly and specifically stipulated by the contract; and an agreement which may be performed within a year, although it is not performed until afterwards, is not within the statute. Hence an agreement allowing one party to cut certain trees on the land of another at any time within ten years is not void because made by parol. *Kent v. Kent*, 35 Mass. (18 Pick.) 569, 571.

It is well settled that an oral agreement, which, according to the expression and contemplation of the parties, may or may not be fully performed within one year, is not within that clause of the statute of frauds which requires any agreement not to be performed within one year from the making thereof to be in writing. An agreement, therefore, which will be completely performed according to its terms and intention if either party should die within the year, is not within the statute. Thus, in *Peters v. Inhabitants of Westborough*, 36 Mass. (19 Pick.) 364, 31 Am. Dec. 142, it was held that an agreement to support a child until a certain age, at which the child would not arrive for several years, was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within one year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. *Doyle v. Dixon*, 97 Mass. 208, 211, 93 Am. Dec. 80.

The term "agreement not to be performed within a year," in the statute of frauds, making an oral agreement not to be performed with a year invalid, does not include a verbal contract, to continue as long as the parties are mutually satisfied, as such a contract may be performed within a year. *Greene v. Harris*, 9 R. I. 401.

Within the meaning of that provision of the statute of frauds that "no action shall be brought upon any agreement not to be performed within a year from the making thereof, unless reduced to writing," etc., the term "agreement" refers to the things to be done by the party sued, and not to the consideration for his promise; and the question whether the statute applies, or not, depends on the question whether the suit is brought against the party who was to perform his part of the contract within a year. If it is so brought, then the statute does not apply to it; but, if brought against the party whose agreement was not to be performed within a year, then the statute would apply to it. *Sheehy v. Adarene*, 41 Vt. 541, 543, 546, 98 Am. Dec. 623.

An agreement between two parties that, if either should die without male issue, he

should bequeath to the other by will a certain sum of money, is held, in spite of the fact that the time of performance depends upon a contingency, to be a contract not to be performed within one year, and within the statute of frauds, the court remarking: "I consider it as a catching bargain, in which case it is an invariable maxim that contingency shall be of no avail." *Izard v. Middleton* (S. C.) 1 Desaus. 116, 122.

On the 19th of March, 1864, the parties made a verbal contract by which defendant agreed to furnish the plaintiff on the 1st day of April next, following, a cow, or \$40 in money with which to purchase a cow, and the plaintiff was to have the use of said cow for a period of one year from said 1st day of April, and at the end of the year was to have the privilege of electing either to purchase the cow by paying \$40 in money, and one year's interest on that sum, for her, or to pay a reasonable sum for her use for that year. As under this contract the part to be performed by defendant was to be completed within a year, it was held that an action would lie against him for damages for breach of such contract, notwithstanding the rule that no action shall be brought upon any agreement not to be performed within a year from the making thereof, unless in writing, etc., although, as plaintiff's part of the contract could not be performed within a year, no action could be brought against him thereon. *Sheehy v. Adarene*, 41 Vt. 541, 542, 98 Am. Dec. 623.

Although an agreement which may be performed within a year is not within the clause of the statute of frauds respecting contracts not to be performed within that period, an agreement which cannot be performed within a year, except on a contingency which the parties could not hasten or retard, as the death of somebody, is not within the statute, and the possibility of performance which withdraws a case from the force of the statute must rest upon human effort or volition, and not upon providential interference. *Tolley v. Greene* (N. Y.) 2 Sandf. Ch. 91, 93.

A contract whose performance is to run through a term of years, but which by its tenure may be defeated at any time before the expiration of the term, is a contract not to be performed within a year, within the meaning of the statute of frauds. *Washington, A. & G. Steam Packet Co. v. Sickles*, 72 U. S. (5 Wall.) 580, 594, 18 L. Ed. 550.

"Performed within a year," in the statute of frauds, relating to agreements not to be performed within a year, means not to be performed on either side, and does not include cases where the contract was performed on one side. *Cherry v. Heming*, 4 Exch. 631, 635.

**PERFORMANCE.**

See "Full Performance"; "Part Performance"; "Specific Performance."

In a deed stated to be in consideration of the performance thereafter mentioned, and providing that the grantee should be liable on certain covenants, the word "performance" was held to mean the promises or engagements made by the grantee. *Rogers v. Eagle Fire Co.*, 9 Wend. 611, 644.

**PERFORMING.**

"Performing," as used in the truck act (1 Wm. IV, c. 37), providing that any one performing work as an artificer shall be paid in the current coin of the realm, means actually doing the work himself; and, if a person is not hired to do the work himself, the fact of his being employed in contracting only to get it done does not make him an artificer, within the meaning of the act. *Sharman v. Sanders*, 16 Eng. Law & Eq. 431, 436.

**PERFUMERY.**

The word "perfumery," as generally used, "means not only a substance which emits an odor, but one which is handled, bought, sold, and used for the purpose of obtaining from it such odor whenever required. In a case involving a construction of the tariff act of 1883, relative to duties on alcoholic perfumery, there was evidence that the word "perfumery" was used in trade to mean anything which gives a pleasant odor, and, on the other hand, that the term was limited to the finished product which could be used by the consumer, and it was held to be a question for the jury to determine which meaning was correct. *Fritzsche v. Magone* (U. S.) 40 Fed. 228, 229.

**PERIL**

See "Common Peril"; "Extraordinary Perils."

All other perils, see "All Other."

Other perils, see "Other."

Unforeseen peril, see "Unforeseen Peril."

"Peril" means exposure to injury, loss, or destruction; imminent or impending danger; risk, hazard, or jeopardy. In case of a personal injury, it would be covered by the term "mental pain and suffering," and, if used in an instruction in such a manner as to be limited to that, its use would not be erroneous. *Terre Haute & S. R. Co. v. Brunner*, 26 N. E. 178, 181, 128 Ind. 542; *Hall v. Town of Manson*, 58 N. W. 881, 882, 90 Iowa, 585.

**PERILS OF THE LAKES.**

The term "perils of the lakes," as used in a policy of marine insurance on a tug-boat against the perils of the lakes, means the natural accidents peculiar to that element which do not happen by the intervention of man, nor that are to be prevented by human prudence. *Union Ins. Co. v. Smith*, 8 Sup. Ct. 534, 538, 124 U. S. 405, 31 L. Ed. 497.

A loss arising from a collision is a loss by peril of the lakes, within the terms of a policy insuring a vessel against "perils of the lakes." *Mathews v. Howard Ins. Co.*, 11 N. Y. (1 Kern.) 9, 20.

**PERILS OF NAVIGATION.**

See "Dangers of Navigation."

**PERILS OF THE RIVER.**

See "Dangers of the River."

**PERILS OF THE SEA.**

"Dangers or perils of the sea," such as will excuse a carrier from liability, are those accidents peculiar to navigation that are of an extraordinary character, and arise from irresistible forces of overwhelming power, which cannot be guarded against by the ordinary exercise of human skill and prudence. *Stephens & C. Transp. Co. v. Tuckerman*, 33 N. J. Law (4 Vroom) 543, 565; *The Antoinetta* (U. S.) 1 Fed. Cas. 1057, 1058; *The Blackhawk* (U. S.) 3 Fed. Cas. 536, 537; *The Arctic Bird* (U. S.) 109 Fed. 167, 169; *A Certain Barge, Id.*; *The Shand* (U. S.) 21 Fed. Cas. 1155, 1160; *Williams v. Grant*, 1 Conn. 487, 492, 7 Am. Dec. 235; *The Reeside* (U. S.) 20 Fed. Cas. 458, 459 (cited in *The Nith* [U. S.] 36 Fed. 86, 95); *Richards v. Hansen* (U. S.) 1 Fed. 54, 61 (citing *The Reeside* [U. S.] 20 Fed. Cas. 458, 459); *Aymar v. Astor* (N. Y.) 6 Cow. 266, 268.

Perils on the sea are all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man cannot foresee, nor his strength resist. *Redpath v. Vaughan* (N. Y.) 52 Barb. 489, 497 (quoting 3 Kent, Comm. 300).

"Perils of the sea" are the dangers resulting from the voyage or the character of the transportation, and which the carrier could not have provided against by the exercise of all due care. *Merritt v. Earle* (N. Y.) 31 Barb. 38, 45.

The term "perils of the sea" means all those accidents and misfortunes to which ships at sea are exposed, and which human foresight or precaution cannot avert or resist. *Appleton v. Crowninshield*, 3 Mass. 413, 450.

Perils of the sea are those which can neither be foreseen nor guarded against. *Bason v. Charleston & C. Steamboat Co.* (S. C.) Harp. 262, 263.

"Perils of the sea" denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. *Bentley v. Bustard*, 55 Ky. (16 B. Mon.) 643, 679, 63 Am. Dec. 561 (citing 3 Kent, Comm. 217).

The term "perils of the sea," in a bill of lading excepting perils of the sea, means extraordinary perils. The injurious force must be unusual. It must be out of the ordinary run of events—such a violent happening as is not fairly to be expected. *Insurance Co. of North America v. Easton & McMahon Transp. Co.* (U. S.) 97 Fed. 653, 655.

"A loss by perils of the sea or dangers of river navigation includes such losses only to the cargo as are of an extraordinary nature, or arise from irresistible force or from inevitable accident, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. If the loss occurs by a peril which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea or the dangers of the river as will exempt the carrier from liability, but is rather a loss by his gross neglect. A loss from the effect of storms and tempests in straining the ship, or causing her to spring a leak or ship a sea, whereby damage or injury is done to the goods on board, are losses perfectly attributable to the perils of the sea, although in a mitigated sense they may be said to be ordinary accidents." *The Northern Belle* (U. S.) 18 Fed. Cas. 349, 350.

Where there has been a want of proper skill and care on the part of the carrier in guarding against damage or deterioration arising from the nature of the article and the voyage, the damage caused in failing to guard against such dangers will be ascribed to negligence, and not to the perils of the sea. *Lamb v. Parkman* (U. S.) 14 Fed. Cas. 1019, 1024.

Perils of the sea are all perils, losses, and misfortunes of a marine character, or of a character incident to a ship at sea. *Miller v. California Ins. Co.*, 18 Pac. 155, 156, 76 Cal. 145, 9 Am. St. Rep. 184.

"Perils of the seas" denote natural accidents peculiar to the sea, which do not happen by intervention of man, nor are to be prevented by human prudence; a sea damage occurring at sea, and nobody's fault.

*Hays v. Phenix Ins. Co.*, 6 N. Y. Supp. 3, 57 N. Y. Super. Ct. (25 Jones & S.) 199.

Within the meaning of marine insurance policies, if the damage might have been avoided by the use of ordinary care and diligence on the part of insured, then the insurer would not be liable, for in such cases the negligence, and not the peril of the seas, is deemed the proximate cause of the loss in *The Titania* (U. S.) 19 Fed. 101, 104.

In construing the meaning of the words "perils of the sea," insured against in a marine policy, it was said that the general doctrine is that the insurer undertakes in a marine risk only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed. Every loss which arises from tempests, or by rocks, winds, or waves, strictly and naturally comes under the idea of a loss occasioned by perils of the sea; but, if this be the extent of the phrase "perils of the sea," we would be obliged to conclude that it covered accidents of an extraordinary nature, and produced only by natural causes, peculiar to that element. Such, however, is clearly not the rule, for, construing the phrase perils of the sea in reference to marine insurance, Mr. Parsons, in his work on Marine Insurance (vol. 1, p. 544), says: "The phrase 'perils of the sea' covers all losses or damages which arise from the extraordinary action of the wind and sea, and from inevitable accidents directly connected with navigation, except those provided for in other parts of the policy, as captures and the like." Mr. Justice Story in the case of *The Reeside* (U. S.) 20 Fed. Cas. 458, 459, remarks that the phrase "dangers of the seas," whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to the element, or whether understood in its more extended sense, as including inevitable accidents upon that element, must still in either case be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. The Supreme Court of the United States, in *Garrison v. Memphis Ins. Co.*, 60 U. S. (19 How.) 312, 314, 15 L. Ed. 656, seems to give the more extended sense to the term "perils of the sea," as suggested by Judge Story. That court says: "These words have been extended to comprehend losses arising from some irresistible force or overwhelming power, which no ordinary skill could anticipate or avoid." *Anthony v. Aetna Ins. Co.* (U. S.) 1 Fed. Cas. 1046.

In a large sense, all the accidents or misfortunes to which those engaged in marine adventure are exposed may be said to arise

from the perils of the sea; and, conformably to this idea, a loss by capture was formerly holden, in our courts, to be a loss by the perils of the sea, as much as if it were occasioned by shipwreck or tempest. But in more modern times it has been found convenient to distinguish the losses to which ships and goods at sea are liable by the more immediate causes to which they may be particularly ascribed. In this view, losses by the perils of the sea are now restricted to such accidents or misfortunes from mere sea damage; that is, such as arise *ex vi divina*, from stress of weather, winds and waves, from lightning and tempest, rocks and sands. Marsh. Ins. pp. 385, 386. Phillips, on the other hand, says: "The risks or perils or causes of loss for which indemnity is promised must be specified. These are usually perils of the sea, fire, public enemies, thieves, captures, restraints and detentions by governments or people, and barratry of the master and marines, and all other perils. The first of these descriptions, namely, perils of the sea, is the most comprehensive. It includes all the others while the subject is off land, except the last, which has very little practical effect, since it can be applied only to perils of the like kind to those specifically enumerated." Phil. Ins. § 35. Again he says: "Perils of the seas, which constitute a part of the risks in almost every marine policy, comprehend those of the winds, waves, lightning, rocks, shoals, collisions, and, in general, all causes of loss and damage to the property insured arising from the elements and inevitable accidents, though sometimes considered not to include capture and detention." Murray v. Receivers of Harmony Fire & Marine Ins. Co. (N. Y.) 58 Barb. 9, 16.

"Dangers of the sea," as used in the embargo act (2 Story, Laws, 1071, 2 Stat. 451), are not limited to those inevitable events which, being unmixed with human negligence, are ascribed to Providence, but would include any loss by sea which would render the landing of the goods impossible, or prevent their transportation to a foreign port. Dixon v. United States (U. S.) 7 Fed. Cas. 761, 762.

Justice Washington, in speaking of an embargo bond, conditioned to reland the cargo, the dangers of the sea only excepted, says: "Without attempting a definition which should include every possible case, it may be safely laid down that the accident which is attributable to this cause must happen without any fault or negligence in the master, and must occur at sea, or, if on land, it must be the immediate and necessary consequence of a peril happening at sea, such as tempests, lightning, loss by pirates, injuries sustained by being run foul of by another vessel, and the like." United States v. Hall (U. S.) 26 Fed. Cas. 84, 85.

Generally speaking, the words "perils of the sea" have the same meaning in a bill of lading as in a policy of insurance. There is a difference, indeed, in their effect in the two kinds of contract, where negligence of the master or crew of the vessel contributes to a loss by a peril of the sea. In such a case an insurer against perils of the sea is liable, because the assured does not warrant that his servants shall use due care to avoid them, whereas an exception of the perils of the sea in a bill of lading does not relieve the carrier from his primary obligation to carry with reasonable care unless prevented by the accepted perils. But when it is distinctly found that there was no negligence, there is no reason, and much inconvenience, in holding that the words have different meanings in the two kinds of commercial contract. The term "perils of the sea," in a bill of lading, does not include an explosion of certain articles of cargo, causing a hole in the ship, which results in an inflow of water, injuring the goods described in the bill of lading. The explosion, and not the inflow of water, is the proximate cause of the injury. The G. R. Booth, 19 Sup. Ct. 9, 10, 171 U. S. 450, 43 L. Ed. 234.

The words "dangers of the seas only excepted," as found in bills of lading, mean the same as "the dangers of the lakes and rivers excepted," as applied to navigation on inland waters. Harrison v. Hixson (Ind.) 4 Blackf. 226, 227.

The expression "dangers of the seas" is equivocal. It is capable of being interpreted to mean all dangers that arise upon the sea, or may be restricted to perils which arise directly and exclusively from the sea, or of which it is the efficient cause. Merrill v. Arey (U. S.) 17 Fed. Cas. 83, 85.

"Perils of the sea" are from (1) storms and waves; (2) rocks, shoals, and rapids; (3) other obstacles, though of human origin; (4) changes of climate; (5) the confinement necessary at sea; (6) animals peculiar to the sea; and (7) all other dangers peculiar to the sea. Civ. Code S. D. 1903, § 1599; Rev. St. Okl. 1903, § 722.

#### Act of God.

The term "peril of the sea," as used in a bill of lading, is not strictly synonymous with "an act of God," which would excuse a carrier from losses of property under his control. Thus the destruction of a vessel by rats, the precaution of keeping a cat on board having been adopted, has been adjudged a peril of the sea; yet this could hardly be deemed a loss by act of God, which would include such losses as from lightning, tempests, etc., only. Plaisted v. Boston & K. Steam Nav. Co., 27 Me. (14 Shep.) 132, 135, 46 Am. Dec. 587.

The term "perils of the sea" was said by Chancellor Kent, in his Commentaries (volume 3, p. 216), to denote natural accidents, peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. The words "perils of the sea" may, indeed, have grown to have had a greater signification than "act of God." *The Majestic*, 17 Sup. Ct. 597, 602, 166 U. S. 375, 41 L. Ed. 1039.

"Dangers of the sea," as used in a bill of lading for the transportation of goods on a vessel, expressly excepting the dangers of the seas, must be construed as equivalent to "act of God" or "inevitable accident," they being terms of a very similar legal import, and excuse a loss; and, if cotton were thrown overboard in a storm at sea to save the vessel and the lives of those on board, this was a loss by dangers of the seas, within the exception of the bill of lading, but if there had been a deviation from the usual route of vessels between the ports without reasonable necessity, either physical or moral, the loss would not be excused. *Crosby v. Fitch*, 12 Conn. 410, 419, 31 Am. Dec. 745.

The expression "dangers of the sea" has a legal signification somewhat different from what might ordinarily be inferred from the primary meaning of the words. The Supreme Court has defined the expression to mean those accidents peculiar to navigation, that are of an extraordinary nature, or arise from irresistible force or overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. It includes loss occasioned by hidden obstructions to navigation recently placed there, collision without fault of either party, and some few other cases not covered by the phrase "act of God." But where the insistence is that the loss was caused by the force of the elements, the phrase "dangers of the sea" is synonymous in its meaning with "the act of God." *Stephens & C. Transp. Co. v. Tuckerman*, 33 N. J. Law (4 Vroom) 543, 550.

#### **Blockade.**

The perils insured against in a marine policy covering "all other perils, losses, and misfortunes" includes the interdiction of commerce with the port of destination by means of a blockade; and therefore the insured in such case may abandon, as for total loss, without having recourse to the sweeping clause of "all other perils, losses, and misfortunes," which by Molloy and some others is supposed to insure against heaven and earth, and to embrace every detriment that could possibly happen to the thing insured. It appears to fall within the risk of restraints of princes or of men of war. It is by the latter that a blockade is formed, and, if they prevent the safe arrival of the vessel or turn her away, how can it be said that the voyage has not been defeated by a

hazard insured against? *Schmidt v. United Ins. Co. (N. Y.)* 1 Johns. 249, 261, 3 Am. Dec. 319.

#### **Capture.**

Where a policy of marine insurance insured against perils of the sea, but excepted danger from capture, etc., and, as a result of stress of weather, the ship was damaged to such an extent as to be compelled to be put in a hostile foreign port, where she was captured, it was held that the loss was not caused by perils of the sea. *Rice v. Homer*, 12 Mass. 230, 233.

Necessary capture and plunder by pirates has been adjudged a peril of the sea. *Jones v. Pitcher (Ala.)* 3 Stew. & P. 135, 177, 24 Am. Dec. 716 (citing *Forward v. Pittard*, 1 Term R. 27).

#### **Collision.**

A policy of insurance against the perils of the sea comprehends the damages paid by the insured vessel to another in consequence of a collision between them at sea. *Sherwood v. General Mut. Ins. Co. (U. S.)* 21 Fed. Cas. 1290.

"Perils of the sea," as used in a marine policy insuring against perils of the sea, include collisions. *Mathews v. Howard Ins. Co. (N. Y.)* 13 Barb. 234, 242.

A loss by collision without fault on either side is a loss by the perils of the sea, within the meaning of a policy of marine insurance insuring against a loss caused by perils of the sea. *Peters v. Warren Ins. Co.*, 39 U. S. (14 Pet.) 99, 108, 10 L. Ed. 371.

The perils of the sea insured against in a marine policy include danger from collisions, without regard to whether they are occasioned by negligence or not, and therefore the insured may recover from the insurer the sum paid by insured for damages to another vessel in a collision occasioned by the negligence of insured. *Nelson v. Suffolk Ins. Co.*, 62 Mass. (8 Cush.) 477, 490, 54 Am. Dec. 776; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93, 107.

"The term 'perils of the sea' has been held to include losses by collision of two ships where no blame is imputable to the injured ship. But if the loss be directly and immediately occasioned by the ignorance or intention of the master and mariners, it is not deemed a loss by the perils of the sea. Hence, it is that, if the loss occurs by a peril of the sea which might have been avoided by the exercise of skill or diligence at the time when it occurred, it is not deemed to be, in the sense of that phrase, such a loss by the perils of the sea as will exempt the carrier from liability." *Whitesides v. Thurlkill*, 20 Miss. (12 Smedes & M.) 599, 601, 51 Am. Dec. 128.

Under a policy insuring against the usual perils of the sea, underwriters are not liable to repay to the insured damages paid by him to the owners of another vessel, suffered in a collision occasioned by the negligence of the master of the insured vessel. If the peril of the sea which operated in a given case was not of itself sufficient to occasion, and did not in fact occasion, the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of peril is essential to be shown by the insured, then we must look beyond the peril to its cause to ascertain the efficient cause of the loss. The negligence is the fact without which the loss would not have been suffered by the plaintiff. In the strictest sense, it causes the loss to the plaintiff. The loss of the owners of the other vessel was occasioned by a peril of the sea, but nothing connects the plaintiff with that loss, or makes it his, except the negligence of his servant. *General Mut. Ins. Co. v. Sherwood*, 55 U. S. (14 How.) 351, 364, 14 L. Ed. 452.

The term "peril of the sea," as used in a common policy of marine insurance, included a collision between two ships, which accidentally took place within the dominion of a foreign power, by the law of which all damages occasioned thereby were to be borne equally by the two vessels; and hence the underwriters were liable not only for the direct damage done to the ship insured by them, but also for the charge apportioned to such ship as her contributive share of the common loss, not as a general average, but as a part of a partial loss occasioned by the collision. *Peters v. Warren Ins. Co.* (U. S.) 16 Fed. Cas. 373, 375.

#### **Dampness and sweating.**

Damage to goods occasioned by the effect of humidity and dampness, in the absence of any defect of the ship or storage quarters, is one of the perils of the sea, for which the carrier is not liable unless it might have been prevented by the reasonable skill and diligence of those employed in conveying the goods. *Clark v. Barnwell*, 53 U. S. (12 How.) 272, 280, 282, 13 L. Ed. 985.

The term "dangers of the seas" does not necessarily include damage to the goods by sweating, and if the sweating be produced in consequence of negligent stowage, the claimant is precluded from setting up the defense. *The Star of Hope*, 84 U. S. (17 Wall.) 651, 654, 21 L. Ed. 719.

#### **Embezzlement.**

Embezzlement is not a peril of the seas, by the maritime law of this country. Theft or robbery is a peril of the seas only where it is piracy on the high seas, but not where it is committed by persons coming to the

ship when she is not on the high seas, or by persons on board. *King v. Shepherd* (U. S.) 14 Fed. Cas. 545.

#### **Entry of water through port hole.**

The term "perils of the sea," in a marine policy, includes a loss from entry of water through an open port hole of a seaworthy vessel shortly after sailing, and before encountering any storms. *Starbuck v. Phenix Ins. Co.*, 62 N. Y. Supp. 264, 265, 47 App. Div. 621.

Damage done to a vessel by perils of the sea includes every species of damage done to the vessel at sea by the violent and immediate action of the winds and waves, or both, as distinct from the ordinary wear and tear of the voyage, and as distinct from injuries suffered by the vessel in consequence of her not being seaworthy at the outset of her voyage, or afterwards, under circumstances in which the master was guilty of negligence in not making her seaworthy. A loss caused by water entering a water-tight compartment through an open deadlight is caused by a peril of the sea. *Starbuck v. Phenix Ins. Co.*, 19 App. Div. 139, 142, 45 N. Y. Supp. 995.

When a passenger steamer during a storm passed through a quantity of wreckage, and thereafter it was discovered that a port hole, which was closed in the usual way with thick glass and an iron cover or dummy, screwed up tightly, had been broken open, evidently by a blow from one of the floating planks of the wreckage, which broke the glass and forced the dummy from its hinges whereby water was let into the apartment, and the baggage of passengers was damaged, the injury was one from an unexpected peril of the sea, within the meaning of the contract on the ticket relieving the carrier from liability from perils of the sea. While it has been thought that the term "perils of the sea" had the same and no larger meaning than losses or injuries by the act of God, it is now generally considered that it has a broader signification, and includes calamities which were not caused by a violence or convulsion of nature, such as lightning, flood, or tempest. *Potter v. The Majestic* (U. S.) 60 Fed. 624, 628, 9 C. C. A. 161, 23 L. R. A. 746.

"Perils of the sea," within a marine insurance policy insuring a vessel and cargo against the perils of the sea, include a loss caused by water entering a water-tight compartment of a vessel through an open deadlight. *Starbuck v. Phenix Ins. Co.*, 45 N. Y. Supp. 995, 996, 19 App. Div. 139.

#### **Escape of steam.**

Property insured against the perils of the sea or of the river, and injured by an escape of steam on the vessel on which they



were shipped, are held to have been injured by the perils of the sea. *Union Ins. Co. v. Groom*, 67 Ky. (4 Bush) 289, 293.

#### **Explosion.**

In *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234, the phrase "danger or perils of the sea" was critically considered, and held not to include a danger to cargoes by the immediate inflow of water upon them through a hole made in the side of the ship below the water line by an explosion without any fault of the ship, inasmuch as the danger was there the immediate, direct, and necessary result of the explosion, without the intervention of any new or other agency disconnected from the explosion as the primary cause. *The Manitoba* (U. S.) 104 Fed. 145, 152.

The bursting of a steam boiler in a vessel is not a peril of the sea. *The Edwin* (U. S.) 8 Fed. Cas. 358, 361.

Perils of the sea, which are defined by Civ. Code, § 2199, to be storms and waves, rocks, shoals, and rapids, and other obstacles, though of human origin, changes of climate, the confinements necessary at sea, and animals peculiar to the sea, do not include the bursting of a boiler. *Miller v. California Ins. Co.*, 18 Pac. 155, 156, 76 Cal. 145, 9 Am. St. Rep. 184.

#### **Fire.**

An accidental fire is not one of the peculiar dangers of the seas. *Merrill v. Arey* (U. S.) 17 Fed. Cas. 83.

The term "perils of the sea" does not include fire, as it is by no means peculiar to the sea, and is nowhere called a sea peril, but is more common and peculiar to the land. *Slater v. Hayward Rubber Co.*, 26 Conn. 128, 143.

The term "perils of the sea" includes fires not caused by the negligence of a shipowner or his servants. *Walker v. Western Transp. Co.*, 70 U. S. (3 Wall.) 150, 151, 18 L. Ed. 172.

Where bills of lading provided, "Dangers of the seas, fire, breakage, leakage, accidents from machinery and boilers, excepted, and with liberty to tow and assist vessels in all situations," the exemption from liability from loss by fire obtained while the goods were on the wharf awaiting transportation, as well as when on board the vessel, the goods having been delivered to the steamboat company for transportation, and the bills not designating any particular vessel. *Scott v. Baltimore, C. & R. Steamboat Co.* (U. S.) 19 Fed. 56, 58.

#### **Grounding or stranding.**

Where an accident occurs in the ordinary course of grounding a vessel in a har-

bor, and there is no proof of inherent weakness, the loss must be attributed to some extraordinary cause, as the striking on some hard substance, or malposition, or overlaying the dock, which would be a peril of the sea, for which the underwriters would be liable. So a loss by ebbing of the tide is a loss by the perils of the sea, if it be not mere wear and tear, but extraordinary in its nature or mode. *Potter v. Suffolk Ins. Co.* (U. S.) 19 Fed. Cas. 1186, 1188.

The stranding of a vessel while attempting to come up the bay of San Francisco in a dense fog—the vessel being safe, and the master not being compelled by any exigencies to make the attempt—was held not to be an injury attributable to the perils of the sea. *The Costa Rica* (U. S.) 6 Fed. Cas. 607, 608.

The rule in determining whether a loss is attributable to perils of the sea within the meaning of a bill of lading exempting the carrier from liability for such perils, which imputes carelessness to the captain whose boat strikes a known rock or shoal, unless driven by a tempest, is only applicable to the navigation of the ocean, where the rocks and shoals are marked upon maps and may be avoided, and does not apply to the navigation of our rivers. In such navigation each case must be governed by its own circumstances, and be tested by the course usually pursued in such cases. *Collier v. Valentine*, 11 Mo. 299, 309, 49 Am. Dec. 81.

#### **Injury by worms.**

The perils of the sea insured against in a marine policy only cover extraordinary perils, and not ordinary perils in the nature of wear and tear. An injury to a vessel by worms is not an injury caused by the perils of the sea, within the meaning of such policy. *Hazard v. New England Marine Ins. Co.* (U. S.) 11 Fed. Cas. 934, 937.

#### **Jettison.**

The term "loss by peril of the sea" includes a jettison occasioned by a peril of the sea. *The Hettie Ellis* (U. S.) 20 Fed. 507, 509.

There can be no doubt that a loss of jettison occasioned by a peril of the sea is a loss by a peril of the sea. In that case the sea peril is deemed the proximate cause of the loss, but, if a jettison of a cargo becomes necessary in consequence of any fault or breach of contract by the master or owners, the jettison is attributable to that fault or breach of contract, and not to the sea peril, though that also may be present and enter into the case. *Lawrence v. Minturn*, 58 U. S. (17 How.) 100, 111, 15 L. Ed. 58.

A peril of the sea, within the meaning of the term as used in a bill of lading exempting a carrier from liability for loss oc-

occasioned by such peril, properly includes a jettison, the necessity for which was occasioned solely by a peril of the sea, but it does not include jettison if the unseaworthiness of the vessel at the time of sailing on the voyage caused or contributed to produce a necessity for the jettison. *Dupont de Nemours v. Vance*, 60 U. S. (19 How.) 162, 166, 15 L. Ed. 584.

#### **Leakage.**

Where a vessel is seaworthy at the time of her sailing, and afterwards suddenly springs a leak and founders, without any stress of weather or apparent cause, it is a loss by the perils of the sea. *Patrick v. Hallett* (N. Y.) 1 Johns. 241.

The term "perils of the sea," in a marine policy insuring against perils of the sea, includes a leak occasioned by rats without the negligence of the captain. *Garrigues v. Coxe* (Pa.) 1 Bin. 592, 598, 2 Am. Dec. 493.

#### **Leakage of oil.**

The leakage of oil caused by water, and damaging other goods, is held to be a peril of the sea. *The Dunbritton* (U. S.) 61 Fed. 764, 766.

#### **Negligent stowage of cargo.**

The phrase "Dangers of the seas" is equivalent to "dangers of navigation," and, as used in a bill of lading relieving the carrier from liability for losses occasioned by dangers of the sea, would not relieve the carrier from losses flowing from the negligent stowage of the cargo, or other improper acts of the master or owner which are proximate causes of the loss. *Baxter v. Leland* (U. S.) 2 Fed. Cas. 1048, 1050.

#### **Ordinary wear and tear.**

The term "perils of the sea" may be defined as denoting all marine casualties resulting from the violent action of the elements, as distinguished from their natural, silent influence upon the fabric of the vessel; casualties which may, and not consequences which must, occur. No loss which is the result of ordinary wear and tear, or a necessary consequence of the employment of the vessel, is a loss by perils of the sea. *The Warren Adams* (U. S.) 74 Fed. 413, 415, 20 C. C. A. 486.

The term "perils of the sea," insured against in a marine policy, includes the consequence of the violence of the winds and waves, running on the rocks, or the like, but does not include losses arising from the ordinary circumstances of the voyage, as from sea damage, or the wear or tear which without the action of any extraordinary cause is to be expected. *Coles v. Marine Ins. Co.* (U. S.) 6 Fed. Cas. 65, 66.

#### **Sinking of ship by man-of-war.**

"Perils of the seas" means perils of the seas arising from wind, weather, and water, but does not include perils on the seas, such as a case where a vessel fell in with a man-of-war, which, mistaking her for a privateer, fired a broadside upon her, which caused her to sink. Such loss is a "peril on the sea," and not "of the sea." *West India & P. Tel. Co. v. Home & C. Marine Ins. Co.*, 6 Q. B. Div. 51, 59; *Cullen v. Butler*, 5 Maule & S. 461, 464; *Cullen v. Butler*, 1 Starkie, 138.

#### **Stress of weather.**

Stress of weather is a peril of the sea. *Dodge v. Union Marine Ins. Co.*, 17 Mass. 471, 475.

Encountering heavy seas causing the vessel to roll heavily is not a "sea peril," within a marine policy against sea perils, but is only an ordinary peril which any strong vessel encounters everywhere. *The Gulnare* (U. S.) 42 Fed. 861, 862.

The term "dangers of the seas," in a bond given under the embargo act, conditioned that the cargo of a certain vessel should be relanded at some port in the United States, the dangers of the seas only excepted, was construed to include storms which compelled the vessel to make a foreign port, where she was compelled by the public authorities to unload her cargo, and therefore such unloading was not a breach of the bond. *United States v. Hall*, 10 U. S. (6 Cranch) 171, 175, 3 L. Ed. 189.

#### **Swell caused by passing steamers.**

The phrase "dangers of the sea" has a settled meaning, and cannot be held to include a danger caused by a slight swell in the harbor, caused by passing steamers, which was one of the ordinary occurrences in such waters; nor can it include a danger which would have been avoided or escaped if due diligence had been used in providing a seaworthy vessel. *Nord-Deutscher Lloyd v. Insurance Co. of North America* (U. S.) 110 Fed. 420, 428, 49 C. C. A. 1.

#### **Vermin on shipboard.**

"Perils of the sea," as used in a bill of lading exempting the carrier for liability from the perils of the seas, does not include damages to the cargo caused by vermin on board the ship. *The Miletus* (U. S.) 17 Fed. Cas. 288, 289.

#### **Wetting of cargo.**

The mere fact that the cargo became wet with sea water is not evidence that the damage arose from the perils of the sea, as it may be produced by bad storage, defective closing of the hatches, or want of

pumping. *Fleming v. Marine Ins. Co. (Pa.)* 3 Watts & S. 144, 153, 38 Am. Dec. 747.

*Sampson v. Peaslee*, 61 U. S. (20 How.) 571, 576, 579, 15 L. Ed. 1022.

## PERIOD.

See "Definite Period."

A period of time is a stated and recurring interval of time, a round or series of years by which time is measured. Where a statute prescribed the term of office of clerks of the court to be for the same period as justices, whose term of office was fixed at six years, it referred to the stated and recurring interval of time, to the round or series of years which had already been named, to wit, six years. *People v. Leask*, 67 N. Y. 521, 528.

In construing a statute authorizing the board of police commissioners of a city to order the closing temporarily of any and all barrooms and drinking houses in the city, and imposing a penalty for selling liquor from any such place or places "during such period as the board shall forbid," under which the board had ordered all drinking places closed "until further order of the board," the court said: "If any doubt or ambiguity rests upon the use of the term 'temporarily' in one part of the section, it is removed by the word 'period' in a subsequent part. Reading the whole clause, and giving the words used their ordinary and accepted meaning and import, it seems to us plain that the Legislature has declared that these orders shall operate, not only for a short, but for a definite, interval or portion of time, to be specified on their face, and we are all of the opinion that an order, which by its terms is to operate until further notice, is unauthorized." *State v. Strauss*, 49 Md. 288, 299.

As used in Revenue Act March 3, 1851, declaring that, in all cases where there is imposed any ad valorem rate of duty on goods imported into the United States, the value of such goods shall be deemed the market value thereof at the period of exportation to the United States in the principal markets of the country from which the same shall have been imported, the word "period" was held to mean the date of the sailing of the vessel bringing the goods. The court said: "The word 'period' has its etymological meaning, but it also has a distinctive signification, according to the subject with which it may be used in connection. It may mean any portion of complete time, from a thousand years, or less, to the period of a day; and when used to designate an act to be done or to be begun, though its completion may take an uncertain time, as, for instance, the act of exportation, it must mean the day on which the exportation commences, or it would be an unmeaning and useless word in its connection in the statute."

### As continuous period.

The general definition of the word "period," in reference to time, is to refer to a continuous period; and where testator devised certain sums to employes who had been in his service for certain named periods, it is immaterial whether the length of time was continuous or not, as, if the testator had in his mind an intention to restrict its provisions to persons who had been in his employ continuously, no doubt he would have indicated it by the use of the word "continuous"; and one who had, counting his various terms of service, which were not continuous, been employed for one of the fixed periods, was entitled to a legacy under the will. In *re Becker*, 80 N. Y. Supp. 1115, 1116, 89 Misc. Rep. 756.

### As definite period.

"Period" may mean an indefinite time, as well as a time specified, but, as used in Const. 1895, art. 1, § 13, providing that no lease or grant of agricultural land for a longer period than 12 years, hereafter made, in which shall be reserved any rent, shall be valid, means a definite period, and not one indefinite, as a lease for the life of the grantor. *Parish v. Rogers*, 46 N. Y. Supp. 1058, 1061, 20 App. Div. 279.

## PERIOD OF PROBATION.

"Period of probation," as used in New York City Charter, § 124, authorizing a municipal civil service commission to provide for a period of probation before appointment of employes is made permanent, implies definite or stated length of duration, especially so when such period is to be provided in advance. It is not any time within a fixed length of duration, unmeasured by the rules and measurable by the pleasure or will of the appointing power. Probation implies the purpose of the term or period, but not its length. *People v. Kearny*, 58 N. E. 14, 15, 164 N. Y. 64.

## PERIODICAL OVERFLOW.

Lands described in the approved plats of township surveys made under the federal authority as "subject to periodical overflow" are not swamp and overflowed lands, within Act Cong. July 23, 1866, making it the duty of the Commissioner of the General Land Office to certify over to the state as swamp and overflowed all lands represented as such on such plats, the term "overflowed," as thus used, has reference to a permanent condition of the lands to which it is applied—that is, to those lands which are overflowed and will remain so without reclamation or drainage—while "subject to periodical overflow" has

reference to a condition which may or may not exist, and which, when it does exist, is of a temporary character. *Heath v. Wallace*, 11 Sup. Ct. 380, 384, 138 U. S. 573, 34 L. Ed. 1063.

"Periodical overflow," as applied to lands, is not a representation that they are "swamp and overflowed lands." *Tubbs v. Wilhout*, 14 Pac. 361, 364, 73 Cal. 61.

### PERIODICALS.

The term "periodicals," in the tariff act of 1890, which are defined in paragraph 657 as unbound or paper-covered publications, does not include German novels translated in the English, printed at stated intervals and imported in pamphlet form. *Eichler v. United States* (U. S.) 71 Fed. 956, 957.

"Periodicals," as used in Act Oct. 1, 1890, par. 657, relating to the duties on "periodicals," does not include illustrated supplements printed in Germany and in the German language, consisting of an eight-page pictorial sheet containing short stories, poems, selections of German humor, and other current literature, and numerous illustrations appropriate thereto, being a publication issued in large numbers in Germany under the title "Lustige Blaetter," and distributed in large editions to various German newspapers in different German cities; the supplement in question being the same publication in an edition thereof printed purposely for the New York Sunday News, and having a distinctive title, "New Yorker Lustige Blaetter," with an illustrated heading representing the harbor of New York, the statue of Liberty, the Brooklyn Bridge, etc., no date appearing anywhere on these illustrated supplements, but they being numbered consecutively throughout the year, numbers 1 to 52, and it appearing on each number in the German language that the same was published by the New York Daily News, New York City, and these supplements being imported to be used as a gratis supplement to the Sunday edition of the New York Daily News. In re New York Daily News (U. S.) 61 Fed. 647, 648; Id., 65 Fed. 493, 494, 13 C. C. A. 16.

### PERISHABLE PROPERTY.

Perishable property is that which is subject to natural and speedy decay. *Webster v. Peck*, 31 Conn. 495, 498; *Newman v. Kane*, 9 Nev. 234, 237.

"Perishable articles" are those which, because of their inherent qualities, rapidly decompose or decay, and in so doing undergo material changes of form and quality, which render them unsuitable for use and of no value, such as fruit, fresh fish, and the like, and to be distinguished from articles liable to deteriorate from keeping. *Jolley v. Har-deman*, 36 S. E. 952, 953, 111 Ga. 749.

"Perishable property," as used in a warehouse receipt, providing that perishable property is at the owner's risk, the use of the term "perishable property" clearly refers to loss resulting from inherent qualities of the subject of the bailment, and hence loss caused by negligence of the warehousemen is not excepted. *Hunter v. Baltimore Packing & Cold Storage Co.*, 78 N. W. 11, 12, 75 Minn. 408.

A memorandum of marine insurance warranting skins and hides and all other "articles perishable in their own nature" free from average, unless general, means those articles not particularly enumerated which were liable to perish of themselves in the course of the voyage, without any external injury. *Astor v. Union Ins. Co.* (N. Y.) 7 Cow. 202, 216.

The fact that attached property will depreciate in value because of changes in the styles is not in itself sufficient to render it perishable, as that term is used in Code, § 656. To render property perishable, it is essential that it should appear to be inherently liable to deterioration and decay. *Fisk v. Spring*, 1 N. Y. Civ. Proc. R. 378, 384, 62 How. Prac. 510, 512.

Comp. Laws, § 4767, provides for the sale under order of the court of animals or perishable property seized under an attachment. Held, that the phrase "perishable property" means property which is perishable in its own nature, and not property which by extraordinary exposure may be liable to loss or destruction; and hence a portable engine and boiler and the machinery of a shingle mill situated in the woods and liable to loss by trespass and theft is not perishable within the statute. *Oneida Nat. Bank v. Paldi*, 2 Mich. N. P. 221, 222.

Consumable or perishable articles are of two classes: (1) Those which are necessarily destroyed in their use, such as corn, hay, etc. (2) Those which are not so much so as being productive and the capital kept up by the increase such as stock of horses, cattle, etc. *Patterson v. Devlin* (S. C.) McMul. Eq. 459, 466.

#### Cloth.

"Perishable," as used in Code Civ. Proc. § 656, authorizing the sale of attached property if the same is "perishable," means goods which are lessened in value and become worse by being kept, and goods used by the fashionable tailors, the styles in which change every season, and which are liable to become hard and unsuitable for use, and moth-eaten and injured by dust, will be deemed "perishable." *Schumann v. Davis*, 13 N. Y. Supp. 575.

As used in Code, § 656, providing that, if property attached is perishable the court may direct the sheriff to sell it at public

auction, "perishable" should be construed in its ordinary signification, which Webster defines to be liable to perish, subject to decay or destruction; and "decay" is defined to be a gradual failure of health, strength, soundness, prosperity, or any species of excellence or perfection declined to a worse or less perfect state. To render property perishable, it is essential that it shall appear to be inherently liable to deterioration and decay. Property is not to be regarded as perishable merely because it will depreciate in value by reason of changes in the styles and fashions. *Fisk v. Spring* (N. Y.) 25 Hun, 367, 368.

#### Corn.

"Perishable property" means, in the commercial sense, that property which from its nature decays in a short space of time without reference to the care it receives. Of that character are many varieties of fruits, some kinds of liquors, and numerous vegetable productions, but mature merchantable corn does not come within the meaning of that term. *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 67, 5 Am. Rep. 83.

#### Cotton.

Cotton ginned and baled is not a perishable article, which, under Code 1880, §§ 1774, 2618, a sheriff is authorized to sell on attachment. *Weis v. Basket*, 15 South. 659, 71 Miss. 771.

#### Dry goods, groceries, etc.

"Perishable," as used in Code, § 2058, authorizing the court to order the sale in advance of judgment of perishable property which has been attached, property to be sold as perishable need not be shown to be necessarily subject to waste or destruction. If it is shown that by keeping the article it will necessarily become or is likely to become worthless to the purchaser, and by consequence to the debtor, it is embraced within the statute. Under certain circumstances it may be that articles not ordinarily regarded as perishable, such as cotton bales, live stock, hardware, provisions, or dry goods, may depreciate in value by being kept, and hence come within the category of perishable articles. *McCreery v. Berney Nat. Bank*, 22 South. 577, 579, 116 Ala. 224, 67 Am. St. Rep. 105.

Perishable goods are defined as goods which decay and lose their value if not speedily put to their intended use. "Perishable" ordinarily means subject to speedy and natural decay; but where the time contemplated is necessarily long, the term may embrace property liable merely to material depreciation in value from other causes than such decay. But a stock of groceries and provisions, lumber, and camp outfits would not come within the term. *Witherspoon v. Cross*, 67 Pac. 18, 19, 135 Cal. 96.

#### Hay.

Hay is not perishable property, within the statute authorizing the speedy sale of perishable property when seized and attached. *Newman v. Kane*, 9 Nev. 234, 237.

#### Leasehold.

A leasehold interest in lands is not perishable property, within the meaning of Code, § 2958, authorizing the court to order a sale of goods levied on under attachment which are perishable in their nature. *First Nat. Bank v. Consolidated Electric Light Co.*, 12 South. 71, 72, 97 Ala. 465.

#### Lumber.

Lumber is not perishable property within *How. Ann. St.* § 8011, authorizing a sale of attached property when the same consists of animals or perishable property. *Mosher v. Bay Circuit Judge*, 108 Mich. 579, 580, 66 N. W. 478, 479.

#### Pickled fish.

"Perishable in their own nature," as used in an insurance policy enumerating dried fish, among other articles, as free from average, unless general, also "other articles perishable in their own nature," does not include pickled fish. *Baker v. Ludlow* (N. Y.) 2 Johns. Cas. 289, 290.

#### Potatoes.

"Perishable," as used in an insurance policy excepting goods perishable in their nature from the risk assumed by the insurer, includes potatoes. *Williams v. Cole*, 16 Me. (4 Shep.) 207, 208.

"Perishable," as used in a policy of insurance on a ship providing that the insurers shall not be liable for any partial loss on salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to 7 per cent. on the whole aggregate value, etc., should be construed so as to include potatoes. *Robinson v. Commonwealth Ins. Co.* (U. S.) 20 Fed. Cas. 1002, 1004.

As used in Code, §§ 232, 233, relating to proceedings in case property attached is perishable, should be construed to include potatoes. *Davis v. Ainsworth* (N. Y.) 14 How. Prac. 346, 347.

#### Slaves.

A will directing the balance of the testator's "perishable property," excepting a certain negro, to be sold, should be construed to include slaves. *Dugans v. Livingston*, 15 Mo. 230, 234.

Perishable property is defined under our law as meaning such property as is liable to perish, or to be consumed or rendered worse by keeping. All perishable property is per-

sonal property; but it is not true, e converso, that all personal property is perishable property. Thus the term "perishable property" in a will was construed not to include a slave. *Dugans v. Livingston*, 15 Mo. 230, 234.

The term "perishable property" in its most enlarged sense means all personal, as distinguished from real, property; while in its most restricted sense it means such personal property as has in itself elements of destruction or decomposition, as, for instance, fruits, or such productions from the labor and skill of man as are ephemeral in their existence or evanescent and changeable in their value, and would include negroes in its enlarged sense. *Steele v. Wyatt's Adm'r*, 23 Ala. 764, 768, 58 Am. Dec. 317.

## PERJURED.

"Perjured," as used in a statement that a person has perjured himself, is actionable; for it implies a direct legal crime. *Hopkins v. Beedle* (N. Y.) 1 Caines, 347, 348, 2 Am. Dec. 191.

The distinction taken in the English books between the words "forsworn" and "perjured" must have been founded on this: that the word "perjured" implied that the false oath was taken in a judicial proceeding, whereas a man might be forsworn in an oath taken on some other occasion, when it could not amount to perjury. Accordingly, when other words are added, showing that the oath spoken of was taken in a judicial court, the word "forsworn," with this explanation, has been considered as importing a charge of perjury, and "forsworn in the civil court" has been held to import a charge of perjury, as was "forsworn before a justice of the peace." *Fowle v. Robins*, 12 Mass. 498, 501.

## PERJURING THIEF.

The term "perjuring thief" means a person who robs by means of perjury, and not by means of larceny or other act. *Burns v. Monell*, 7 N. Y. Supp. 624.

## PERJURY.

At common law perjury is defined as the willful giving under oath in a judicial proceeding or in a court of justice of false testimony material to the issue or point of inquiry. *Commonwealth v. Maynard*, 15 S. W. 52, 91 Ky. 131; *Commonwealth v. Edison* (Ky.) 9 S. W. 161; *People v. Martin*, 79 N. Y. Supp. 340, 345, 77 App. Div. 396; *Hopkins v. Smith* (N. Y.) 3 Barb. 599, 600; *Commonwealth v. Powell*, 59 Ky. (2 Metc.) 10, 12; *Chapman v. Gillet*, 2 Conn. 40, 47 (citing 4 Bl. Comm. p. 136); *State v. Rowell*, 41 Atl. 430, 431, 70 Vt. 405.

Perjury, as defined by Lord Coke and Blackstone, is a crime committed when a lawful oath is administered by any one having lawful authority in any judicial proceeding, by one who sweareth absolutely and falsely in a matter material to the issue in question. A witness may commit perjury by falsely and corruptly stating that it was his opinion that a man was not drunk. *Commonwealth v. Edison*, 10 Ky. Law Rep. 340, 9 S. W. 161.

Perjury is committed when a lawful oath is administered in some judicial proceeding to a person who swears willfully, absolutely, and falsely in a matter material to the issue or point in question. *Beecher v. Anderson*, 45 Mich. 543, 552, 8 N. W. 539.

Perjury is the willful giving under oath or affirmation, legally imposed, of false testimony material to the issue or point of inquiry. *Schmidt v. Witherick*, 29 Minn. 156, 157, 12 N. W. 448.

Perjury is committed when a lawful oath is administered in some judicial proceeding in due course of justice to a person who swears willfully, absolutely, and falsely in a matter material to the issue or point in question. *State v. Fahey* (Del.) 54 Atl. 690, 692, 3 Pennewill, 594.

Perjury is defined to be the taking of a willful false oath by one who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears falsely in a matter material to the point in question. *State v. Simons*, 30 Vt. 620, 621.

Perjury consists in the oath by which the party indicted swears to the truth of some matter. *United States v. Ambrose*, 2 Sup. Ct. 682, 684, 108 U. S. 336, 27 L. Ed. 746.

"Perjury is a false statement, either in writing or verbal, made under the sanction of an oath." *Lyle v. State*, 19 S. W. 903, 905, 31 Tex. Cr. R. 103.

Perjury at common law is defined to be a willful false oath by one who, being lawfully required to depose the truth in a judicial proceeding, swears absolutely in a matter material to the point in question, whether he be believed or not. *State v. Morse* (Iowa) 1 G. Greene, 503, 508.

Perjury is willfully and corruptly swearing falsely. Corruption is an element of the crime. *In re Rainsford* (U. S.) 20 Fed. Cas. 188, 191.

Perjury is not only *malum prohibitum*, but *malum in se*. At both the civil and common law it was classed among the crimes *falsi*. The commission of perjury is such bad conduct as will preclude the naturalization of the criminal under the statute requiring the applicant to have behaved as a man of good moral character. *In re Spenser* (U. S.) 22 Fed. Cas. 921.

Under Acts 1890, No. 29, providing that an indictment for perjury is sufficient if the respondent is informed with reasonable certainty of the cause and nature of the accusation against him, an allegation in an indictment that defendant committed perjury sufficiently avers that defendant was legally sworn, and that he willfully testified falsely; the word "perjury" having by the common law a well-defined legal meaning, with the knowledge of which the defendant is charged. *State v. Camley*, 31 Atl. 840, 67 Vt. 322.

The word "perjury," in Pension Act 1820, c. 51, § 2, declaring that any person who shall swear falsely in the premises and be thereof convicted shall suffer as for willful and corrupt perjury, does not mean the technical offense of perjury, but merely refers to it for the purpose of affixing the same punishment as for technical perjury. *United States v. Elliot* (U. S.) 25 Fed. Cas. 1002.

A statement in a published article that "in legal terms the violation of an oath is called perjury" is insufficient to charge that crime against the person with reference to whom the statement is made. *Scougale v. Sweet*, 82 N. W. 1061, 1064, 124 Mich. 311.

Perjury is committed when a legal oath is administered by one having authority to a person in any judicial proceeding, who swears absolutely and falsely on any subject material to the issue or cause in question. *People v. Fox*, 25 Mich. 492, 496.

All such false oaths as are taken before those who are in any way intrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries. *Arden v. State*, 11 Conn. 408, 412 (citing 1 Hawk. P. O. lib. 1, c. 60, § 8).

#### Statutory definitions.

Gantt's Dig. § 1415, defines perjury to be "the willful and corrupt swearing, testifying, or affirming falsely to any material matter in any cause, matter, or proceeding before any court, tribunal, body, or other officer having authority to administer oaths." *State v. Kirkpatrick*, 32 Ark. 117, 122. The willful and corrupt swearing, affirming, or declaring falsely to any affidavit, deposition, or probate, authorized by law to be taken before any court, tribunal, body politic, or officer, shall also be deemed perjury. See Gould's Dig. p. 361, c. 51, §§ 1, 2. *Horn v. Foster*, 19 Ark. 346, 350.

Pen. Code, § 118, provides that "every person who, having taken an oath that he will testify, declare, and depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, will-

fully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury." *People v. Simpson*, 65 Pac. 834, 133 Cal. 367.

Perjury is defined in the elementary books to be the taking of a willfully false oath by one who, being lawfully sworn by a competent court to depose the truth in any judicial proceeding, swears absolutely and falsely in a matter material to the point in question, whether he be believed or not. Our statute, in accordance with this definition of perjury, in "An act to provide for the punishment of crime and proceedings in criminal cases," passed in 1868, says: "Whoever, being authorized or required by law to take an oath or affirmation, willfully swears or affirms falsely in regard to any material matter or thing respecting which such oath or affirmation is authorized or required, shall be deemed guilty of perjury," etc. *Miller v. State*, 15 Fla. 577, 585.

Perjury is defined by Rev. St. 1874, c. 38, § 225, as willfully swearing falsely in a matter material to the issue or point in question; and hence an instruction that one is guilty of perjury, if he willfully testifies falsely in a material matter, is misleading, since defendant may have sworn falsely in a material matter, and yet not have sworn falsely in a matter material to the issue. *Young v. People*, 134 Ill. 37, 39, 24 N. E. 1070.

Every person, having taken a lawful oath in any judicial proceeding, who shall swear or affirm willfully, corruptly, and falsely in a matter material to the issue or point in question, shall be deemed guilty of perjury. *Hereford v. People*, 64 N. E. 310, 312, 187 Ill. 222 (citing Cr. Code).

Pen. Code, § 118, defines perjury as follows: "Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury." Section 125 declares: "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false." *People v. Von Tiedeman*, 52 Pac. 155, 157, 120 Cal. 128.

The New York Penal Code provides that a person who swears or affirms that he will truly testify in an action, and who in such action or on such hearing willfully and knowingly testifies, declares, deposes, or certifies falsely to any material matter, or states in his testimony, declaration, or certificate any material matter to be true which he knows to be false, is guilty of perjury. *People v. Dishler*, 4 N. Y. Cr. R. 188, 190.

Whoever shall willfully and knowingly swear falsely in taking any oath required by law, and administered by any person directed or permitted by law to administer such oath, shall be deemed guilty of perjury. Gen. St. § 2534. Under this section an indictment need not charge that the proceeding before a trial justice "was commenced on information under oath." *State v. Byrd*, 4 S. E. 793, 795, 28 S. C. 18, 13 Am. St. Rep. 660.

Perjury is a false statement, deliberately and willfully made, relating to something past or present, under the sanction of an oath or affirmation, where such oath or affirmation is legally administered under circumstances in which an oath or affirmation is required by law, or is necessary for the transaction or defense of any right or for the ends of public justice. Rev. St. 1895, Pen. Code, art. 201. This does not require as a part of the definition of perjury that the party making the false statement knew that it was false when he made it. *Ferguson v. State*, 36 Tex. Cr. R. 60, 61, 35 S. W. 369. See, also, *Langford v. State*, 9 Tex. App. 283, 285; *State v. Perry*, 42 Tex. 238, 239.

Section 5079, V. S., provides that "a person of whom an oath is required by law, who willfully swears falsely in regard to any matter or thing respecting which such oath is required, shall be guilty of perjury." *State v. Rowell*, 41 Atl. 430, 431, 70 Vt. 405.

#### **False swearing distinguished.**

Perjury is falseness of statement as required by law, as distinguished from "false swearing," which is a voluntary declaration or affidavit which is not required by law, or made in the course of judicial proceedings. *O'Bryan v. State*, 11 S. W. 443, 444, 27 Tex. App. 339.

#### **Subornation of perjury distinguished.**

In perjury and subornation of perjury the act of the two offenders is concurrent, parallel, and closely related in point of time and conduct. The two crimes both culminate in the delivery of false testimony. Still the offenses are dual, each having in it elements not common to the other. There is sufficient inherent difference between the two to warrant the lawmaking power in separating the act into its component parts, making that of the suborner a new and independent offense, punishable with greater or less severity than that inflicted on the perjurer. *Stone v. State*, 45 S. E. 630, 631, 118 Ga. 705.

#### **Proceedings in which oath was administered.**

Perjury at common law can only be committed by false swearing in some judicial proceeding. *Clark v. Clark*, 26 Atl. 1012, 51 N. J. Eq. 404.

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False swearing in a case in which the court has no jurisdiction is not perjury. *Buell v. State*, 45 Ark. 336, 339.

Perjury is defined in 2 Bish. New Cr. Law, § 1015, as the willful giving under oath, in a judicial proceeding or court of justice, of false testimony material to the point of inquiry. One giving false testimony on a trial of a crime under an indictment which was subsequently adjudged insufficient on appeal is guilty of perjury, since the perjury of a witness does not depend on the validity in point of form of the indictment under which he testifies. *State v. Rowell*, 47 Atl. 111, 72 Vt. 28, 82 Am. St. Rep. 918.

At common law, in order to constitute the crime of perjury, it was necessary that the alleged false testimony should have been given before a competent judicial tribunal having jurisdiction of the parties to and the subject-matter of the action. Our statute is much broader, and makes false swearing punishable as perjury when committed by a person who, having taken an oath before a competent tribunal, officer, or person, in any case where the law authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true. Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653]. *Rich v. United States*, 37 Pac. 1083, 1084, 2 Okl. 146.

It is well settled that on a prosecution for perjury facts showing the jurisdiction of the court must be affirmatively alleged. 2 Bish. Cr. Proc. § 905. Mr. Bishop says that to render a false swearing perjury there must be an issue or inquiry before some tribunal or person competent in law to act therein. This must be alleged in order to show jurisdiction, and hence a complaint which charges the making of a false oath to a criminal complaint, but fails to allege that such complaint contained a charge of which the court before whom it was filed had jurisdiction, does not charge an offense. *People v. Howland*, 44 Pac. 342, 343, 111 Cal. 655.

#### **Administration, form, and making of oath.**

Act Cong. March 7, 1825 (4 Stat. 118). declares that if any person, in any cause or other proceeding where an oath is required by law, shall swear falsely touching the expenditure of public money or in support of any claim against the United States, he shall be guilty of perjury. Held, that the oath must be required by law or usage and sanction of the court or some department of government; and hence, where a clerk of the Circuit Court administered an oath as to the travel of a witness, which was not required



by law or rule of court, perjury could not be predicated thereon. *United States v. Babcock* (U. S.) 24 Fed. Cas. 928.

To constitute the crime of perjury in this state it is essential that the oath or affirmation was administered in the manner prescribed by law, and by some person duly authorized to administer the same in the matter or cause wherein it was taken. *Stewart v. State*, 6 Tex. App. 184, 185 (citing Pasch. Dig. art. 1911).

To constitute perjury or false swearing under the laws of the United States, it must appear that the officer administering the oath was authorized to administer it by the laws of the United States. *United States v. Madison* (U. S.) 21 Fed. 628.

Perjury is a corrupt, willful, false oath, taken in a judicial proceeding in regard to a matter or thing material to a point involved in the issue. The oath must be taken before some officer or court having authority to administer it. Perjury, therefore, cannot be charged on an affidavit made before the clerk of the Circuit Court for the issuance of an attachment, unless the affidavit avers the facts required by the statute authorizing the process and these statutory facts are alleged to be false. *Hood v. State*, 44 Ala. 81, 86.

"Every person who, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury." It is clear, from an analysis of this section, that when the oath is taken before a tribunal, in order to constitute the crime of perjury, such tribunal must be a competent tribunal. It must be a tribunal having jurisdiction, or authorized by law, to hear and determine the matter in controversy before it; for the law is well settled that the crime of perjury cannot be committed before a tribunal that has no jurisdiction of the subject-matter of the controversy. *Rich v. United States*, 33 Pac. 804, 805, 1 Okl. 354.

#### **Knowledge of falsity of oath.**

False swearing, to constitute perjury, must not only be willful or corrupt, but intentionally false. The false swearing must be willful, both in its falsity and in the act of swearing. *Cothran v. State*, 39 Miss. 541, 546.

Perjury is a false statement, deliberately and willfully made. A false statement, made through inadvertence, or under agita-

tion, or by mistake, is not perjury. *Garza v. State* (Tex.) 47 S. W. 983, 984.

Under Code, art. 30, § 155, "affirmation or oath, if made willfully or falsely in any of the following cases, shall be deemed perjury: First, in all cases where false swearing would be perjury at common law; second, in all affidavits required by law to be taken." It is willfully and falsely swearing to an untruth in any instance mentioned in the statutes which it defines as perjury and subjects to punishment as such. *State v. Bixler*, 62 Md. 354, 357.

Where a person makes an oath to a matter concerning which he has no knowledge, and, where he does not know whether his statements concerning the things are true or not, he commits perjury, notwithstanding the fact that the statements made under oath were in fact true. *State v. Brooks*, 7 Pac. 591, 594, 33 Kan. 708.

There is some difference of opinion as to whether perjury, or false swearing in the nature of perjury, can be committed by mere rash and reckless statements on oath. 1 Bish. Cr. Law (3d Ed.) § 396, says: "Probably the better opinion is that perjury is not committed by any mere reckless swearing to what the witness would, if more cautious, learn to be false; but the oath must be willfully corrupt." In a note he quotes, as opposed to his own opinion, an extract from a report of the Penal Code commissioners of New York: "An unqualified statement of what one does not know to be true is equivalent to a statement of that which one believes to be false." The latter proposition may be nearly true, so far as the effect of the statement on others is concerned; but it is not a sound legal definition of perjury. It has been held, indeed, by an able and learned court, that rash swearing, without any reasonable or probable cause of belief of the fact sworn to, is perjury. *Commonwealth v. Cornish* (Pa.) 6 Bin. 249. The doctrine was denied to be law, in an able and careful charge to the jury in the Circuit Court of the United States sitting in the same state. *United States v. Shellmire*, 27 Fed. Cas. 1051. It has been virtually denied in Massachusetts, in *Commonwealth v. Brady*, 71 Mass. (5 Gray) 78. If any material circumstance is falsely stated, such as that the witness was present and heard a certain conversation, it has been held to be perjury if he were not present, though the conversation really occurred. If the witness only swears rashly to his belief of a matter of which he does not profess to have personal knowledge, the jury cannot be permitted to decide on the reasonableness of his belief, except as tending to show whether he did believe. In short, perjury is always of some matter of fact; and belief may be a fact. *United States v. Moore* (U. S.) 26 Fed. Cas. 1304, 1305.

A man is even guilty of perjury if he swears to a particular fact without knowing at the time whether it is true or false. *Bank v. Markowitz*, 65 N. Y. Supp. 369, 54 App. Div. 299; *Klinger v. Same*, Id.

The statutory definition of perjury includes swearing falsely in any material matter, or stating any material matter to be true which the witness knows to be false. An expert may be guilty of swearing to a false opinion. *State v. Henderson*, 90 Ind. 408. A person who testifies that he believes a certain statement to be true, when he has no probable cause for such belief, is guilty of perjury. *State v. Knox*, 61 N. C. 312. When a person swears positively to the value of goods, of which he knows nothing, he is guilty of perjury. *People v. McKinney*, 3 Parker, Cr. R. 510. When a man swears that a thing is so, or that he believes it to be so, when in truth he does not believe it to be so, the oath is false, although the fact really be as stated. *State v. Cruikshank*, 6 Blackf. 62. An unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false. Pen. Code, § 101. Thus a false statement by a witness that he does not remember certain transactions is perjury. *People v. Doody*, 76 N. Y. Supp. 606, 613, 72 App. Div. 372.

A witness who has made an erroneous statement in giving evidence, but who subsequently corrected it, is not guilty of perjury in making the erroneous statement. *Henry v. Hamilton* (Ind.) 7 Blackf. 506, 509.

Whether a man be drunk or not is in the first place not necessarily merely a matter of opinion of the person who smells the fumes of liquor from his breath, hears his silly, blasphemous, and vulgar conversation, and sees him staggering and falling on the street. On the contrary, when a witness undertakes to testify intelligently on the subject, what he sees is generally to be regarded as a statement of fact, for the intentional falsity of which he is to be held criminally responsible. So perjury may be committed in testifying that one accused of drunkenness was not drunk at the time charged. *Commonwealth v. Edison* (Ky.) 9 S. W. 161.

Rev. St. U. S. § 5392 [U. S. Comp. St. 1901, p. 3653], makes it perjury for one to testify to any material matter which he does not believe to be true. Defendant was indicted for perjury, alleged to have been committed when examined to serve on the grand jury, for swearing that he did not believe in polygamy and did not believe it right for a man to have more than one wife. It was proved that the defendant was a teacher in the Mormon Church, and his duty was to teach their practices, and that polygamy was a doctrine of the church. Several witnesses testified that the defend-

ant afterwards explained to them that he testified as he did because it was not a matter of belief, but that he knew it was right to have more than one wife at the same time. Held sufficient to convict. *United States v. Brown*, 21 Pac. 461, 462, 6 Utah, 115.

One commits perjury where he swears falsely to a matter the truth of which, though he believed, yet he had no probable cause for believing, and might, with a little trouble, have ascertained the fact. *State v. Berkeley*, 41 W. Va. 455, 458, 23 S. E. 608.

Perjury is an assertion upon an oath duly administered in a judicial proceeding before a competent court of the truth of some matter or fact material to the question pending in that proceeding, which assertion he does not believe to be true when he makes it, or on which he knows himself to be ignorant. *Bank v. Markowitz*, 65 N. Y. Supp. 369, 54 App. Div. 299; *Klinger v. Same*, Id.

#### Materiality of statement.

To constitute perjury, the oath and affirmation must be material, or be required by or have some effect in law. *Hamm v. Wickline*, 26 Ohio St. 81, 84 (citing *Silver v. State*, 17 Ohio, 365).

"One of the primary essentials of the crime of perjury is that the false oath must be material, or of consequence in the matter or proceeding in which it is taken. Pen. Code, § 118. And it is well established that the matter or thing shown or testified to will not be held so material where the officer or tribunal had not jurisdiction of the subject-matter of the oath." *People v. Howland*, 44 Pac. 342, 343, 111 Cal. 655 (quoting 2 Bish. Cr. Law, 1020, 1028).

To constitute the crime of perjury it is not necessary that a false oath taken in a judicial proceeding shall relate to the whole case, but it is sufficient if it relates to a single circumstance constituting a link in the chain of evidence. *State v. Wakefield*, 73 Mo. 549, 553.

A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also in swearing falsely and corruptly as to the material circumstances tending to prove or disprove such fact; and it is so, without reference to the question whether such fact does or does not exist. It is as much perjury to establish a truth by false testimony as to maintain a falsehood by such testimony, and the fact that the former may lead to a correct decision is immaterial. *Bradberry v. State*, 7 Tex. App. 375, 378.

There is no offense the general character of which is better understood than that of

perjury, and no point better settled than that the oath must relate to some fact material to the issue. This does not mean that the particular facts sworn to must be immediately material to the issue, but it must have such a direct and immediate connection with a material fact as to give weight to the testimony to that point. *State v. Hattaway* (S. C.) 2 Nott & McC. 118, 120, 10 Am. Dec. 580.

Perjury includes a case where a witness knowingly fabricates details in order to strengthen his credibility as a witness and may be committed in false swearing to a collateral matter with intent to fortify the testimony on some other point. *Hanscom v. State*, 67 N. W. 419, 421, 93 Wis. 273 (citing 2 Whart. Cr. Law [10th Ed.] § 1277; 2 Bish. New Cr. Law, § 1037).

To constitute an attempt punishable under the name of "perjury," there must not only be an intent to pervert the course of justice, but also some act done which is in some degree adapted to accomplish the thing intended. *State v. Whittemore*, 50 N. H. 245, 248, 9 Am. Rep. 196.

A party not only commits a perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove such fact. *Commonwealth v. Grant*, 116 Mass. 17, 20.

Perjury is committed by a witness who testifies falsely to a material fact, though he was not a competent witness, and was especially inadmissible to prove the particular fact to which he testified. *Chamberlain v. People*, 23 N. Y. 85, 87, 80 Am. Dec. 255.

## PERMANENT.

"Permanent" is defined to mean not temporary, or subject to change; abiding, remaining fixed, or enduring in character, state, or place. *Ten Eyck v. Rector of Protestant Episcopal Church*, 20 N. Y. Supp. 157, 159, 65 Hun, 194.

As used in business transactions, "permanent" should be construed in contradistinction from "temporary." *Feeder v. Van Winkle*, 33 Atl. 399, 400, 53 N. J. Eq. 370, 51 Am. St. Rep. 628.

The meaning of the word "permanent," according to lexicographers, is continuing in the same state, or without any change that destroys form or character, remaining unaltered or unremoved, abiding, durable, fixed, lasting, continuing; as a permanent impression. Synonyms: lasting, durable, constant. *Washington & G. R. Co. v. Patterson*, 9 App. D. C. 423, 435 (citing *Webst. Dict.*); *National Bank of Commerce v. Town of Grenada* (U. S.) 44 Fed. 262, 266.

## PERMANENT ABODE.

"Permanent abode," as used in *Rev. St. 1874*, p. 460, declaring that a permanent abode is necessary to constitute a residence within the meaning of the law relating to elections, means nothing more than a domicile, a home, which a party is at liberty to leave as interest or whim may dictate, without any present intention to change it. It need not be an abode which the party does not intend to abandon at any future time. *Dale v. Irwin*, 78 Ill. 170, 181 (quoted in *Berry v. Wilcox*, 62 N. W. 249, 251, 44 Neb. 82, 48 Am. St. Rep. 706).

"Permanent abode," as used in *Rev. St. c. 46, § 66*, providing that a person must have a permanent abode within the state as an indispensable requisite in the right to vote, means nothing more than a domicile, a home, which the party is at liberty to leave temporarily as interest or whim may dictate; and an unmarried man, who spends his time when ill or out of work at the house of a friend, who allows him to call it his home, and leave there his personal effects, has a permanent abode there, though he spends much of his time away from such house, in attending to his business or visiting his relatives. *Moffett v. Hill*, 22 N. E. 821, 823, 131 Ill. 239.

## PERMANENT AGENTS.

Permanent agents of the United States government are those agents who are appointed by the President with the advice and consent of the Senate; in contradistinction to those persons appointed by the Secretary of the State on some special occasion, or at his discretion, and on such terms as he on his official responsibility chooses to make or arrange with the person so appointing him. *Armstrong v. United States* (U. S.) 1 Fed. Cas. 1147, 1154.

## PERMANENT ALIMONY.

Permanent alimony is a provision for the support and maintenance of the wife out of her husband's estate during her life, according to her rank and condition in the community in which she resides. *Odom v. Odom*, 36 Ga. 286, 320.

Permanent alimony is regarded rather as a portion of the husband's estate to which a wife is equitably entitled than as strictly a debt, and alimony payable from time to time may well be regarded as a portion of his current income or earnings, and is ordinarily based in its allowance on such income or earnings. *In re Lachemeyer* (U. S.) 14 Fed. Cas. 914, 915.

Alimony in its strict, technical sense proceeds only from husband and wife, and where the relation of husband and wife

does not exist there can, strictly speaking, be no alimony. But the term "permanent alimony" is often used to denote an allowance for the support of the wife after divorce, and though in this sense the term "alimony" is a misnomer, a decree granting a permanent allowance for the support of the wife after the dissolution of the marriage bonds will not be considered erroneous merely because such allowance is improperly termed "alimony." *In re Spencer*, 23 Pac. 395, 396, 83 Cal. 460, 17 Am. St. Rep. 266.

### PERMANENT ASSOCIATION.

Where a building and loan association issues its stock, not all at once, or in series, but at any time when application is made therefor, the association is known as a "permanent association." *Cook v. Equitable Building & Loan Ass'n*, 30 S. E. 911, 914, 104 Ga. 814.

### PERMANENT BRIDGES.

The words "permanent and substantial," as used in Gen. St. c. 67, § 15, as amended by Act 1866, providing that a certain special tax shall be applied to building and repairing permanent and substantial bridges, etc., are used in a descriptive sense, and apply only to structures of a permanent and substantial character, and do not include temporary structures or ordinary repairs. *Follmer v. Nuckolls County Com'rs*, 6 Neb. 204, 212.

### PERMANENT DISABILITY.

The "permanent disability" for which recovery may be had in an action for personal injuries is the permanent reduction of the injured person's power to earn money resulting from the injury, caused by the negligent act of the other party. *Louisville & N. R. Co. v. Mason* (Ky.) 72 S. W. 27, 28 (citing *Muldrough's Hill*, C. & O. Turnpike Co. v. Maupin, 79 Ky. 105).

### PERMANENT EMPLOYMENT.

An agreement to give a person permanent employment means nothing more than that the employment is to continue indefinitely, and until one or the other of the parties wishes for some good reason to sever the relation. *Lord v. Goldberg*, 22 Pac. 1126, 1128, 81 Cal. 596, 15 Am. St. Rep. 82; *Faulkner v. Des Moines Drug Co.*, 90 N. W. 585, 586, 117 Iowa, 123.

An agreement to give a person a job of "steady and permanent employment" means employment as long as the person is able, ready, and willing to perform such services as the other party may have for him to perform. The words "steady and perma-

nent" usually signify stability and duration. *Pennsylvania Co. v. Dolan*, 32 N. E. 802, 805, 6 Ind. App. 109, 51 Am. St. Rep. 289.

Under Civ. Code, § 1999, providing that an employment having no specified term may be terminated at the will of either party on notice to the other, an agreement to give a party "permanent employment" may be terminated at any time. Permanent employment is employment for an indefinite time, which may be severed by either party. *Davidson v. Laughlin* (Cal.) 68 Pac. 101, 104.

A contract of employment for \$75 a month, the employment to be permanent, means something more than for a month, because the plaintiff is to be employed for a period not exactly named, but is to be paid monthly. This implies payment for more than one month. An instruction, in an action on such contract, that if the employment was not for a month, a reasonable construction would be for a year, in the absence of a construction of the parties, was held not erroneous on appeal. *Roddy v. McGettrick*, 49 Ala. 159, 161.

"Permanent employment," as used in an agreement of defendant to furnish plaintiff with permanent employment at stipulated wages, if he would give up his business and enter defendant's service in the same occupation, should be construed to mean a contract to employ plaintiff only so long as defendant had work to do in such occupation, and so long as plaintiff could do the work satisfactorily, and hence was not void for indefiniteness. *Carnig v. Carr*, 46 N. E. 117, 118, 187 Mass. 544, 35 L. R. A. 512, 57 Am. St. Rep. 488.

### PERMANENT FIXTURES.

Though a cotton screw may have been a chattel attached to the realty, yet if it was detached and carried away, an action of trover would lie, and it is not an answer to such an action to say that the cotton screw was a permanent fixture. *Woods v. McCall*, 67 Ga. 506, 507.

### PERMANENT GUARD.

The term "permanent guard," in the statute prohibiting the employment of militiamen as a regular permanent guard for federal prisoners, does not characterize the act of requiring militiamen to guard federal prisoners for a period of three months. The word "permanent" imports a lasting, fixed employment, one not temporary or transitory. It is conceivable that in some exigency of public affairs the county reserves might be employed during the exigency, even though it lasted longer than three months, and yet not be properly said to be permanently employed. The expression is relative in its

character. The same period would stamp one subject with the character of permanency, while in reference to other subjects it would impart what would be denominated a transitory or fleeting character. Human life is said to be fleeting, while the country in which one has his domicile is called his permanent home. In *re State*, 39 Ala. 546, 548.

### PERMANENT HOSPITAL.

A hospital is "permanent," in the ordinary sense of the word, which is in a continuing and lasting condition. *Atwater v. Russell*, 51 N. W. 629, 631, 49 Minn. 57.

### PERMANENT IMPROVEMENT.

A lease contained a provision that the lessee should pay all assessments for paving, flagging, or repairing the streets adjoining the leased premises, but that assessments for opening streets or for permanent improvements should be paid by the lessor. At the time of making this lease the streets were paved with cobble stones, but one of them was afterwards repaved with granite blocks. It was held that the court would take judicial notice that the new granite pavement was permanent, lasting, and not subject to change, so that the assessment therefor was one for which the lessor was liable. *Ten Eyck v. Rector of Protestant Episcopal Church*, 65 Hun, 194, 198, 20 N. Y. Supp. 157, 159.

### PERMANENT INJUNCTION.

A permanent injunction means an injunction which shall remain in force until the final termination of the suit. *Riggins v. Thompson*, 71 S. W. 14, 16, 96 Tex. 154.

### PERMANENT INJURY.

The term "permanent injury" does not import an injury which will continue forever, but means an injury which is something more than a mere temporary conveyance. Thus the erection of a dam may constitute a permanent injury to lands, even though it may not continue forever. *Bassett v. Johnson*, 2 N. J. Eq. (1 H. W. Green) 154, 162.

"Permanent," as applied to injuries and damages, is apt to mislead, as it is used, not only in cases where the damage is all done at once, as, for instance, in the tearing down of a house, but also as to those cases where the damage is continuing and prospective. In these latter cases the damage is called "permanent," because it proceeds from a permanent cause, and will probably continue indefinitely as the natural effect of the same cause. *Beach v. Wilmington & W. R. Co.*, 26 S. E. 703, 704, 120 N. C. 498.

"Permanent," as used in reference to the damages recoverable for a permanent personal injury, means lasting, and in some cases lifelong, because, if the injured party will be cured, the injury could not be permanent. *Stokes v. Ralpho Tp.*, 40 Atl. 958, 962, 187 Pa. 333.

### PERMANENT LOCATION.

Abiding place equivalent, see "Abiding Place."

### PERMANENT MONUMENTS.

"Permanent monuments," within Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requiring that all records of mining claims shall contain a description of the claim or claims located by reference to such natural objects or permanent monuments as will identify the claims, are such objects as will enable a person endeavoring to locate a claim to correctly make a survey of it by means of the reference made to such natural objects or permanent monuments. *Baxter Mountain Gold Min. Co. v. Patterson*, 8 Pac. 741, 743, 8 N. M. (Johns.) 179.

As used in Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1426], requiring that the record of a mining claim shall contain such a description by reference to some natural object or permanent monument as will identify the claim, "permanent monument" is a general term, susceptible of different shades of meaning, depending largely on its application. What might be regarded as a permanent monument for one purpose might not be so considered with reference to a different purpose. A tree is certainly a fixed natural object, and as a monument it is as firmly planted in the ground and as durable as a post or stake. It should be marked in some manner so as to be readily identified, unless it possesses peculiarities so different from trees in general that a description thereof is sufficient to identify it. Thus marked, naturally or artificially, there would be less room to question the sufficiency of a tree as a natural object or permanent monument, within the meaning of the law, than the sufficiency of a shaft sunk in the ground; for, unless the latter be tempered, it is doubtful whether it could be said to possess the quality of permanency. *Wade, Am. Mining Law*, 113, enumerates the following objects as satisfying the requirements of the statute, to wit: Stone monuments, blazed trees, the confluence of streams, the point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc. *Quimby v. Boyd*, 6 Pac. 462, 466, 8 Colo. 194.

Posts from five to seven inches in diameter, firmly planted in the ground at the corners and ends of a mining claim, and standing not less than five feet above ground.

are permanent monuments, within the meaning of Rev. St. § 2334 [U. S. Comp. St. 1901, p. 1435], requiring the records of such claims to contain such description of the claim by reference to some natural object or permanent monument as will identify the claim. *Credo Mining & Smelting Co. v. Highland Min. & Mill. Co.* (U. S.) 95 Fed. 911.

#### PERMANENT NUISANCE.

To speak of a nuisance as "permanent" does not necessarily mean forever, or that the nuisance should be perpetual. However, the word always conveys the idea of a continuance in the same state. *Cleveland, C., C. & St. L. Ry. Co. v. King*, 55 N. E. 875, 879, 23 Ind. App. 573.

#### PERMANENT POLICY.

The words "permanent policy," in a policy of life insurance, are not ambiguous, and therefore not subject to explanation by parol evidence, but mean an insurance from year to year, and until terminated by an express notice by one of the parties to the contract to the other. *First Baptist Church v. Brooklyn Fire Ins. Co.* (N. Y.) 23 How. Prac. 448.

#### PERMANENT POST.

Under Act Cong. Aug. 23, 1842, § 65, 5 Stat. 513, enacting that the rations authorized to be allowed to each officer while commanding a separate post, by the acts of March 3, 1797, and March 16, 1802, shall be allowed only to certain officers, among whom is included "the commandant of each fixed or permanent post garrisoned with troops," the marine station at the navy yard in Washington was held a permanent or fixed post, garrisoned with troops. *Tyler v. Walker* (U. S.) 24 Fed. Cas. 469, 470.

#### PERMANENT SEAT OF JUSTICE.

The term "permanent seat of justice," in the legislative acts speaking of a permanent seat of justice being established, was not used to import that the courthouse or county buildings should always remain upon the precise spot or location where originally placed. The town of Columbus having been designated as a permanent seat of justice, it was within the power of the board of police in the first instance to build the courthouse on any lot within the limits of that town, and a similar discretion existed and could have been exercised by them in the location of a new courthouse. *Odineal v. Barry*, 24 Miss. (2 Cushm.) 9-22.

In the act of the Legislature providing for the location and removal of county seats, and requiring the chief justice of a certain county to order an election to be held therein for the purpose of selecting the permanent seat of justice of said county, the word

"permanent" is used only in contradistinction to "temporary," and means that it shall remain at the place selected at such election until it shall be removed in the manner directed by law. *Fowler v. Brown*, 5 Tex. 407, 409.

#### PERMANENT SIDEWALK.

A wooden sidewalk, which lasted 11 years, is a "permanent sidewalk," as the term is used in a city charter authorizing a city to cause permanent sidewalks to be constructed on the streets in front of buildings at the expense of the owners. *City of Lowell v. French*, 60 Mass. (6 Cush.) 223, 224.

#### PERMANENT SITE.

In a deed to the trustees of an academy, reciting that it was executed in consideration of the trustees having fixed on the land of the grantor as a proper place for erecting the building of the academy and as a permanent site for the same, the term "permanent site" was not used with the view of compelling the trustees to maintain forever a building and school upon the property conveyed, but was rather descriptive of the nature of the use for which the trustees had selected the land. *Fuquay's Heirs v. Hopkins Academy* (Ky.) 58 S. W. 814.

#### PERMANENT STATUTE.

Generally speaking, a permanent statute is one which is understood to continue in force until its repeal; but the use of the word "permanent" in Rev. St. § 5596 [U. S. Comp. St. 1901, p. 3750], providing for the repeal of all acts of Congress passed prior to the 1st day of December, 1873, any portion of which is contained in the Revision, and all parts of such acts not contained in the Revision, not being general or permanent in their nature, is rather in the sense as applying to all acts of a general and public nature which are in force at that time, and which were so far permanent as that, if not repealed or re-enacted, they would have continued in force as the law of the land for an indefinite period. *Palcher v. United States* (U. S.) 11 Fed. 47.

#### PERMANENT STRUCTURE.

A power house, in its nature and use in furnishing power and pulling in and out cars in connection with a street railroad, is a "permanent structure"; being erected by the railroad company in pursuance of lawful authority for the uses of its road. *Chicago North Shore St. Ry. Co. v. Payne*, 61 N. E. 467, 468, 192 Ill. 239.

#### PERMANENTLY.

"Permanently," as used in the call of the rector of a church, that he be and is

elected permanently to the rectorship of such church, means an indefinite period. The term "permanently," as used, does not mean that the parties were to be bound together by ties to be dissolved only by mutual consent, or for sufficient legal or ecclesiastical reasons. It was intended that he should continue to hold the place only until one or the other of the contracting parties should desire to terminate the connection. *Perry v. Wheeler*, 75 Ky. (12 Bush) 541, 548.

"Permanently," as used in the definition of a mortgage that chattels should be annexed to real estate with the intention that they were to remain permanently in their place, does not mean perpetually, nor that they should remain there forever, but rather that it is as permanent as the business in which they are used and the intention with which they are placed in the case. *Fisk v. People's Nat. Bank*, 59 Pac. 63, 65, 14 Colo. App. 21.

"Permanently," as used in the definition of residence, that there must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, is used as the converse of "transient," and expresses the idea of an abode which may be temporary, but is not transient. *Austen v. Crilly*, 42 N. Y. Supp. 1097, 1098, 13 App. Div. 247.

#### PERMANENTLY ESTABLISHED.

A grant of bonds on land in consideration of the agreement of a railroad company to "permanently establish" its terminus in the city did not mean forever, or remaining forever, but the agreement was complied with by the construction of the terminus. *Texas & P. Ry. Co. v. City of Marshall*, 10 Sup. Ct. 846, 847, 136 U. S. 393, 34 L. Ed. 385 (citing *People v. Board of Railroad Com'rs*, 52 N. Y. Supp. 901, 903, 32 App. Div. 158).

The phrase "permanently established," as used in Act Feb. 16, 1846, providing that the seat of justice should be at a certain town, but that before it should be considered permanently established there the citizens of such town should make certain donations, means established as other county seats are established. *Newton v. Mahoning County Com'rs*, 26 Ohio St. 618, 626.

"Permanently established," as used in Act 1846, § 8, providing that, before the seat of justice of a county shall be considered permanently established at the town of Canfield, the proprietors or citizens thereof shall do certain things, means placing the county seat at Canfield with the intention that it should remain there, but does not mean or imply that it should remain there for all time. *Newton v. Mahoning County*, 100 U. S. 548, 562, 25 L. Ed. 710.

A contract wherein a railroad company agreed, in consideration of a certain donation, to "permanently establish" its eastern terminus and a certain office at a certain city, etc., construed with reference to the subject-matter of the contract, is satisfied by the establishment of the terminus, etc., with no intention at the time of removing or abandoning the same. *Jones v. Newport News & M. V. Co.* (U. S.) 65 Fed. 736, 741, 13 C. C. A. 95.

#### PERMANENTLY LOCATED.

A merchant's stock in trade, located in a city, and not simply in transit or temporarily located, is "permanently located" in such city, within the meaning of Const. art. 3, § 51, providing that goods and chattels permanently located shall be taxed in the city or county where they are located. *Hopkins v. Baker*, 28 Atl. 284, 78 Md. 363, 22 L. R. A. 477.

A gift of money to an institution of learning on condition that it shall be permanently located in a certain place means that the place stated shall be the site of the institution as long as it endures. *Hascall v. Madison University* (N. Y.) 8 Barb. 174, 185.

A grant of land on the condition that a certain institute of learning then incorporated shall be permanently located on such land between the date of the deed and the same day on the succeeding year did not constitute a covenant against removal at any time, or to keep up the institution of learning for an indefinite time; but such permanent location there may be when a resolution was passed locating the building on the land, with the intention that it should be its permanent place. *Mead v. Ballard*, 74 U. S. (7 Wall.) 290, 294, 19 L. Ed. 190.

The word "permanent" does not mean forever, or lasting forever, or existing forever, as used in a contract providing that the lands deeded to a railroad for its terminus and machine shops should be their permanent location; so that the condition is complied with as soon as the railroad company locates such terminal appurtenances on the land, and the removal of some of them eight years later is not a breach of the contract. *Texas & P. Ry. Co. v. City of Marshall*, 10 Sup. Ct. 846, 848, 136 U. S. 393, 34 L. Ed. 385.

The term "permanently located elsewhere," in Tax Law 1852, c. 337, providing that all property owned by residents not permanently located elsewhere within the state shall be assessed to the owner in the county or city where he or she may reside, does not apply to a vessel registered at a custom house in and sailing out of the port of Baltimore, owned by a bona fide and actual resident of Baltimore county, having his place

of business as a merchant in the city, but it comes within the general rule that personal property has no location other than the domicile of the owner. *Hooper v. City of Baltimore*, 12 Md. 464, 472.

## PERMISSION—PERMIT.

"Permit" conveys the idea of an allowance, a sufferance, a toleration, an authorization. *Cowley v. People*, 83 N. Y. 464, 471, 38 Am. Rep. 464.

"Permit" is defined: To grant permission, to give leave, to grant express license or liberty to. *Board of Education v. Board of Education*, 3 Ohio Dec. 70, 71.

The word "permit," when used as an infinitive, is defined as meaning to allow, or giving leave, as in the familiar quotation, "Thou art permitted to speak for thyself." *McHenry v. Winston*, 20 Ky. Law Rep. 1194, 1195, 105 Ky. 307, 49 S. W. 4.

The word "permit" is defined thus: A grant; permission; liberty or leave; to allow; to suffer; to tolerate; to empower; to license; to authorize. *Gregory v. Marks* (U. S.) 10 Fed. Cas. 1194, 1198.

"Permit," as used in Laws 1885, c. 296, § 2, as amended by Laws 1887, c. 404, providing that town boards, village boards, and common councils, etc., may grant a permit to registered pharmacies to sell strong, spirituous, and ardent liquors, is equivalent to the word "license." The word "permit" is used merely to indicate such license to pharmacies, as distinguished from the other class of licenses mentioned. *Neuman v. State*, 45 N. W. 30, 32, 76 Wis. 112.

The permit to retail spirituous liquors, given by the clerk of the board of county commissioners until the next meeting of the board, is substantially the same thing as a license. *State v. Watson* (Ind.) 5 Blackf. 155, 156.

### Affirmative action implied.

"Permit" is in one sense synonymous with "suffer" or "allow," but is also equivalent to "give leave," "license," or "authorize," and as used in a complaint for damages for personal injuries, alleging that defendant caused or permitted the sidewalk to become obstructed, and caused and permitted a quantity of wire to remain there, was not used in the sense of "passively suffered," but charged the defendants with affirmative action in creating or giving permission to continue a nuisance. *Coon v. Froment*, 49 N. Y. Supp. 305, 306, 25 App. Div. 250.

In construing a statute providing that "the board of education of any school shall permit children of school age who reside further than one and one-half miles from

the school where they have legal residence to attend the nearest school," the court said: "The ordinary meaning of the word 'permit' would be that the board of education is to do some affirmative act, grant permission to children to attend the nearest school." *Board of Education v. Board of Education*, 3 Ohio Dec. 70, 71.

Mere inactivity on the part of a landlord, or his failure to take some steps to prevent an illegal use of the premises by the tenant, is not permitting him so to do, in the sense contemplated by the statute, making it criminal for a landlord to permit such a use of the premises. An affirmative assent is necessary, and if the landlord by any act or declaration affirmatively assents to the premises being so used, after he has knowledge of the purpose for which they are used, he is guilty. To make him liable there must be a consent to such use, either expressly given or given by his silent acquiescence. A mere failure to interfere, or to prosecute, or to prevent the illegal use, cannot be construed to amount to a permission, or a silent affirmative acquiescence in such use. *State v. Abrahams*, 6 Iowa (6 Clarke) 117, 122, 71 Am. Dec. 399. See, also, *State v. Abrahams*, 4 Iowa, 541, 543.

### Allow and suffer distinguished.

Webster, in referring to the words "permit," "allow," and "suffer," says: "'Permit' is the most positive, denoting a decided assent." *City of Chicago v. Stearns*, 105 Ill. 554, 558.

The words "permit" and "suffer" are pseudo synonyms. There is a shade of difference between their meanings. The word "permit" seems to convey the idea of affirmative action, more than the word "suffer." *City of Ft. Wayne v. De Witt*, 47 Ind. 391, 394, 395.

As distinguished from "allow" or "suffer," "permit" is more positive, denoting a decided assent, either directly or by implication. "Allow" is more negative, and denotes only acquiescence or an abstinence from prevention. "Suffer" is used when our feelings are adverse, but we do not think best to resist. *Board of Education v. Board of Education*, 3 Ohio Dec. 70, 71.

As used in Bankr. Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing that an attachment in a suit begun within four months before the filing of a petition in bankruptcy against the defendant shall be dissolved by the adjudication in bankruptcy, if it appears that said lien was permitted while the defendant was insolvent, "permitted" is synonymous with the word "suffered," and the defendant permitted the creditor to obtain such lien if he suffered grounds for an attachment to arise and did not in good faith prevent or resist



the creditor's proceedings. *In re Arnold* (U. S.) 94 Fed. 1001, 1002.

"Permit" is defined as "not to hinder." Webster defines the word as more negative than "allow"; that it imports only acquiescence or an abstinence from prevention. He defines the word "suffer" as having an even stronger passive and negative sense than "permit," and as implying sometimes mere indifference. It would seem, therefore, that to permit or suffer implies no affirmative act. It involves no intent. It is mere passivity, indifference, abstaining from preventive action. For an insolvent debtor to suffer an execution to issue on a judgment, and to permit his personal property to be levied on and sold thereunder, without taking affirmative action to pay the judgments and to vacate and discharge the executions, is an act of bankruptcy, within Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing that acts of bankruptcy shall consist of an insolvent debtor's having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having vacated or discharged such preference. *In re Thomas* (U. S.) 103 Fed. 272, 274.

#### Consent distinguished.

See, also, "Consent."

The word "consent" implies some positive action, while the word "permit" implies merely passivity. *Aull v. Columbia, N. & L. R. Co.*, 20 S. E. 302, 304, 42 S. C. 431.

#### Discretion in granting implied.

The word "permit," with an infinitive, is defined as meaning to authorize or give leave. The words "may be permitted," as used in Ky. St. § 400, providing that the parties or their attorneys may be permitted by the court to select a commissioner to perform the duties of the master commissioner, etc., imply that the court may withhold this permission if it sees proper, and do not render the appointment of such commissioner obligatory. *McHenry v. Winston*, 49 S. W. 971, 972, 105 Ky. 307.

#### As failure to prohibit.

"Permit," as used in Acts 15th Gen. Assm. c. 59, § 1, making it unlawful for the keeper of a billiard saloon to permit a minor to remain in the saloon, implies express assent or license to do an act, or the failure to prohibit it. If it is the duty of one to prohibit an act, and he fails to do so, or to use efforts to do so, he permits the act which he could have prevented. *State v. Probasco*, 17 N. W. 607, 608, 62 Iowa, 400.

Suffering or allowing, without interference or prohibition, or allowing or permitting negatively by not preventing, is "permitting," within the meaning of Pen. Code, § 370, pro-

viding that any person who permits any building to be used as a house of ill fame shall be guilty, etc. *Territory v. Stone*, 4 N. W. 697, 700, 2 Dak. 155.

A debtor permits a lien to be obtained, not only when he actively assists and furthers the obtaining of it, but also when he neglects to interpose in such ways as are open to him to prevent it, and, indeed, when, though from inability, he does not pay the debt for the enforcement or securing of which it is about to be entered. It is synonymous with "suffers." *Ferguson v. Greth*, 45 Atl. 735, 737, 195 Pa. 272, 78 Am. St. Rep. 812; *Appeal of National Bldg. & Sav. Ass'n*, No. 2, Id.

"Permit," as used in a city ordinance providing for the punishment of any person who shall permit any swine under his care to go upon any sidewalk in the city, is defined as to allow by not prohibiting. If a person voluntarily drove swine, he was bound to prevent them from going upon the sidewalks. *Commonwealth v. Curtis*, 91 Mass. (9 Allen) 266, 271.

"Permit," as used in a note providing that, if the maker permits or suffers any attachment to be issued against his property, imports acquiescence in or abstinence from prevention of the issuance of an attachment. *Robertson v. Ongley Electric Co.*, 81 N. Y. Supp. 605, 608, 82 Hun, 585.

In an action against a city, it was alleged that the city "wrongfully and negligently permitted divers persons to assemble on the streets and fire a piece of cast iron, bored out as a cannon, which was dangerous to life and limb of a passer-by, and by means of which firing the cannon burst when so fired, and a fragment thereof struck and killed plaintiff's husband while he was lawfully on the street." In holding that such complaint stated no cause of action, the court said: "This paragraph wholly failed to disclose the character of the permission charged, whether active—that is, given in advance of the firing complained of, by actual consent—or whether it consisted in noninterference with the firing going on. 'Permit,' as defined by lexicographers, means not to prohibit or prevent, and the allegation amounts to an allegation that the police or peace officers of the city were remiss in duty, and therefore guilty of negligence in not stopping the firing of a cannon upon the streets of their city, which such officers knew to be dangerous to limb and life. Such negligence on the part of the peace officers cannot furnish a ground of private action against the city." *Arms v. City of Knoxville*, 32 Ill. App. 604, 607.

#### As guaranteed.

In an instruction that a defendant in a criminal action is permitted to be a witness in his own behalf, "permitted" was not used

to express an idea antagonistic to the fact that the defendant had an absolute right to testify in his own behalf, but rather that the right was guaranteed to him, and hence the instruction is not erroneous. *State v. Porter*, 49 Pac. 964, 970, 32 Or. 135.

**Knowledge and consent implied.**

"Permit," as used in a statute providing a punishment for permitting gaming to be carried on in one's house, means that one has given his consent, or that gaming took place in a house, and the person in control of the house knew that gaming was taking place. *Stuart v. State* (Tex.) 60 S. W. 554.

Permission involves knowledge of the thing permitted. If persons permitted an unlawful business, they must have knowingly acquiesced in it; so that an averment that an unlawful sale of liquor was conducted in a building with the owner's permission is sufficient, without alleging that it was leased for that purpose, or that the owner consented to such use. *Gray v. Stienes*, 28 N. W. 475, 69 Iowa, 124.

"Permitted," as used in an indictment charging the defendant with having leased a certain hotel and permitted it to be used for the illegal sale and keeping of intoxicating liquors, means that it was so used with the defendant's knowledge and consent. *State v. Pierce* (Me.) 15 Atl. 68.

The word "permit," in a statute making it criminal for any one to permit or suffer any person to gamble in any house, shop, etc., under his control, means to allow gambling with full knowledge thereof. *State v. Cure*, 7 Iowa (7 Clarke) 479, 481.

The term "permit" implies consent given or leave granted, so that a complaint alleging that a sheriff did suffer and permit a person to escape states a voluntary, and not a negligent, escape. *Loosey v. Orser*, 17 N. Y. Super. Ct. (4 Bosw.) 391, 404.

"Permit," as used in Act Aug. 1, 1892, c. 352, 27 Stat. 340 [U. S. Comp. St. 1901, p. 2521], making it unlawful for a contractor on public works to require or permit laborers to work more than eight hours in any calendar day, means to allow or consent to; and a charge in an information that a defendant permitted its laborers to work more than the prescribed number of hours, may properly be regarded as the legal equivalent of an allegation that such work was done with its knowledge and consent, and, if so, there was intentional violation of the law by the defendant. *United States v. San Francisco Bridge Co.* (U. S.) 88 Fed. 891, 893.

The word "permit" is more positive than the word "allow" or "suffer," denoting a decided assent, either definition of the word including knowledge of what is to be done under the permission, and intention that what is done is what is to be done; and

hence entry of a saloon by a bartender at a time when the sale of liquor is forbidden without the proprietor's knowledge, and against his orders, does not render the proprietor liable, under Acts 1895, p. 248, § 3, forbidding him to permit any person except members of his family to enter at such times. *Wilson v. State*, 46 N. E. 1050, 1051, 19 Ind. App. 389.

As used in Rev. St. § 1835, p. 260, providing that to permit a prisoner to escape shall render a sheriff liable, etc., "permit" should be construed to mean voluntarily or negligently permit. *Warberton v. Woods*, 6 Mo. 8.

"Permit" is defined by Webster as meaning to allow or suffer, and he says that "permit" is the most positive of the terms, and denotes a decided assent; and hence an instruction that a city was liable if it permitted the sidewalk to remain out of repair was not objectionable as making the city liable without actual or constructive notice of the defect, since to permit a walk to remain out of repair means that the city assented to its so remaining with knowledge of its condition. *City of Chicago v. Stearns*, 105 Ill. 554, 558.

"Permitted," as used in a statement that, if a person permits his property to be held out as the property of a firm and as forming part of the foundation on which it rests, the property may be held for the debts of the firm, is used in the sense of "allowed," "suffered," or "acquiesced in," and implies the knowledge on the part of the person of such representation. *Thomas Adams & Co. v. Albert*, 34 N. Y. Supp. 328, 330, 87 Hun, 471.

"The word 'permit' is defined thus: To grant permission, liberty, or leave; to allow; to suffer; to tolerate; to empower; to license; to authorize." So that, to authorize the forfeiture of land used as entrance to an illicit distillery, the owner must have known of such use. *Gregory v. United States* (U. S.) 10 Fed. Cas. 1195, 1197.

Permission implies leave, license, or consent; so that, under a complaint charging certain election judges with permitting certain things to be done which should not have been done, the complaint should also charge that such acts were done with the knowledge and consent of the judges. *Ball v. Campbell*, 59 Pac. 559, 560, 6 Idaho, 754.

As ordinarily used, the word "permit" includes the element of assent. When used in a statute to describe an action made penal, it must be held to include that element, unless there be something in the context clearly indicating the contrary. Under Gen. Laws, 1885, c. 147, as amended by Gen. Laws 1891, c. 104, providing (section 12): "Any registered pharmacist or other person, who shall permit the compounding or dispensing of prescriptions, or the vending of drugs, medicines or poisons in his store or place of business

except under the supervision of a registered pharmacist, or by a registered assistant," shall be liable, etc., the owner of a drug store is not liable for a sale by one in his employ, not a registered pharmacist or assistant, made without his knowledge or assent, and contrary to his express instructions to such employé not to sell any drugs or poisons or prepare any prescriptions. *State v. Robinson*, 55 Minn. 169, 171, 56 N. W. 594.

**Power to consent implied.**

The word "permitted," as used in a covenant that defendant had not done or permitted to be done any certain acts, does not include assenting to an act which the covenantor could not prevent. *Hobson v. Middleton*, 13 Eng. Com. Law, 175, 179.

**Suffer synonymous.**

The word "permitted," as employed in Bankr. Act July 1, 1898, c. 541, § 3a, subd. 1, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], providing that an act of bankruptcy shall consist in having permitted property to be removed or concealed, is by no means synonymous with "suffered," in subdivision 3 of the same section. One does not permit a removal of the property, within the meaning of the former provision, who has neither power nor right to prevent it. In re *Wilmington Hosiery Co.* (U. S.) 120 Fed. 180, 184.

**Willful act implied.**

The word "permit" means "to allow; to grant leave or liberty to, by express consent; to allow by silent consent, or by not prohibiting." *Webst. Dict.* In one sense, therefore, a man may be said to permit that which he has the power to prevent, but does not prevent. His permission may result from mere passiveness or inertness, and where, in an action under a statute providing that where any live stock is killed or injured by a railroad company at a point where the company has the right to fence its track against cattle running at large, and has not done so, unless the injury complained of is occasioned by the willful act of the owner or his agent, an agreed statement of facts showing that the animal killed was running at large by the permission of the owner does not show that the injury caused was occasioned by the willful act of the owner. *Stewart v. Burlington & M. R. Co.*, 32 Iowa, 561, 563.

**PERMISSIVE WASTE.**

Permissive waste implies acts of omission, as suffering buildings to fall for want of ordinary repairs, or lands to deteriorate from neglect. *Willey v. Laraway*, 25 Atl. 436, 437, 64 Vt. 559 (citing Bl. Comm. 281).

Permissive waste implies negligence, which may consist either of acquiescence or assent in the acts of strangers, or failure to

prevent such acts, or to do that which is incumbent upon the party in possession, as matter of good husbandry. The very essence of liability for permissive waste must be negligence. The most ordinary kind of permissive waste is suffering buildings to fall into decay from neglect. Where a lessee, who covenants to surrender the premises at the expiration of a term in good condition, promptly invokes the aid of the courts in endeavoring to prevent a partial destruction of the premises by municipal authorities, he is not liable for injuries to the premises. *Beekman v. Van Dolsen*, 63 Hun, 487, 490, 18 N. Y. Supp. 376, 377.

Permissive waste consists in the negligent or willful omission to do what is required to prevent an injury to demised premises, as to suffer the demised premises or a part thereof to go to decay for want of repairs. *Regan v. Luthy*, 11 N. Y. Supp. 709, 710, 16 Daly, 413; *Eysaman v. Small*, 15 N. Y. Supp. 288, 289, 61 Hun, 618; *White v. Wagner* (Md.) 4 Har. & J. 373, 391, 7 Am. Dec. 674.

**PERPETRATION.**

2 Rev. St. 1876, § 2, providing that if any person of sound mind shall, with premeditated malice or in the "perpetration of burglary," kill any human being, such person shall be deemed guilty of murder in the first degree, includes the act of a person who had burglariously broken and entered a house, and while yet in the house shot and killed a watchman. It cannot be contended that the burglary had been consummated as soon as the burglarious entry had been made, and that the homicide was committed thereafter, and not in perpetration of the burglary. *Bissot v. State*, 53 Ind. 408, 413.

**PERPETRATOR.**

A railroad, the death of an employé of which is caused by the act of a co-employé, is the "perpetrator" of such act, within Revision, § 4111, providing that, when a wrongful act produces death, the perpetrator shall be civilly liable for the injury. *Philo v. Illinois Cent. R. Co.*, 33 Iowa, 47, 49.

The word "perpetrator," in Revision, § 4111, providing that, where a wrongful act produces death, the perpetrator is civilly liable for the injury, etc., does not operate to limit the remedy given by the statute to that for damages resulting from criminal acts only. *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280, 286, 87 Am. Dec. 391.

**PERPETUAL.**

"Perpetual" is defined by Webster, as follows: "Never ceasing; continuing forever in future time; destined to be eternal; as a

perpetual covenant, a perpetual statute. (2) Continuing or continued without intermission; uninterrupted, as a perpetual stream, the perpetual action of the heart and arteries." *Scanlan v. Crawshaw*, 5 Mo. App. 337, 339.

### PERPETUAL INJUNCTION.

An injunction granted upon the final trial is called a "perpetual injunction." *Riggins v. Thompson*, 71 S. W. 14, 16, 96 Tex. 154.

The words "perpetual injunction," in a decree enjoining the violation of a patent right, mean only for the life of the patent, which must be determined by the statute and all the facts of the case, and not merely by the terms of the grant in the patent. *De Florez v. Reynolds* (U. S.) 8 Fed. 434, 438.

### PERPETUAL INTEREST.

A perpetual interest has a duration equal to that of the property. Civ. Code Cal. 1903, § 691; Rev. Codes N. D. 1899, § 3290; Civ. Code S. L. 1903, § 206; Civ. Code Mont. 1895, § 1112.

### PERPETUAL LEASE.

The term "perpetual lease" can only mean one for years, wherein the lessor has the covenant of the lessor for perpetual renewals. Such a covenant does not offend the rule against perpetuities, provided its entire control is in the hands of a person who has a vested interest under the lease. *Edwards v. Noel*, 88 Mo. App. 434, 440.

### PERPETUAL LIEN.

"Perpetual lien," as used in a statute declaring taxes to be a perpetual lien is to be taken as meaning a primary lien, overriding all others, and not as continuing delinquent taxes in force against real estate after the statute has barred a right of action thereon. *D'Gette v. Sheldon*, 44 N. W. 30, 32, 27 Neb. 829.

### PERPETUAL SUCCESSION.

The term "perpetual succession," as used in a statute giving a certain company perpetual succession, was intended merely to give the company continuous succession so long as it continued in existence, and not to define its duration. *State ex rel. Walker v. Payne*, 31 S. W. 797, 798, 129 Mo. 468, 33 L. R. A. 576; *Scanlan v. Crawshaw*, 5 Mo. App. 337, 341.

"Perpetual" is frequently used in the sense of "continuous" or "uninterrupted" by eminent writers and speakers. That another meaning of indefinite duration is also legiti-

mate is equally clear, and one or the other may be adopted according to the context or the subject-matter. The words "perpetual succession," used in the charter of a private corporation, would naturally mean, if unrestricted by other terms, an indefinite duration. *Fairchild v. Masonic Hall Ass'n*, 71 Mo. 526, 530.

### PERPETUALLY.

Where a railroad conveyed land in fee as part consideration, imposed a condition for making and maintaining fences, which was to be "perpetually binding on the owners of the land," such condition will be construed to be an obligation on the grantee only during the time he was the owner of the land; the condition being one which runs with the land, and one assumed by an assignee of such grantee upon a subsequent sale of the land. *Hickey v. Lake Shore & M. S. Ry. Co.*, 36 N. E. 672, 675, 51 Ohio St. 40, 23 L. R. A. 396, 46 Am. St. Rep. 545.

### PERPETUITY.

A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and 21 years more, with a fraction of a year added for the term of gestation in cases of posthumous birth. *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 212, 24 L. Ed. 450; *Duggan v. Slocum* (U. S.) 92 Fed. 806, 808, 34 C. C. A. 676; *Pulitzer v. Livingston*, 36 Atl. 635, 637, 89 Me. 359; *In re Johnston's Estate*, 39 Atl. 879, 880, 185 Pa. 179, 64 Am. St. Rep. 621; *Hart v. Seymour*, 35 N. E. 246, 250, 147 Ill. 598.

Perpetuity is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being and 21 years beyond, and, in case of a posthumous child, a few months more. *Bouv. Law Dict.* Gilbert defines it to be such a limitation of property as renders it inalienable beyond the period allowed by law. Gilbert, *Uses* (by Sugd.) 260, and note. *Waldo v. Cummings*, 45 Ill. 421, 427.

A perpetuity is a limitation taking the subject thereof out of commerce for a longer period than a life or lives in being and 21 years and 9 months thereafter. *Lunt v. Lunt*, 108 Ill. 307, 313.

A perpetuity is a limitation taking the subject-matter of the perpetuity out of commerce for a period of time greater than a life or lives in being and 21 years thereafter. If by any possibility a devise violates the rule against perpetuity, it cannot stand. If there is any possibility that a violation of this rule can happen, then the devise must be held void. *Bigelow v. Cady*, 48 N. E. 974, 975, 171 Ill. 229, 63 Am. St. Rep. 230.

"Perpetuity" is a word applied to attempts to invest money or restrict the alienation of land in such a way as to forever retain it for the benefit or the enjoyment of persons of a particular line of descendants. *Whitney v. Dodge*, 38 Pac. 636, 638, 105 Cal. 192.

A perpetuity is any limitation or condition which may (not will, or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. The absolute power of alienation is equivalent to the power of conveying an absolute fee. In *re Walkerly's Estate*, 108 Cal. 647, 41 Pac. 772, 49 Am. St. Rep. 97. This is but a paraphrase of Civ. Code, § 716, declaring void in its creation "every future interest which by any possibility may suspend the absolute power of alienation," etc. The statute does not permit us to wait and see whether events may not so transpire that in fact no perpetuity results; but if, under the terms of the deed or will creating the trust, when properly construed, the instrument by any possibility may suspend the absolute power of alienation beyond a continuance of lives in being, the instrument, whether a deed or will, is void, and no trust is created, nor any estate vested in the trustee. In *re Steele's Estate*, 57 Pac. 564, 565, 124 Cal. 533.

"A perpetuity is a future limitation, whether executory or by way of remainder, and of real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed by and prescribed by law for the creation of future interests, and which is not destructible by the persons for the time entitled to the property, subject to the future limitations, except with the concurrence of the individual interested under that limitation." *Franklin v. Armfield*, 34 Tenn. (2 Sneed) 305, 354 (quoting *Lewis*, Perp. 164); *Appeal of Mifflin*, 15 Atl. 525, 526, 121 Pa. 205, 1 L. R. A. 453, 6 Am. St. Rep. 781; *Phillips v. Harrow*, 93 Iowa, 92, 106, 61 N. W. 434, 438.

The original meaning of a perpetuity is an inalienable indestructible interest. The secondary meaning is an interest which will not vest till a remote period. When the rule against perpetuities is spoken of, the latter is the meaning which is attached to the word "perpetuity." *Webster v. Morris*, 28 N. W. 353, 359, 66 Wis. 366, 57 Am. Rep. 278.

A perpetuity is "such a limitation of property as renders it inalienable beyond the period allowed by law." 2 Bouv. Law Dict. 326. Under Code, § 1920, providing that "every disposition of property is void which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being and for 21 years thereafter," the lease of a railroad for a term of 999 years, with a certain rent, is

not prohibited; there being no provision therein precluding the lessor from disposing of the fee title to the property, or limiting the lessee from selling and assigning the lease. By uniting in a conveyance, the lessor and lessee may freely and without restraint convey both the fee and the leasehold interest. *Todhunter v. D., M., I. & M. R. Co.*, 12 N. W. 267, 268, 58 Iowa, 205.

A perpetuity may be defined to be such a limitation of property as will render it inalienable for a life or lives in being and 21 years beyond. *Barbee v. Jacksonville & A. Plank Road Co.*, 6 Fla. 262, 268. A perpetuity will no more be tolerable when it is covered by a trust than when it displays itself undisguised in the settlement of a legal estate; and courts of equity will not permit limitations of future equitable interests to transcend the limits assigned for the limitation of similar legal interests or executory devises and shifting and springing uses at law. Trusts for accumulation must be strictly confined within the limits of the rule against perpetuities. *Howe v. Hodge*, 38 N. E. 1083, 1088, 152 Ill. 252.

"Perpetuities are grants of property wherein the vesting of an estate is postponed." *Ingraham v. Ingraham*, 48 N. E. 561, 566, 169 Ill. 432.

"Perpetuity" is the condition of an estate when rendered perpetual or for any time inalienable by the acts of its proprietor. *Maiben v. Bobe*, 6 Fla. 381, 397.

Perpetuities are defined to be grants of property wherein the vesting of an estate or interest is unlawfully postponed; and another definition is as follows: Any limitation tending to take the subject of it out of commerce for a longer period than a life or lives in being and 21 years beyond. *Flanner v. Fellows* (Ill.) 68 N. E. 1057, 1058, 206 Ill. 136.

A "perpetuity" may, with greater propriety, be defined to be a future limitation restraining the owner of the estate from alienating the fee simple of the property, discharged of such future use or estate, before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity. *Stevens v. Annex Realty Co.*, 73 S. W. 505, 507, 173 Mo. 511 (citing *Sanders, Uses and Trusts*, 203).

"Perpetuity" is a word applied to attempts to invest money or restrict the alienation of land in such way as forever to retain it for the benefit or in the enjoyment of the persons of a particular line of descendants. *Whitney v. Dodge*, 105 Cal. 192, 200, 38 Pac. 636.

The rule against perpetuities is said to be one of the wisest inventions of the com-

mon law. It was devised to prevent the perpetual entailment of estates, and to give them over to free conveyance. *Troutman v. De Bolssiere Odd Fellows' Orphans' Home and Industrial School*, 71 Pac. 286, 292, 68 Kan. 1.

The common-law rule as to perpetuities respecting personal property is in force in Wisconsin. The power of alienation of realty is not suspended where there are living parties, however numerous, who have unitedly the entire ownership, and may presently lawfully join in an absolute conveyance of the same. *Becker v. Chester*, 91 N. W. 87, 115 Wis. 90.

The word "perpetuity," in Const. art. 13, § 4, declaring that perpetuities are contrary to the genius of a free state, refers only to estates; and hence an act of incorporation cannot be invalid as a perpetuity. *Barbee v. Jacksonville & A. Plank Road Co.*, 6 Fla. 262, 268.

#### **Perpetual trust for charitable use.**

"A perpetual trust for a charitable use is not condemned by the law against perpetuities." *Abend v. Endowment Fund Com'rs*, 50 N. E. 1052, 1053, 174 Ill. 96.

In general, the rule of perpetuities does not apply to devises for charitable purposes. *Phillips v. Harrow*, 93 Iowa, 92, 106, 61 N. W. 434, 438.

The rule against "perpetuities is inapplicable to charitable gifts, and it has been always so recognized. A gift or conveyance, forever inalienable, though to take immediate effect, is generally a perpetuity; yet the rule has never been applied when the beneficiary is a charity, and a direct gift for the support of the pastor of a certain church, while it is a perpetuity as to time, yet, since it is a charitable gift, is not affected by the rule against perpetuities. *Farmers' & Merchants' Bank v. Robinson*, 70 S. W. 372, 373, 96 Mo. App. 385.

A gift to a charitable use, with a direction that no part thereof should at any time be alienated, does not create a perpetuity in the sense forbidden by law, but only a perpetuity allowed by law and equity in cases of charitable trusts. *Mills v. Davison*, 35 Atl. 1072, 1073, 54 N. J. Eq. 659, 35 L. R. A. 113, 55 Am. St. Rep. 594.

The meaning which the law annexes to the term "perpetuity" is that of an estate tail so settled that it cannot be undone or made void, as when, if all parties who have an interest join, they cannot bar or pass the estate; but if, by a concurrence of all having the estate tail, it may be barred, it is not a perpetuity. In obedience to the declaration in the Bill of Rights and an injunction in the Constitution, the Legislature of 1784 abolished entails, giving as a reason

that they tended to raise the wealth and importance of particular families and to give them an undue influence in a republic. This shows plainly that they designed to prevent the accumulation of individual wealth, and did not contemplate the possibility of any evil likely to arise from the establishment of a permanent fund for charitable uses, and the probable effect of this was the reverse of what they meant to guard against, as it promised to increase the equality of the republic. It would afford the means of instruction to those who could not otherwise procure them. It would diffuse knowledge and morality among the class of society which stands most in need of them, and by rendering them useful and efficient members add to the strength and happiness of the community. Assuredly, then, property applied to those ends never entered into the common-law idea of perpetuity. *Griffin v. Graham*, 8 N. C. 96, 130, 9 Am. Dec. 619.

Charities are not prohibited by the provisions of Civ. Code, §§ 715, 772, prohibiting perpetuities. In *re Hinckley's Estate*, 58 Cal. 457, 475.

The word "perpetuity" has a technical signification, denoting the period of time beyond which a future interest cannot vest. "It may be defined to be a future limitation, restraining the owner of the estate from aliening the fee of the property, discharged of such future use or estate, before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity." If a gift be to charity and then over to an individual, or to an individual and then over to charity, the rule is effective, and has perfect application; but a gift to charity and then over to charity forms the exception, and this is sustained upon the reasoning that, as one charitable use may be made perpetual, speaking in a general and natural sense, the gift to two in succession can be of no longer duration or greater evil. The property is taken out of commerce, and goes instantly into perpetual servitude to charity. A charitable trust for the maintenance of public schools in a city is not invalid, as against the rule of perpetuities, because the will provides for the appointment of trustees 15 years after testator's death; the property in the meantime being given in trust to the executors. In *re John's Will*, 47 Pac. 341, 347, 30 Or. 494, 36 L. R. A. 242.

#### **PERQUISITE.**

"Perquisite" means something gained by a place or office beyond the regular salary or fee. *Wren v. Luzerne County*, 9 Pa. Co. Ct. R. 22, 24, 6 Kulp, 37, 39 (citing *Webst. Dict.*).

In *Bouvier's Law Dictionary*, after giving the meaning of "perquisites" in its most

extended sense, it is defined: "In a more limited sense it means something gained by a place or office beyond the regular salary or fee"—and was used in such sense in Const. art. 4, § 37, providing for the compensation of clerks of court in the city of Baltimore, and directing that they shall be entitled "to no other perquisites or compensation." *Vansant v. State*, 53 Atl. 711, 714, 98 Md. 110.

The idea of a "perquisite of office," in the sense of a fee or allowance for services beyond the ordinary salary or settled wages, has no place in our legislation, but seems to be repudiated by the most necessary implication. Once to admit it is to open a wide door for imposition and corruption. Webster tells us that the common acceptance of the word in America is a fee to an officer for a specific service in lieu of an annual salary; but he also gives the other sense, in which it is elsewhere used. Thus, the inspector of flour cannot take draft flour as a perquisite of office, though a custom to do so may have existed longer than the memory of any living man. Since the statutes show the commencement of the inspection of flour in Virginia, and this period is within the limitations prescribed for the commencement of a custom, the custom is bad. *Delaplane v. Crenshaw* (Va.) 15 Grat. 457, 468.

A notice that live animals are baggage-men's "perquisites," posted in a railway station, does not mean that the company will assume no responsibility in the shipment of a live animal as baggage, but implies that the company will allow the baggage master to take live animals in the baggage room, and that the charge for so doing is a perquisite of the baggage master and does not go into the coffers of the company. *Cantling v. Hannibal & St. J. R. Co.*, 54 Mo. 385, 390, 14 Am. Rep. 476.

## PERSIST.

"Persist" is the correlative of "attempt" or "endeavor," and signifies "hold on," "persevere," etc. The word, in a statute providing that if an actual settler shall by force of arms of the enemies of the United States be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement, he shall be entitled to have and hold the land in the same manner as if the actual settlement had been made, means if he shall persevere in his efforts to make such settlement. *Commonwealth v. Coxe* (Pa.) 4 Dall. 170, 202, 203, 1 L. Ed. 786, 801.

## PERSISTENT.

"Chronic" is defined as in effect meaning "persistent," so that, as used in a question in an application for an insurance policy as

to whether applicant ever had chronic and persistent hoarseness, the two words were intended in the same sense. *Blumenthal v. Berkshire Life Ins. Co.* (Mich.) 96 N. W. 17, 18.

## PERSISTENT POLICY HOLDER.

The meaning of the phrase "persistent policy holder," as the term is used in the life insurance business, is not the subject of expert testimony, but is sufficiently obvious, as meaning one who has not defaulted in the payment of his premiums, or, in other words, has continued to perform the duties imposed on him by the policy. *Fry v. Provident Sav. Life Assur. Soc. of New York* (Tenn.) 38 S. W. 116, 128.

## PERSON.

See "About the Person"; "Another Person"; "Artificial Persons"; "Black Person"; "Competent Person"; "Contiguous Person"; "Credible Person"; "Disorderly Person"; "Existing Person"; "From the Person"; "Infamous Persons"; "Natural Person"; "Private Person"; "Reasonable Person"; "Suitable Person"; "Suspicious Person"; "Third Person."

All persons, see "All."

Any other person, see "Any Other."

Any person, see "Any."

Body of, see "Body."

Other person, see "Other."

Webster describes a "person" as a living soul, a self-conscious being, a moral agent; especially a living human being, a man, woman, or child, an individual of the human race. *United States v. Crook* (U. S.) 25 Fed. Cas. 695, 697.

In law the word "person" does not simply mean the visible body, for, if it did, it would apply equally to a corpse. It means a living person, composed of body and soul. *Morton v. Western Union Tel. Co.*, 41 S. E. 484, 485, 130 N. C. 299.

"Person," as used in a warranty of the soundness of the person of the slave, includes the mind. The best lexicographers give the word "person" as meaning the whole man. It is true that in common parlance it is frequently applied to the outward or visible man, yet its correct meaning conveys the idea of the mind as well as the body, and it is a term used to contradiistinguish rational from irrational creatures, and, thus applied, seems to refer peculiarly to the mind. *Caldwell v. Wallace* (Ala.) 4 Stew. & P. 282, 285.

"Person" is a broad term, and legally includes not only the physical body and members, but also every bodily sense and per-

sonal attribute, among which is the reputation a man has acquired. *Johnson v. Bradstreet Co.*, 13 S. E. 250, 251, 87 Ga. 79.

#### Construed as claim.

The word "person" in Bankr. Act July 1, 1898, c. 541, § 64, cl. 5, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], giving priority of payment to any person who by the laws of the United States or of the state is entitled to priority, should be construed to mean "claim." In *re Hays, Foster & Ward Co.* (U. S.) 117 Fed. 879, 880.

#### Construed as joint owners.

In Rev. St. § 1625, forbidding under penalty the erecting or maintaining of any seine, net, or trap in any of the waters of the state or other streams, etc., and declaring that such prohibition shall not apply to waters wholly on the premises belonging to such person or persons using such device or contrivances, "persons" should be construed to mean "joint owners." *State v. Blount*, 85 Mo. 543, 546.

#### Construed as party.

The word "person" in the law giving the right to any person to obtain an appeal, writ of error, or supersedeas, has been construed to mean "party," and, in order to entitle any person to appeal from a judgment, he must be a party to the cause, and aggrieved by the judgment. *Culpeper County Sup'rs v. Gorrell*, 20 Grat. 484, 519.

Civ. Code, § 606, reads: "No person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief." The word "person," as used in this section, is manifestly synonymous with "party to the action." The whole section indicates and refers to what a party may not do—as that he shall not testify for himself in chief after introducing other testimony for himself in chief. *Western District Warehouse Co. v. Hayes*, 97 Ky. 16, 18, 29 S. W. 738, 739.

The word "person," as used in the statute that any person aggrieved by a judgment of any justice of the quorum or of the peace may appeal, etc., is one that may be of larger significance than the word "party" as used in a later act, but it certainly includes a party. The two words, in common discourse, are used often synonymously, and hence the change from "person" to "party" does not so change the statute that one of several defendants will not be authorized to appeal where the rest refuse to join. *Ex parte Bogatsky*, 32 South. 727, 728, 134 Ala. 384.

The term "person" includes every living human being, and in Code, § 401, providing that when any party intends to make or oppose a motion in any court of record, and

it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may by order appoint a referee to take the affidavit or deposition of such person, the term "person" is held to include a party. *Cockey v. Hurd* (N. Y.) 45 How. Prac. 70, 73.

Code, § 57, providing that any "person interested" in any final order, sentence, or decree of any probate court, and considering himself injured thereby, may appeal therefrom, means only persons who are parties to the proceeding in a court of probate, for no one can properly be said to be interested in any final order or decree made in a proceeding to which he is not a party. *Witte Bros. v. Clarke*, 17 S. C. 313, 323.

#### Construed in plural.

"Person," as used in a municipal ordinance requiring a certain estimate to contain the name and place of residence of the person making it, should be construed to mean "persons" in case more than one person joins in making such estimate. *People Croton Aqueduct v. Board* (N. Y.) 5 Abb. Prac. 316, 320.

The word "person" may be extended and applied to several persons or things as well as to one person or many, and vice versa, under the express provisions of Rev. St. c. 21, § 12. *Commonwealth v. Gabbert's Adm'r*, 68 Ky. (5 Bush) 438, 446.

2 Rev. St. p. 297, § 27, suspends the running of the statute of limitation against any person who shall be out of the state when any cause of action specified in the statute shall accrue against him. Held, that the word "person," as here used, should not be deemed to include "persons," so that the statute should read "person or persons," in the sense that in the case of joint debtors both must reside out of the state the length of time required to avoid the statute. *Denny v. Smith*, 18 N. Y. 567, 568.

The word "person" in a statute providing that if any person or persons entitled to any action of trespass, detinue, trover, etc., shall be within the age of 21 years at the time any such cause of action accrues, etc., then such person or persons shall be at liberty to bring the same actions, within such time as before limited, after their coming to or being of full age, must refer to each and every individual coming within any one of the exceptions—to each individual infant. "Persons" unquestionably means more than one individual falling within the same category. Without the use of the singular, the plural, "persons," would, as has been judicially held, mean the same thing. *Jordan v. Thornton*, 7 Ga. 517, 522.

By the "act concerning Revised Statutes" (2 Rev. St. p. 778, § 11), the word "per-



son," as used in 2 Rev. St. p. 297, § 27, declaring "if at the time when any cause of action specified in such article shall accrue against any person he shall be out of the state, such action may be commenced within the terms therein respectively limited after the return of such person into the state," is declared to mean "persons"; so that whenever a cause of action accrues against several persons who are absent from the state the period of their absence shall not be deemed any part of the time limited for the commencement of the suit founded on such cause of action. In assumpsit against several defendants it is no answer to the plea of the statute of limitations that one of them within six years from the accruing of the cause of action departed from the state, and continued absent until the commencement of the suit. All the persons liable on a joint contract must depart from the state in order to arrest the running of the statute against the demand. The rule is different in actions for torts. There, the cause of action being several, the plaintiff can avail himself of the saving provision against any party who has resided out of the state during the period of limitation. *Brown v. Delafield* (N. Y.) 1 Denio, 445, 447.

Under 2 Rev. St. p. 778, § 11, providing that when a statute refers to any matter or person by words importing the singular number, several matters or persons shall be deemed to be included, unless such a construction would be repugnant to the general language implied, the word "person," as used in 4 Edmonds' St. at Large, p. 626, exempting from levy and sale the necessary team of any person being a householder or having a family for which he provides, may be construed to mean "persons," so as to exempt a team belonging to the partnership. *Stewart v. Brown*, 37 N. Y. 350, 351, 93 Am. Dec. 578.

The word "person" or "persons," when used in the revenue act, shall be construed to include male, female, corporation, company, firm, society, singular or plural number. *Hurd's Rev. St. Ill.* 1901, p. 1494, c. 120, § 292, subd. 11.

#### Construed as witness.

Laws 1840, c. 276, confers upon the Supreme Court power to take by commission a deposition of any witness who shall have refused voluntarily to make his deposition, which deposition is required for the purpose of a motion. Code Proc. § 401, subd. 7, provides that a referee may be appointed by order to take the affidavit of "any person" to be used upon a motion who shall have refused to make it. Held, that the word "person," as used in the latter statute, means and is synonymous with "witness" as used in the former section, and hence does not

apply to a party to the action. *Hodgskin v. Atlantic & P. R. Co.* (N. Y.) 3 Daly, 70, 73.

#### As a particular individual.

"Person," as used in Act 1889, imposing a tax upon certain descriptions of personal property owned, held, or possessed by any person, persons, copartnership, or unincorporated association or company held as active trustee, agent, attorney in fact, or any other capacity for the use, benefit, or advantage of any other person, persons, copartnership, unincorporated association, etc., means a particular individual; one who could claim, in the words of the act, the use, benefit, or advantage of the property; one who could enforce the trust in his favor. Property held for certain charitable and religious objects is not held for the use, benefit, or advantage of any person, though the charitable and religious purposes to which the property is applied have relation to certain classes of people. The trusts mentioned are not trusts for particular persons, but for particular objects. Some person may be incidentally benefited, but he is not a person entitled by law to the use, benefit, or advantage of the trust, or who has by the law any beneficial interest or ownership in it whatever. The funds are not held in trust for any person whomsoever, but to be applied to the particular charities and religious purposes mentioned, in the discretion of the trustees; so that no person or individual can possibly be said to have a legal right or interest in it whatever. *General Assembly v. Gratz*, 20 Atl. 1041, 1043, 139 Pa. 497.

#### Alien.

The term "person" in the fifth amendment of the United States Constitution is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same jurisdiction under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws. *Wong Wing v. United States*, 16 Sup. Ct. 977, 983, 163 U. S. 228, 41 L. Ed. 140.

An alien is a person within the fourteenth amendment of the federal Constitution. *In re Parrott* (U. S.) 1 Fed. 481, 511; *State v. Montgomery*, 47 Atl. 165, 167, 94 Me. 192, 80 Am. St. Rep. 386.

#### Army officer.

The word "person," as used in Rev. St. § 5414 [U. S. Comp. St. 1901, p. 3662], referring to every person who, with intent to defraud, falsely makes, forges, counterfeits, or alters an obligation or security of the United States, is comprehensive enough in its scope to include an army officer of the United

States, as well as all other persons within the jurisdiction of the United States, unless he is exempted from its operation by some provision of the Constitution or some other statute. *Neall v. United States* (U. S.) 118 Fed. 699, 700, 56 C. C. A. 31.

#### **Body of persons.**

The word "person," as used in the negotiable instruments act, includes a body of persons, whether incorporated or not. *Ann. Codes & St. Or.* 1901, § 4592; *Negotiable Instruments Law*, N. D. § 191; *Rev. Codes N. D.* 1899, § 1060; *Rev. Laws Mass.* 1902, p. 653, c. 73, § 207; *Code Supp. Va.* 1898, § 2841a; *Bates' Ann. St. Ohio* 1904, § 3178.

#### **Child prematurely born.**

"Person," as used in *Pub. St. c. 52, § 17*, providing that an action may be brought for benefit of the next of kin by an administrator of a person whose death was caused by the negligence of a town, etc., does not include a child delivered of a mother between four and five months advanced in pregnancy by reason of her falling on a defective highway, whereby the birth of the child was caused, and which survived his premature birth only a few minutes. *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16, 52 Am. Rep. 422.

#### **Chinese.**

Chinese or Mongolians residing within the jurisdiction of the state are "persons" within the meaning of such term as used in the fourteenth amendment to the federal Constitution. *In re Tiburcia Parrott* (U. S.) 1 Fed. 481, 482, 520.

#### **Colored person.**

In the construction of statutes the word "person" includes persons of color. *Pen. Code Ga.* 1895, § 2.

#### **Deceased person or estate of deceased person.**

The natural and obvious meaning is a living human being, and it was so used in *Pub. St. c. 11, § 13*, requiring the tax on real estate to be assessed on the 1st day of May to the person who is either the owner or in possession; and an assessment to a person holding the record title, but who had died before such assessment, was void. *Sawyer v. Mackie*, 21 N. E. 307, 149 Mass. 269.

"Person," as used in *Rev. St. c. 6, § 27*, authorizing the assessor to continue to assess real estate to the person to whom it was last assessed, although the ownership or occupancy has changed, unless previous notice of such change has been given, in its natural and obvious signification means a living being. *Morrill v. Lovett*, 49 Atl. 666, 667, 95 Me. 165, 56 L. R. A. 634.

As the estate of a decedent is in law regarded as a person, a forgery committed after the death of the man whose name purports to be signed to the instrument may be prosecuted as with the intent to defraud the estate. *Billings v. State*, 107 Ind. 54, 55, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77.

The word "person" usually means a natural person or an artificial person—that is, a corporation—but as used in *Acts 1883, c. 168*, providing that the Union Bank & Trust Company shall have the right and power to accept and execute trusts which may be imposed on it with its consent by any person or corporation, whether the trust be that of guardian, executor, trustee, the committee of an estate of a non compos mentis, or any other trust, has a broader meaning, so as to give such corporation the power to act as the administrator of a decedent under an appointment of the county court. If the word "person" be limited to its exact meaning, it would follow that the trusts referred to could only be such as are imposed by some natural person or by some corporation; but when these words are tried by the connection in which they are used, and the illustrations given of them in the statute, it is seen that this could not have been the meaning, for, while a great variety of trusts may be created by private individuals and also by corporations, yet neither of them can appoint a guardian or committee from the estate of a lunatic. This must be done by the chancery court or the county court. *Union Bank & Trust Co. v. Wright* (Tenn.) 58 S. W. 755, 757, 52 L. R. A. 469.

#### **Dog.**

The term "person" in a statute providing that any person may kill a dog not licensed or collared, is used literally, and means a human being, and cannot be construed to mean a dog, and therefore the statute cannot be urged as a defense in an action by plaintiff against defendant for the killing of plaintiff's dog by defendant's dog. *Heisrodt v. Hackett*, 34 Mich. 283, 284, 22 Am. Rep. 529.

#### **Druggist.**

The term "person" in *Rev. St.* 1889, §§ 3890, 3892, 3893, providing that no person shall sell spirituous liquors without signing an affidavit and bond not to adulterate the same, includes druggists selling plain liquor, called for by a physician's prescription. *State v. Summers*, 44 S. W. 797, 798, 142 Mo. 586.

#### **Employé.**

"Persons," as used in *Rev. St. § 1810*, providing that, unless fences and cattle guards shall be duly made, every railroad corporation owning or operating any road shall be liable for all damages done to cattle,

horses, or other domestic animals, or persons thereon, occasioned in any manner, in whole or in part, by the want of such fences and cattle guards, shall be construed to include the employes of the company. *Quackenbush v. Wisconsin & M. R. Co.*, 22 N. W. 519, 62 Wis. 411.

"Person," as used in Gen. St. 1865, c. 63, providing that a railroad corporation shall be liable for all damages which shall be sustained by any person by reason of its neglect to have a bell placed on each locomotive engine, to be run at least eighty rods from the place where the railroad shall cross any public road or street, and be kept ringing until it shall have crossed such road or street, should be construed to mean any person other than employes of the railroad. *Robb v. Pacific R. R.*, 43 Mo. 187, 195.

#### **Every owner of property.**

The word "person," as used in the Penal Code, when used to designate the owner of any property the subject of any offense, includes not only natural persons, but every other owner of property. *Bates' Ann. St. Ohio 1904*, § 6794; *Rev. St. Wyo. 1899*, § 5190.

#### **Indian.**

An Indian is a person within the meaning of the statute decreeing that any person who shall furnish intoxicating liquors to Indians shall be punished. *United States v. Miller* (U. S.) 105 Fed. 944, 948; *United States v. Shaw-Mux* (U. S.) 27 Fed. Cas. 1049, 1050.

An Indian is a person within the habeas corpus act describing applicants for the writ as persons who may be entitled thereto. *United States v. Crook* (U. S.) 25 Fed. Cas. 695, 697.

Const. Amend. 14, § 1, providing that all persons born or naturalized in the United States, subject to the jurisdiction thereof, are citizens thereof and of the state wherein they reside, does not apply to Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes. *Elk v. Wilkins*, 5 Sup. Ct. 41, 45, 112 U. S. 94, 28 L. Ed. 643.

#### **Infant or minor.**

A "minor" is a person, within the meaning of the latter word as used in the bankruptcy act of 1898, providing that any person who owes debts, except a corporation, shall be entitled to the benefits of the act as a voluntary bankrupt. *In re Duguid* (U. S.) 100 Fed. 274, 276.

As used in St. 1877, c. 234, providing that any person injured by a defect in a highway shall within a certain time give notice to the town, etc., to repair the same, and of

the time, place, etc., of the injury, such notice to be a condition precedent to the right to maintain an action for the injury, the term "person" includes infants as well as adults, a sufficient protection to the rights of infants being furnished by a further provision which permits the notice in their behalf to be given by their parents, guardians, or any other person. *Madden v. City of Springfield*, 131 Mass. 441, 442.

"Person" or "persons," as used in the first statute of Wills, 32 Hen. VIII, though general words, did not include infants and persons non compos. *Beckford v. Wade*, 17 Ves. 88, 91.

#### **Inhabitant.**

The word "person" in a statute providing that if any person not the owner is living on any farm on the 1st day of April, and refuses to be taxed for rent, etc., is held to mean "inhabitant of the town." *Mowry v. Blandin*, 64 N. H. 3, 4 Atl. 882, 884.

#### **Judge or magistrate.**

A judge is a "person" within Code Proc. § 1103, providing that a writ of prohibition may be issued to an inferior tribunal, to a corporation, board, or person, where there is not a plain and adequate remedy at law. *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315, 324.

"Person," as used in Acts 1890, No. 29, § 3, punishing the offense of perjury committed before a "person or persons," includes every magistrate or judge to whom power is given to conduct judicial or other investigations. *State v. Baker*, 24 Atl. 98, 64 Vt. 355.

"Person," as used in New Code, § 4579, which makes it criminal for any person whatever to pursue their business or work of their ordinary calling on the Lord's Day, would include a judge of the superior court, so as to render a verdict received by such judge from the jury on the Sabbath Day illegal and a nullity. *Bass v. Irvin*, 49 Ga. 436, 439.

#### **Nonresident.**

Nonresidents are persons within the meaning of a general law authorizing any number of persons not less than seven to form a corporation to construct a railroad. *Central R. Co. of New Jersey v. Pennsylvania R. R. Co.*, 31 N. J. Eq. (4 Stew.) 475, 480, 483.

New York City Charter (Laws 1897, c. 378, § 936) providing that any tax for personal property on any person or corporation in the city of New York which is in default may be recovered by an action in any court of record in the state, only applies to such persons or corporations as are residents of

the city, and does not apply to a nonresident. *City of New York v. McLean*, 63 N. E. 380, 381, 170 N. Y. 374.

**Officer of corporation, association, or partnership.**

"Persons," as used in the bankruptcy act, shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations. U. S. Comp. St. 1901, p. 3419.

The president, vice president, secretary, general superintendent, or other principal officer of any such partnership, association, or corporation as is named in section 1 of the act providing that no person, partnership, or corporation carrying on any trade or business shall require as a condition of employment the surrender of any right of citizenship, who may direct or be a party to the violation of the provisions thereof, shall be taken and deemed as "persons" within the meaning thereof, and shall be liable in all courts and places for a violation by such partnership or corporation of the provisions thereof. Gen. St. Minn. 1894, § 6963.

**Owner.**

St. 1845, c. 117, providing that "any person who shall take, carry away, or remove any stones, gravel or sand from any of the beaches in the town of Chelsea," applies as well to the owner of the land as to any other person. The object of the statute was to protect the beach and the natural embankments from being broken up. If the removal of sand was done by the owner, the damage would be as great as if done by a stranger; hence the term "any person" in the statute applies as well to the owner as to any other person. *Commonwealth v. Tewksbury*, 52 Mass. (11 Metc.) 55, 56.

**Partnership, firm, company, society, joint-stock company, or association.**

"Person," as used in St. 1893, c. 443, providing that no person, association, or union that has adopted a trade-mark may file therewith a certificate specifying the name or names of the person, association, or union so filing, includes a partnership firm. *Commonwealth v. Rozen*, 57 N. E. 223, 224, 176 Mass. 129.

"Persons," within the meaning of a statute exempting to persons not constituents of the family all tools, apparatus, or books belonging to any trade or profession, includes a partnership. *St. Louis Type*

*Foundry v. International Live Stock, Printing & Pub. Co.*, 12 S. W. 842, 74 Tex. 651, 15 Am. St. Rep. 870.

A business copartnership or firm is not in law considered a "person," and it cannot maintain an action, but must sue in the name of its individual members on contracts made in the firm name or on other liabilities due the firm. *Lasater v. First Nat. Bank* (Tex.) 72 S. W. 1054, 1055.

Act May 8, 1876, authorizing an action of trespass against any person or corporation knowingly mining coal on the lands of another, is to be construed to include a limited partnership. Such a partnership is an artificial person, and hence within the statute. *Oak Ridge Coal Co. v. Rogers*, 108 Pa. 147, 151.

By express statutory provisions in many of the states the word "person" is declared to include, firm, company, partnership, society, joint stock company, or association. See Ann. Codes & Sts. Or. 1901, § 2099; Code W. Va. 1899, p. 198, c. 29, § 45; Bates' Ann. St. Ohio 1904, §§ 2730, 4427-12; U. S. Comp. St. 1901, pp. 3, 2040, 3202, 3419; Ballinger's Ann. Codes & St. Wash. 1897, §§ 3361, 1658, 826, 3365; Rev. St. Utah 1898, §§ 2498, 2505, 1762, 4053; Rev. Codes N. D. 1899, § 1176; Rev. St. Tex. 1895, art. 5064; Gen. St. Minn. 1894, §§ 1511, 2264, 2187, 6842, subd. 13; Ann. St. Ind. T. 1899, § 4900; V. S. 1894, 355; Rev. St. Mo. 1899, §§ 9123, 10,104, 5647; Civ. Code Ala. 1896, § 3900, subd. 5; Pub. St. R. I. 1882, p. 77, c. 24, § 5; Civ. Code S. C. 1902, § 265; Rev. Laws Mass. 1902, p. 917, c. 106, § 8; Gen. St. Conn. 1902, § 1; Gen. St. Kan. 1901, §§ 6650, 5997; Hurd's Rev. St. Ill. 1901, p. 1494, c. 120, § 292, subd. 11; Ky. St. 1903, § 457, Cobbey's Ann. St. Neb. 1903, § 11,512; Rev. St. Okl. 1903, § 2701; Pen. Code Idaho 1901, § 4544; Laws N. Y. 1892, c. 677, § 5; Rev. Codes N. D. 1899, §§ 7727, 7728; Pen. Code S. D. 1903, §§ 822, 823.

**Private corporation.**

The word "person," as a general rule, is held to include corporations. *Cary v. Marston* (N. Y.) 56 Barb. 27, 29; *People v. Utica Ins. Co.* (N. Y.) 15 Johns. 358, 381, 382, 8 Am. Dec. 243; *State of Indiana v. Woram* (N. Y.) 6 Hill, 33, 38, 40 Am. Dec. 378; *People v. May* (N. Y.) 27 Barb. 238; *Brown v. City of New York*, 66 N. Y. 385, 388; *Wallace v. City of New York* (N. Y.) 18 How. Prac. 169, 173; *United States Telegraph Co. v. Western Union Telegraph Co.* (N. Y.) 56 Barb. 46, 53; *People v. Dederick*, 55 N. E. 927, 928, 161 N. Y. 195; *People v. Rector of Trinity Church*, 22 N. Y. 44, 57; *Scharmann & Sons v. De Palo*, 72 N. Y. S. 1008, 1009, 66 App. Div. 29; *La Farge v. Exchange Fire Ins. Co.*, 22 N. Y. 352; *Barth v. Backus*, 35 N. E. 425, 428, 140 N. Y. 230, 23 L. R. A. 47, 37 Am. St. Rep. 545; *Meech v. Stoner*,

19 N. Y. 26, 28; C. E. Sherin Special Agency v. Seaman, 63 N. Y. S. 407, 408, 49 App. Div. 33; Duval County v. Charleston Lumber & Mfg. Co. (Fla.) 33 South. 531, 532, 60 L. R. A. 549; City of Los Angeles v. Leavis, 51 Pac. 34, 119 Cal. 164; Douglass v. Pacific Mail S. S. Co., 4 Cal. 304, 306; City of Pasadena v. Stimson, 27 Pac. 604, 606, 91 Cal. 238; County of Fresno v. Fowler Switch Canal Co., 9 Pac. 309, 310, 68 Cal. 359; People v. Riverside, 5 Pac. 350, 66 Cal. 288; Chapman v. Brewer, 62 N. W. 320, 322, 43 Neb. 890, 47 Am. St. Rep. 779; First Nat. Bank v. Huntington Distilling Co., 41 W. Va. 530, 535, 23 S. E. 792, 56 Am. St. Rep. 878; South Bend Toy Mfg. Co. v. Pierre Fire & Marine Ins. Co., 4 S. D. 173, 183, 56 N. W. 98, 100; Greenwich Ins. Co. v. Carroll (U. S.) 125 Fed. 121, 129; Central Trust Co. v. Western N. C. Ry. Co. (U. S.) 89 Fed. 24, 31; Turnbull v. Prentiss Lumber Co., 55 Mich. 387, 393, 21 N. W. 375; People v. Ferguson, 78 N. W. 334, 335, 119 Mich. 373; McGarry v. Nicklin, 110 Ala. 559, 565, 17 South. 726, 55 Am. St. Rep. 40; Planters' and Merchants' Bank of Mobile v. Andrews (Ala.) 8 Port. 404, 426; In re Gulf Brewing Co. (Pa.) 8 Montg. Co. Law Rep'r, 93; Hermits of St. Augustine v. Philadelphia County (Pa.) 4 Clark, 120, 123, Brightly, N. P. 116, 118; Trustees St. Michael's Church v. Same (Pa.) 4 Clark, 150, 153, Brightly, N. P. 121, 124; In re Road in Lancaster City, 68 Pa. (18 P. F. Smith) 396, 399; North Missouri R. Co. v. Akers, 4 Kan. 453, 470, 96 Am. Dec. 183; Blue Earth County v. St. Paul & S. C. R. Co., 28 Minn. 503, 507, 11 N. W. 73; Baker v. Kelley, 11 Minn. 480, 485 (Gil. 358, 363); Dickie v. Boston & Albany R. R. Co., 131 Mass. 516, 517; Enterprise Brewing Co. v. Grimes, 53 N. E. 855, 857, 173 Mass. 252; Aldrich v. E. W. Blatchford & Co., 56 N. E. 700, 175 Mass. 369; Dobbins v. West End St. Ry. Co., 47 N. E. 428, 429, 168 Mass. 556; Dickie v. Boston & A. R., 131 Mass. 516; Proprietors of Jeffries Neck Pasture v. Inhabitants of Ipswich, 153 Mass. 42, 26 N. E. 239; Louisville & N. R. Co. v. Commonwealth, 64 Ky. (1 Bush) 250, 253; Segnitz v. Garden City Banking & Trust Co., 83 N. W. 327, 329, 107 Wis. 171, 50 L. R. A. 327, 81 Am. St. Rep. 830 (citing Chippewa Valley & S. R. Co. v. Chicago, St. P., M. & O. R. Co., 75 Wis. 224, 253, 44 N. W. 17, 6 L. R. A. 601, note; Fadness v. Braunborg, 73 Wis. 257, 279, 41 N. W. 84; Larson v. Aultman & Taylor Co., 86 Wis. 281, 286, 56 N. W. 915, 39 Am. St. Rep. 893); State v. Portage City Water Co., 83 N. W. 697, 700, 107 Wis. 441; Fisher v. Horicon Iron & Mfg. Co., 10 Wis. 351, 355; Wales v. City of Muscatine, 4 Iowa, 302, 307; Aldrich v. Paine, 76 N. W. 812, 815, 106 Iowa, 461; Union Pac. Ry. Co. v. De Busk, 20 Pac. 752, 757, 12 Colo. 294, 3 L. R. A. 350, 13 Am. St. Rep. 221; Heintz v. Mueller, 49 N. E. 293, 296, 19 Ind. App. 240; White v. State, 69 Ind. 273, 280; Al-

bany Mut. Bldg. Ass'n v. City of Laramie, 65 Pac. 1011, 1019, 10 Wyo. 54; In re Oregon Bulletin Publishing & Printing Co. (U. S.) 18 Fed. Cas. 770, 773; Fleming v. Texas Loan Agency, 27 S. W. 126, 127, 87 Tex. 238, 26 L. R. A. 250 (citing Southwestern R. Co. v. Paulk, 24 Ga. 356); Barte v. Houston & T. C. Ry. Co., 36 Tex. 648, 649; Fagan v. Boyle Ice Machine Co., 65 Tex. 324, 331; Norris v. State, 25 Ohio St. 217, 218, 18 Am. Rep. 291; Society for the Propagation of the Gospel v. New Haven, 21 U. S. (8 Wheat.) 464, 489, 5 L. Ed. 662; Beaston v. Farmer's Bank of Delaware, 37 U. S. (12 Pet.) 102, 133, 9 L. Ed. 1017; Cincinnati Gas Light & Coke Co. v. Avondale, 43 Ohio St. 257, 268, 1 N. E. 527, 531; Crafford v. Warwick County Sup'rs, 12 S. E. 147, 148, 87 Va. 110, 10 L. R. A. 129; City of Springville v. Fullmer, 27 Pac. 577, 7 Utah, 450; Doane v. Clinton, 2 Utah, 417, 420; Deringer's Adm'r v. Deringer's Adm'r (Del.) 6 Houst. 64, 82; Jones v. Green, 41 Ark. 363; Shultz v. Sutter, 3 Mo. App. 137, 140; City of St. Louis v. Rogers, 7 Mo. 19, 21; State v. Seattle Gas & Electric Co., 68 Pac. 946, 28 Wash. 488; Slosser v. Salt River Valley Canal Co. (Ariz.) 65 Pac. 332, 335; McIntire v. Preston, 10 Ill. (5 Gilman) 48, 63, 48 Am. Dec. 321; Blair v. Worley, 2 Ill. (1 Scam.) 178, 180 (citing Betts v. Menard, 1 Ill. [Breese] 395); Boyd v. Croydon Ry. Co., 4 Bing. N. C. 669, 672; Chase v. American Steamboat Co., 10 R. I. 79, 84. And the statutes of nearly all the states expressly provide that the word "person" shall include corporations. See U. S. Comp. St. 1901, pp. 3589, 3, 3202, 3419; V. S. 1894, 21; Gen. St. Kan. 1901, § 7342, subd. 13, and sections 5997, 6650; Code Iowa 1897, § 48, subd. 13; Cobbe's Ann. St. Neb. 1903, § 2382; Rev. St. Utah 1898, § 4053, subd. 7, and sections 1762, 2498; Rev. St. Okl. 1903, §§ 2701, 2794; Horner's Rev. St. Ind. 1901, §§ 1899, 1285; Pen. Code Tex. 1895, art. 24; Pen. Code Idaho 1901, § 4544; Ballinger's Ann. Codes & St. Wash. 1897, §§ 4786, 6796, 3365, 826, 3361; Laws N. Y. 1892, c. 677, § 5; Pen. Code S. D. 1903, §§ 822, 823; Rev. Codes 1899, N. D. §§ 5121, 7727, 7728, 1176; Civ. Code S. D. 1903, § 2455; Gen. St. Minn. 1894, § 6842, subd. 13, and section 255, subd. 11, and section 2264; Pen. Code Ariz. 1901, par. 7, subd. 20; Code Miss. 1892, § 1512; Ann. Codes & Sts. Or. 1901, § 2186; Civ. Code Ala. 1896, § 1; Gen. St. Conn. 1902, § 1; Hurd's Rev. St. Ill. 1901, p. 1719, c. 131, § 1, subd. 5; Code Civ. Proc. Cal. 1903, § 17; Civ. Code Cal. 1903, § 14; Pol. Code Mont. 1895, § 16; Code Civ. Proc. Mont. 1895, § 3463; Civ. Code Mont. 1895, § 4662; Pub. Gen. Laws Md. 1888, p. 1021, art. 67, § 4, and page 3, art. 1, § 12; Pub. St. N. H. 1901, p. 63, c. 2, § 9; Comp. Laws Mich. 1897, § 50, subd. 12; Comp. Laws Nev. 1900, § 2749; Rev. St. Me. 1883, p. 59, c. 1, § 6, subd. 13; Rev. Laws Mass. 1902, p. 917, c. 106, § 8, and page 89, c. 9, § 5, subd. 16; Mills' Ann. St.

Colo. 1891, § 4185, cl. 8; Rev. Code Del. 1893, c. 5, § 1, subd. 10; Rev. St. Fla. 1892, § 1; Rev. St. Mo. 1899, §§ 5647, 10104; Comp. Laws N. M. 1897, § 2900; Code Va. 1887, § 5; Code W. Va. 1899, p. 133, c. 13, § 17; Rev. St. Wis. 1893, §§ 4972, 4971; Civ. Code S. C. 1902, § 265; Code N. C. 1883, § 3765, subd. 6; Rev. St. Wyo. 1899, § 2724; Pub. St. R. I. 1882, p. 77, c. 24, § 5; Bates' Ann. St. Ohio 1904, §§ 4427-12, 4947, and section 1536-907; Shannon's Code Tenn. 1896, § 62; Rev. St. Tex. 1895, art. 3270; Ky. St. 1903, § 457. Contra, see *B. & Y. Turnpike Co. v. Crowther*, 1 Atl. 279, 284, 63 Md. 558, 571; *Frostburg Mut. Bldg. Ass'n v. Lowdermilk*, 50 Md. 175, 177, 179; *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. (9 Barr) 359, 361; *School Directors of Carlisle Borough v. Carlisle Bank (Pa.)* 8 Watts, 289, 291 (cited and approved Appeal of Fox, 4 Atl. 149, 152, 112 Pa. 337); *Coddington v. Havens' Ex'rs*, 8 N. J. Eq. (4 Halst.) 590, 592; *Steel Edge Stamping & Retinning Co. v. Manchester Sav. Bank*, 39 N. E. 1021, 1022, 163 Mass. 252; *Commonwealth v. Phoenix Bank*, 52 Mass. (11 Metc.) 129, 149, 151; *Blair v. Worley*, 2 Ill. (1 Scam.) 178, 180; *Betts v. Menard*, 1 Ill. (Breese) 395, 398; *Stuart v. Greenbrier County*, 16 W. Va. 95, 103; *Keeler v. Dawson*, 73 Mich. 600, 602, 41 N. W. 700, 701; *Ingate v. La Commissionne Del Lloyd Austria-co.*, 4 C. B. 703, 706, 708; *Olcott v. Tloga R. Co.*, 20 N. Y. 210, 222, 75 Am. Dec. 393; *Faulkner v. Delaware & R. Canal Co. (N. Y.)* 1 Denio, 441, 443; *Clarke v. Bank of Mississippi*, 10 Ark. 516, 523, 525, 52 Am. Dec. 248.

The rule above laid down has also been applied to acts relating to attachments in which the word "person" occurs. See *South Carolina R. Co. v. McDonald*, 5 Ga. 531, 535; *Bushel v. Commonwealth Ins. Co. (Pa.)* 15 Serg. & R. 173, 177; *Knox v. Protection Ins. Co.*, 9 Conn. 430, 434, 25 Am. Dec. 33; *Bray v. Town of Wallingford*, 20 Conn. 416, 418. To acts relating to taxation and revenue. See *Western Union Tel. Co. v. City of Richmond (Va.)* 26 Grat. 1, 20; *Miller's Ex'r v. Commonwealth (Va.)* 27 Grat. 110, 114; *British Commercial Life Ins. Co. v. Commissioners of Taxes and Assessments*, \*40 N. Y. (1 Keyes) 303, 305; *People v. Commissioners of Taxes of City of New York*, 23 N. Y. 242, 243, 22 How. Prac. 143, 147; *Ohio Farmers' Ins. Co. v. Hard*, 52 N. E. 635, 637, 59 Ohio St. 248; *Chicago & N. W. Ry. Co. v. Ellison*, 71 N. W. 324, 325, 113 Mich. 30; *Union Canal Co. v. Dauphin County (Pa.)* 3 Brewst. 124, 127; *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. (9 Barr) 359, 361; *Chapman v. First Nat. Bank*, 47 N. E. 54, 56, 56 Ohio St. 310; *Civ. Code Ala. 1896*, § 3906, subd. 5; *Ann. St. Ind. T. 1899*, § 4900; *Gen. St. Minn. 1894*, § 1511; *Rev. St. Mo. 1899*, § 9123; *Rev. St. Utah 1898*, § 2505; *Ballinger's Ann. Codes & St. Wash. 1897*, § 1658; *Rev. St. Tex. 1895*, art. 5064; *V. S. 1894*, 355; *U. S. Comp. St.*

1901, p. 2040; *Bates' Ann. St. Ohio*, § 2730; *Code W. Va. 1899*, p. 198, c. 29, § 45; *Hurd's Rev. St. Ill. 1901*, p. 1494, c. 120, § 292, subd. 11. Contra, see *Appeal of Hunter (Pa.)* 10 Atl. 429, 433; *Nashua Sav. Bank v. City of Nashua*, 46 N. H. 339, 391; *School Directors v. Carlisle Bank (Pa.)* 8 Watts, 289, 291. To usury laws. See *Bank of Alexandria v. Mandeville (U. S.)* 2 Fed. Cas. 607, 608; *Lumberman's Bank v. Bearce*, 41 Me. 505, 507; *Stribbling v. Bank of Valley (Va.)* 5 Rand. 132, 141; *Commercial Bank v. Nolan*, 8 Miss. (7 How.) 508, 522. And to laws relating to crimes, and the punishment thereof, and penalties. See *Stewart v. Waterloo Turn Verein*, 32 N. W. 275, 276, 71 Iowa, 226, 60 Am. Rep. 786; *State v. Easton Social Literary & Musical Club*, 20 Atl. 783, 784, 73 Md. 97, 10 L. R. A. 64; *People v. Brunell (N. Y.)* 48 How. Prac. 435, 447; *Van Horne v. State*, 5 Ark. (5 Pike) 349, 351; *Comp. Laws Mich. 1897*, § 11748; *Ann. St. Ind. T. 1899*, § 1298; *Rev. St. Me. 1883*, p. 911, c. 124, § 48; *Pen. Code Cal. 1903*, § 7; *Pen. Code Mont. 1895*, § 7; *Gen. St. Minn. 1894*, § 2187; *Rev. St. Okl. 1903*, §§ 2700, 5146; *Rev. St. Utah 1898*, § 4459; *Cr. Code S. C. 1902*, § 630; *Rev. St. Wyo. 1899*, § 2287; *Cobbey's Ann. St. Neb. 1903*, § 11512; *Ann. Codes & St. Or. 1901*, § 2099; *Bates' Ann. St. Ohio 1904*, § 3721; *State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 388, 389, 36 Am. Rep. 803. But in the following cases it has been held, in construing criminal and penal statutes, that the word "person," as used therein, was not to be held to include corporations. See *Paragon Paper Co. v. State*, 49 N. E. 600, 603, 19 Ind. App. 314; *State v. Ohio & M. R. Co.*, 23 Ind. 362, 363; *Studebaker Bros. Mfg. Co. v. Morden*, 64 N. E. 594, 159 Ind. 173; *Southern Indiana Loan & Savings Inst. v. Doyle*, 59 N. E. 179, 180, 26 Ind. App. 102; *State v. Cincinnati Fertilizer Co.*, 24 Ohio St. 611, 614; *People v. Duke*, 44 N. Y. Supp. 336, 338, 19 Misc. Rep. 292; *Inhabitants of Wiscasset v. Trundy*, 12 Me. (3 Fairf.) 204, 207.

The word "person," as used in acts relating to the formation of corporations, has been held not to include the word "corporation." See *Factors' & Traders' Ins. Co. v. New Harbor Protection Co.*, 37 La. Ann. 233, 238; *Denny Hotel Co. v. Schram*, 32 Pac. 1002, 1003, 6 Wash. 134, 36 Am. St. Rep. 130. And in an act which provides that "no person" unauthorized by law shall subscribe to or become a member of any association or proprietor of any bank or fund for the purpose of issuing notes, receiving deposits, or transacting any other business which incorporated banks may do, the word "person" means corporations and bodies politic as well as individuals. *People v. Utica Ins. Co. (N. Y.)* 15 Johns. 358, 388, 393, 8 Am. Dec. 243.

"Person" is a generic word of comprehensive nature, embracing natural and artificial persons, such as corporations. But to

say that a description of the specific class of artificial persons known as corporations shall embrace all persons, both natural and artificial, would be to reverse the rule and the reason on which it is founded. *Goddard v. Chicago & N. W. Ry. Co.*, 66 N. E. 1066, 1067, 202 Ill. 362.

Code Civ. Proc. § 160, provides that a plaintiff who has an office for the transaction of business in person within New York City is a resident. A foreign corporation is not a person. *Norton v. Doherty*, 69 Mass. (3 Gray) 372, 373, 63 Am. Dec. 758.

A corporation is a person within the fourteenth amendment to the Constitution of the United States, providing that no state shall deny to any person the equal protection of the laws. *Dugger v. Mechanics' & Traders' Ins. Co.*, 32 S. W. 5, 6, 95 Tenn. 245, 28 L. R. A. 796; *Insurance Co. v. New Orleans* (U. S.) 13 Fed. Cas. 67; *Home Ins. Co. v. State of New York*, 10 Sup. Ct. 593, 597, 134 U. S. 594, 33 L. Ed. 1025; *Singer Mfg. Co. v. Wright* (U. S.) 33 Fed. 121, 124; *County of Santa Clara v. Southern Pac. R. Co.* (U. S.) 18 Fed. 385, 404; *County of San Mateo v. Southern Pac. R. Co.* (U. S.) 13 Fed. 722, 757; *Johnson v. Goodyear Min. Co.*, 59 Pac. 304, 305, 127 Cal. 4, 47 L. R. A. 338, 78 Am. St. Rep. 17. *Contra*, *Central Pac. R. Co. v. State Board of Equalization*, 60 Cal. 35, 60.

A corporation is a person within the meaning of the constitutional provision declaring that no person shall be deprived of his property without due process of law. *Rochester & C. Turnpike Road Co. v. Joel*, 58 N. Y. Supp. 346, 347, 41 App. Div. 43 (citing *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585); *Harbison v. Knoxville Iron Co.*, 53 S. W. 955, 957, 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682; *Dayton Coal & Iron Co. v. Barton*, 53 S. W. 970, 971, 103 Tenn. 604; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 154; *North British & Mercantile Ins. Co. v. Craig*, 62 S. W. 155, 157, 106 Tenn. 621; *Missouri Pac. Ry. Co. v. Mackey*, 8 Sup. Ct. 1161, 1163, 127 U. S. 205, 32 L. Ed. 107; *County of San Mateo v. Southern Pac. R. Co.*, 13 Fed. 722, 757; *Charlotte, C. & A. R. Co. v. Gibbes*, 12 Sup. Ct. 255, 256, 142 U. S. 386, 35 L. Ed. 1051. *Contra*, see *Insurance Co. v. New Orleans* (U. S.) 13 Fed. Cas. 67, 68; *State v. Brown & Sharpe Mfg. Co.*, 25 Atl. 246, 248, 18 R. I. 16, 17 L. R. A. 856.

The term "person," as used in the attachment act, providing the summoning as garnishees of persons whom the creditor shall designate, while sufficiently broad and comprehensive to charge as garnishees all persons who have any property, estates, or effects of the debtor, yet various considerations of public policy may intervene, in the light of which it is assumed that the Legislature intended a much more restricted application

of the statute than the language used would import. Accordingly it has long been held that no person deriving his authority from the law, and obliged to execute it according to the rules of the law, can be charged as garnishee with respect to any money or property held by him by this authority. Under this principle, executors, administrators, guardians, trustees, municipal corporations, assignees in bankruptcy, and various other persons and officers cannot be charged as garnishees. As to railroad companies, the operation of the statute will not be extended when its application will manifestly and necessarily interfere with the proper discharge on its part of its public duties and functions. So that a car passing over a right of way of its owner to the line of another company is not subject to process of garnishment as against the railroad company owning the car. *Michigan Cent. R. Co. v. Chicago & M. L. S. R. Co.*, 1 Ill. App. (1 Bradw.) 399, 403.

#### Public or municipal corporation.

The words "person or persons" do not include municipal corporations, as used in Act 1825, c. 114, § 2, authorizing attachments on judgments to be laid in the hands of any person or persons whatever, corporate or sole. *City of Baltimore v. Root*, 8 Md. 95, 103, 63 Am. Dec. 696.

"Persons," as used in Code 1880, § 1832, providing that the chancery court shall have jurisdiction in attachment suits against any nonresident, absent, or absconding debtor, and "persons" in this state who have in their hands effects of, or are indebted to, such debtor, should not be construed to include a board of school trustees or municipal corporation. *Dollman v. Moore*, 12 South. 23, 24, 70 Miss. 267, 19 L. R. A. 222.

"Persons," as used in Rev. St. § 5601, which provides that all persons who have any controversy, except when the title or possession of real estate may come in question, may submit such controversy to arbitration, etc., includes not only private corporations, but also municipal corporations, as well as the persons with whom they have controversies. *Springfield v. Walker*, 42 Ohio St. 543, 548.

The term "person," as used in statutes, includes corporations, not only private, but municipal. *Metropolitan R. Co. v. District of Columbia*, 10 Sup. Ct. 19, 23, 132 U. S. 1, 33 L. Ed. 231.

"Person," as used in a constitutional provision for the protection of life, liberty, and property, relates to municipal corporations in their private capacities. In *re Jensen*, 59 N. Y. Supp. 653, 655, 28 Misc. Rep. 378.

"Person," as used in Atlanta City Charter, § 213, authorizing street paving to be done when "the person owning real estate

which has at least one-third of the fronting on a street or portion of a street the improvement of which is desired shall in writing request the commissioners of streets and sewers to make such improvement," does not include the municipal corporation, which is itself the sovereign power moving in this matter, though the word "person" ordinarily comprehends corporations. *City of Atlanta v. Smith*, 27 S. E. 696, 697, 99 Ga. 462.

"Persons," as used in Code, § 50, providing that the remedy by garnishment shall be available to "all persons," includes private corporations, but not public or municipal corporations. *City of Memphis v. Laski*, 56 Tenn. (9 Heisk.) 511, 512, 24 Am. Rep. 327.

In a statute providing that "an action may be brought by an attorney general against any person who usurps or unlawfully holds or exercises any franchise within the state," the word "person" includes a municipal corporation; and where a city attempts to exercise its power of taxation over the inhabitants of territory outside of its charter limits such act is the usurpation of a franchise, and such action may be brought against it. *People v. City of Oakland*, 28 Pac. 807, 808, 92 Cal. 611.

"Person," as used in Code, § 2967, providing how "any person" indebted to or having in his hands effects of a nonresident defendant may be summoned as a garnishee, includes corporations as well as natural persons, and a municipal corporation is included under such term as well as private corporations. *Portsmouth Gas Co. v. Sanford*, 33 S. E. 516, 97 Va. 124, 45 L. R. A. 246, 75 Am. St. Rep. 778 (citing *Baltimore & O. R. Co. v. Gallahue's Adm'rs* [Va.] 12 Grat. 655, 663).

A statute providing that the word "person" in any statute shall be deemed to include females as well as males, and bodies corporate as well as individuals, does not mean to establish a rule without exceptions that the word embraces municipal corporations. *Lindsey v. Rottaken*, 32 Ark. 619, 637.

A municipal corporation is a person within the meaning of Rev. St. c. 151, which in general terms authorizes an action of unlawful detainer against any person; the court saying: "We cannot conceive of any possible reason why the statute should not extend to corporations, public and private, while the remedy is quite as essential and necessary against them as against an actual person." *Rains v. City of Oshkosh*, 14 Wis. 372, 374.

As used in a statute providing that debts due from any person to a debtor may be secured in his hands by process of attachment to pay such judgment as the plaintiff shall recover against such debtor, the word "person" is sufficiently comprehensive to embrace not only a natural person, but also a cor-

poration, and it is applicable to territorial corporations, such as towns, etc., which have the power to make contracts, and are liable for debts due by them. *Bray v. Town of Wallingford*, 20 Conn. 416, 418.

In the construction of statutes the word "person" may extend and be applied to bodies politic or corporate, societies, communities, and the public generally, as well as individuals, partnerships, persons, and joint-stock companies. Ky. St. 1903, § 457.

By statute in many states it is provided that whenever the term "person" is used to designate a party whose property is the subject of an offense, or against whom an act is done with intent to defraud or injure, the term may be construed to include any public or private corporation. *Horner's Rev. St. Ind.* 1901, § 1899; *Pen. Code Idaho* 1901, § 4544; *Rev. St. Okl.* 1903, § 2701; *Ballinger's Ann. Codes & St. Wash.* 1897, §§ 4786, 6786; *Rev. St. Utah* 1898, § 4053; *Laws N. Y.* 1892, c. 677, § 5; *Rev. Codes N. D.* 1899, §§ 7727, 7728; *Pen. Code S. D.* 1903, §§ 822, 823; *Gen. St. Minn.* 1894, § 6842, subd. 13; *Pen. Code Ariz.* 1901, par. 7, subd. 20; *Ann. Codes & St. Or.* 1901, § 2186; *Gen. St. Kan.* 1901, § 2315; *Code Miss.* 1892, § 1512; *Pen. Code Tex.* 1895, art. 24; *Cobbey's Ann. St. Neb.* 1903, § 2382.

#### Same—County.

A county is a "person" within Laws 1890, c. 1, authorizing any person deeming himself aggrieved by the refusal of the State Auditor to allow any just claim against the state to commence an action. *Lyman County v. State*, 69 N. W. 601, 9 S. D. 413.

As used in Comp. St. c. 77, art. 5, providing that any person having a lien on any real property for taxes may enforce the lien by action in the nature of a mortgage foreclosure, "person" means not only individuals, but embraces a county. *Lancaster County v. Trimble*, 52 N. W. 711, 712, 34 Neb. 752.

"Person," as used in a statute authorizing devises to be made to any person, should be construed to include a county. A county, or more properly its board of commissioners, is a quasi corporation, and there is no good reason why it may not be regarded as a person. The term was evidently intended to be used in a broad sense, and to include every party that could safely and without countervailing the policy of our laws be made the recipient of testamentary donation, whether of real or personal property. *Carder v. Fayette County Com'rs*, 16 Ohio St. 353, 367.

"Person having such right of action," as used in Wag. St. p. 1302, § 1, providing that any person bound as surety may require in writing the person having such right of action forthwith to commence suit against



the principal, does not include municipal corporations, though Wag. St. 1887, art. 2, § 4, provides that the term "party or person" shall include bodies corporate. *Cedar County v. Johnson*, 50 Mo. 225, 227.

64 Ohio Laws, p. 285, providing that a certain canal company on certain conditions might abandon a portion of its canal, but that such abandonment shall not be construed to release the company from any liability or contract incurred or entered into, nor defeat the rights of any "person or persons, company or corporations," should be construed to mean only private persons, companies, or corporations, and not to refer to the public, and hence the omission of a canal company to keep in repair bridges over highways after abandonment of that portion of the canal gave the county commissioners no right to make such repairs and charge the expense thereof to the canal company. *Pennsylvania & O. Canal Co. v. Portage County Com'rs*, 27 Ohio St. 14, 21.

Const. art. 5, § 26, prohibits the Legislature to pass local or special laws changing the names of persons or places. The word "person," as here used, embraces all persons, whether natural or artificial, and is held to apply to counties. *State v. Thomas*, 64 Pac. 503, 506, 25 Mont. 226.

The word "person" in section 863, Rev. St., is sufficiently broad to include the bringing of a suit under section 5880 by the board of county commissioners against a boat by name that has committed an injury to a bridge located within the jurisdiction of the county. *The Tempest v. Lucas County Com'rs*, 7 O. C. D. 137, 141, 13 Ohio Cir. Ct. R. 263.

The word "person" or "persons," as well as all words referring to or importing persons, may extend and be applied to bodies politic and corporate as well as individuals. *Hurd's Rev. St. c. 131, § 1, par. 5*. Under Revenue Act, § 56 (Rev. St. c. 120), providing that any person or corporation giving a false schedule or statement, or failing to deliver to the assessor a list of the taxable personal property which he is required to list under the act, shall be liable to a penalty, to be recovered in the name of the people in any proper form of action on the complaint of any person, the word "person" authorizes a recovery upon the complaint of a body politic or corporate, and authorizes a county board to make the complaint. *Durbin v. People*, 54 Ill. App. 101, 104.

The word "person" is extended by statutes of Montana so as to include bodies politic and corporations, and hence is held to include counties. *Waterbury v. Deer Lodge County Com'rs*, 26 Pac. 1002, 1003, 10 Mont. 515, 24 Am. St. Rep. 67.

By statute in many states it is provided that whenever the term "person" is used to

designate the party whose property may be the subject of offense it shall include any county which may lawfully own property in the state. *Code Miss. 1892, § 1512*; *Gen. St. Kan. 1901, § 2315*.

#### Same—Foreign nation.

A foreign nation is a "person" within Code Civ. Proc. § 3268, providing that a plaintiff who is a person residing without the state, or a foreign corporation, may be required to give security for costs. The word "person" was used in its enlarged sense, as comprising all legal entities, except foreign corporations, which were authorized to bring actions in this state. *Republic of Honduras v. Soto*, 19 N. E. 845, 846, 112 N. Y. 310, 2 L. R. A. 642, 8 Am. St. Rep. 744, 20 N. Y. St. Rep. 749, 750.

#### Same—School district.

A school district is not a "person" within the meaning of Code Civ. Proc. § 542, providing that debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ, etc. *Skelly v. Westminster School Dist.*, 37 Pac. 643, 644, 103 Cal. 652 (cited and approved in *Witter v. Mission School Dist.*, 121 Cal. 350, 53 Pac. 905, 906, 66 Am. St. Rep. 33).

The word "person" in the garnishment statute (Rev. St. § 5218) held not to include school districts, although section 6586 requires the word "persons" to be construed so as to include corporations, etc., as a school district is a public corporation, and as the statute (section 2541) provides that none of the sections in relation to private corporations shall extend to any school incorporated by the laws of the state. *Keln v. School Dist. of City of Carthage*, 42 Mo. App. 460, 464.

#### Same—State.

Pol. Code, § 1548, providing that if a majority of the votes at a special election held for the purpose shall be against the sale it shall not be lawful for any person within the limits of the county to sell or barter for valuable consideration any alcoholic, spirituous, malt or intoxicating liquors, etc., does not apply to the state or its agents or officers, and the state may maintain dispensaries for the sale of intoxicating liquors within such county. *Butler v. Merritt*, 38 S. E. 751, 752, 113 Ga. 238.

Code Wash. § 604, authorizing an injunction to prevent waste in cases where two or more persons are opposing claimants to the same tract of land under the land laws of the United States, does not apply to the state of Washington, for it is not a person

within the ordinary or legal definition of that word. The Court of Appeals of New York, in a case in which the definition of the word was of vital importance, and in which its decision was afterwards on appeal affirmed by the Supreme Court of the United States, held that the word "person" does not, in its ordinary or legal definition, include either a state or a nation. *McBride v. Pierce County Com'rs* (U. S.) 44 Fed. 17, 18 (citing *In re Fox*, 52 N. Y. 530, 535, 11 Am. Rep. 751; *United States v. Fox*, 94 U. S. 815, 24 L. Ed. 192).

An information in the nature of a quo warranto filed by the Attorney General in the Supreme Judicial Court to test one's right to a public office is not a controversy "between two or more persons" within the meaning of Declaration of Rights, art. 15, securing the right of trial by jury in all suits "between two or more persons," because the Attorney General merely represents the commonwealth. *Attorney General v. Sullivan*, 40 N. E. 843, 846, 163 Mass. 446, 28 L. R. A. 455.

"Person," as used in Rev. St. 1894, §§ 251, 253 (Rev. St. 1881, §§ 251, 525), requiring every action to be prosecuted in the name of the real party in interest, except the person expressly authorized by statute may sue without joining the person for whose benefit the action is prosecuted, should be construed to include the state in view of Rev. St. 1894, § 1309 (Rev. St. 1881, § 1285), declaring that the word "person" extends to bodies politic and incorporate. *Ervin v. State*, 48 N. E. 249, 251, 150 Ind. 332.

"Person," in its ordinary legal signification, does not embrace a state or government. *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 66 Pac. 97, 103, 25 Wash. 627, 62 L. R. A. 763.

Crimes Act N. Y. § 314, provides that when the term "person" is used to designate the party whose property may be the subject of any offense such term shall be construed to include the United States and this state. *State v. Bancroft*, 22 Kan. 170, 202 (citing *In re Fox*, 52 N. Y. 530, 534, 11 Am. Rep. 751; *United States v. Fox*, 94 U. S. 315, 320, 321, 24 L. Ed. 192).

The word "person" in a statute does not necessarily include the state itself. The decisions upon the question are not easily reconciled, but the better opinion seems to be that the word "person" does not, in its ordinary or legal signification, embrace the state or government. *Banton v. Griswold*, 50 Atl. 89, 90, 95 Me. 445

"Person," as used in Act March 20, 1848, § 33, providing for the punishment of the false making or fraudulent alteration of a public record when done with intent that any person may be defrauded, should be con-

strued to include the state. *Martin v. State*, 24 Tex. 61, 68.

A general law concerning persons may include artificial as well as natural persons, and every corporation is a legal person. Even the United States, and each separate state, and every county in each state, are quasi corporations, and each of all such corporations is in law a person. Consequently a tax on the real estate of all persons would, without qualification or exception, literally include that of every corporation, municipal as well as private. But in this respect there is an obvious and essential distinction between municipal and private corporations. A private corporation, like a bank, or railroad, or turnpike company, is in the technical sense altogether personal. But a municipal corporation, like a state, a county, or a city, is much more than a person. While nominally a person, it is vitally a political power; and each in its prescribed sphere is "imperium in imperio." The tax law of Kentucky applies to persons only, and not at all to political bodies exercising in different degrees the sovereignty of the state. Neither the state nor the county has ever been considered a person contemplated by any tax law ever enacted, and the municipal property of a state, used for the convenience and facility of its local government, is equally excluded. *City of Louisville v. Commonwealth*, 62 Ky. (1 Duv.) 295, 297, 85 Am. Dec. 624.

The person whose property is forged within the meaning of a statute making it criminal for any person to forge or counterfeit any writing whatever to obtain the possession of or to deprive another of any money or property, includes corporations, societies, bodies politic, and the public generally as well as individuals, and therefore the statute covers the forgery of a witness certificate payable by the state. *Moore v. Commonwealth*, 18 S. W. 833, 92 Ky. 630.

The term "person," as used in the acts of Congress touching internal revenue, does not include a state. *United States v. Baltimore & O. R. Co.*, 84 U. S. (17 Wall.) 322, 329, 21 L. Ed. 597.

Although the state in her corporate capacity may be included within the general term of "person," a trespass on the property of the state is not to be included within the statute in reference to prosecutions for trespass on persons or property, but "persons" within the meaning of such statute is to be limited to natural persons, or at most to corporations. *State v. Brown*, 10 Ark. (5 Eng.) 104, 107.

A state is a corporation, as it is a legal being capable of transacting some kinds of business like a natural person, and therefore it is a person within the meaning of 1 Rev. St. p. 768, §§ 1-3, providing that all notes in

writing made and signed by any person, whereby he shall promise to pay to any other person, or his order, etc., shall be negotiable, etc., which defines the word "person" as including every corporation capable by law of making contracts. *Indiana v. Hill* (N. Y.) 6 Hill, 33, 38, 40 Am. Dec. 378.

1 Rev. St. p. 768, §§ 1, 3, provides "all notes in writing made and signed by any person," etc., "shall be negotiable," etc., and that the word "person" in the last two preceding sections shall be construed to extend to every corporation capable by law of making contracts. It did not require the aid of the Legislature to prove that the word "person" in the statute may be extended to a corporation as well as to a natural person. The state is held to be a "person" within this section. *Indiana v. Woram* (N. Y.) 6 Hill, 33, 38, 40 Am. Dec. 378.

By statute in many states it is provided that whenever the term "person" is used to designate the party whose property may be the subject of any offense, or against whom the act is done with intent to defraud or injure, it shall include the state (or territory), or any other state, government, or country, etc. *Ann. Codes & St. Or.* 1901, § 2186; *Gen. St. Kan.* 1901, § 2315; *Code Miss.* 1892, § 1512; *Pen. Code Ariz.* 1901, par. 7, subd. 20; *Gen. St. Minn.* 1894, § 6842, subd. 13; *Rev. Codes N. D.* 1899, §§ 7727, 7728; *Pen. Code S. D.* 1903, §§ 822, 823; *Laws N. Y.* 1892, c. 677, § 5; *Rev. St. Utah* 1898, § 4053; *Ballinger's Ann. Codes & St. Wash.* 1897, §§ 4786, 6786; *Horner's Rev. St. Ind.* 1901, § 1899; *Pen. Code Idaho* 1901, § 4544; *Rev. St. Okl.* 1903, § 2701; *Cobbey's Ann. St. Neb.* 1903, § 2382; *Pen. Code Tex.* 1895, art. 24.

#### Same—United States.

The word "person," as used in a covenant in a deed warranting title against "all and every person or persons whomsoever, lawfully claiming or to claim the same," includes the United States. *Giddings v. Holter*, 48 Pac. 8, 9, 19 Mont. 263.

"Person," as used in a state statute of limitations, includes the United States as a body politic, and they may take advantage of such statute. *Stanley v. Schwalby*, 13 Sup. Ct. 418, 422, 147 U. S. 508, 37 L. Ed. 259.

"Person," as used in a statute providing that a devise of lands may be made to any person capable by law of holding real estate, applies to natural persons and also to artificial persons—bodies politic deriving their existence and powers from legislation—but cannot be so extended as to include within its meaning the federal government. *United States v. Fox*, 94 U. S. 315, 321, 24 L. Ed. 192; *In re Fox*, 52 N. Y. 530, 535, 11 Am. Rep. 751.

"Person," as used in *Gen. St. c. 113, § 1*, which makes it an offense for "any person to

cut down, injure, or destroy, or dig or remove any tree, timber, rails, or wood standing, being, or growing on the land of any other person," etc., includes the United States. *State v. Herold*, 9 Kan. 194, 199.

By statute in many states it is provided that whenever the term "person" is used to designate the party whose property may be the subject of any offense, or against whom the act is done with intent to defraud or injure, it shall include the United States. *Horner's Rev. St. Ind.* 1901, § 1899; *Ballinger's Ann. Codes & St. Wash.* 1897, §§ 4786, 6786; *Pen. Code Ariz.* 1901, par. 7, subd. 20; *Code Miss.* 1892, § 1512; *Gen. St. Kan.* 1901, § 2315.

#### Women.

"Person," as used in the federal Constitution, providing that no state shall deprive any "person" of life, liberty, or property without due process of law, should be construed to include women. *Ritchie v. People*, 40 N. E. 454, 458, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315.

The word "persons" in *St.* 1879, c. 291, § 2, which provides that the Governor with the advice and consent of the council should appoint nine persons, who should constitute a board of health, lunacy, and charity, is used in its ordinary sense, and includes women as well as men. *Opinion of Justices*, 136 Mass. 578, 580.

*Comp. St.* 1893, § 1, authorizes the Governor to appoint and commission such number of persons to the office of notary public in each of the counties of the state as he shall deem necessary. Held, that the word "persons" in this statute was broad enough to include women, and, there being no constitutional provision or law prohibiting a woman from holding the office of a notary public, a woman so appointed was legally entitled to hold her office. *Von Dorn v. Mengedohrt*, 59 N. W. 800, 803, 41 Neb. 525.

The word "person," in the latest rule of court upon the subject of the admission of attorneys, was the word used in the rule of 1810 and in the statutes of 1785 and 1836, at times when no one contemplated the possibility of a woman being admitted to practice as an attorney. *In re Robinson*, 131 Mass. 376, 382, 41 Am. Rep. 239.

The word "person" includes both sexes, as used in *Code*, § 2571, declaring that on the death of any person leaving an estate, and leaving, among others named, a minor child or children, it shall be the duty of the ordinary to appoint appraisers to set apart a sufficiency for the support of such child or children for a space of twelve months. *Brown v. Hemphill*, 74 Ga. 795, 796.

"Persons," as used in *Revision* 1875, p. 44, § 29, providing that the superior court may admit as attorneys such persons as are

qualified therefor, etc., should be construed to include women. *In re Hall*, 50 Conn. 131, 135, 47 Am. Rep. 625.

In the statute of limitations, declaring that if any person entitled to bring an action be within the age of twenty-one years, etc., the word "person" applies to both males and females, and such statute applies to a female until twenty-one years of age, notwithstanding another provision of the statute provides that "males of the age of twenty-one years and females of the age of eighteen years shall be considered of full age for all purposes, and until those ages are attained they shall be considered minors." *Relasse v. Clarenbach*, 61 Mo. 310, 313.

"Person," as used in a statute declaring that every person who shall have carnal knowledge, etc., of a woman is guilty of rape, etc., means a male person. *United States v. Cannon*, 7 Pac. 369, 370, 4 Utah, 122.

Where the officer's return calls the appraisers of an estate "persons" instead of "men," the word used in the statute, and specifically mentions them by names given to males alone, the court will construe the word "persons" to mean "men" and not "women." *Glidden v. Philbrick*, 56 Me. 222, 227.

"Person" is applicable to man and woman or either. *Civ. Code La.* 1900, art. 3556, subd. 23.

The word "person" or "persons," when used in the revenue act, shall be construed to include male, female, corporation, company, firm, society, singular or plural number. *Hurd's Rev. St. Ill.* 1901, p. 1494, c. 120, § 292, subd. 11.

"Persons," as used in the bankruptcy act, shall include women. *U. S. Comp. St.* 1901, p. 3419.

#### **Same—Married women.**

"Person," as used in *Pub. St. c.* 157, § 112, providing that where a "person" whose goods or estate are attached on mesne process has not, before the return day of the process, dissolved the attachment, such person may be proceeded against in insolvency, includes a married woman, notwithstanding the pronouns "he" and "himself" are used in connection with the word "person" in other parts of the section. *Binney v. Globe Nat. Bank*, 23 N. E. 380, 382, 150 Mass. 574, 6 L. R. A. 379.

"Person" is defined by the statute (section 2676) as including not only human beings, but corporate entities, and, as used in section 73, providing that all persons are capable of contracting, will be held to include married women as well as single women or men. *Cooper v. Bank of Indian Territory*, 46 Pac. 475, 476, 4 Okl. 632.

Under statutes providing that "a married woman may hold and dispose of her separate personal property and the issues and profits thereof in the same manner and with like effect as if she were unmarried," and "when property of any value is taken under an execution, and any person other than the party against whom the process issued claimed such property," the circuit court may determine such question of ownership in a summary proceeding prescribed, a married woman may resort to such summary proceeding in asserting her claim to her property when taken on execution issued against the property of her husband. She having been given by the statute full right to acquire, hold, and dispose of her separate property, there is no reason why she should not be included in the term "any person" as used in such statute. *Miller v. Peck*, 18 W. Va. 75, 101.

#### **PERSON AGGRIEVED.**

See "Aggrieved."

#### **PERSON CONCERNED.**

See "Concern."

#### **PERSON CONTINGENTLY INTERESTED.**

The phrase "person contingently interested," as used in the statute providing that the expression "person interested," used in connection with an estate or fund, shall include every person entitled, either absolutely or contingently, to share in the estate, or the proceeds thereof, or in the fund, except as a creditor, means, in its legal sense, a person who has an interest dependent upon the happening of some defined contingency, as where a testator gives a legacy to A. provided he shall attain the age of 21 years, but, failing to do so, the legacy is given to B., B. is a person contingently interested in the testator's estate. *Woodruff v. Woodruff* (N. Y.) 3 Dem. Sur. 505, 510.

#### **PERSON ENGAGED.**

See "Engage."

#### **PERSON ENLISTED FOR THE NAVY.**

See "Enlist—Enlistment."

#### **PERSON FOR WHOSE IMMEDIATE BENEFIT.**

See "Immediate Benefit."

#### **PERSON INJURED.**

See "Injured Person."

**PERSON IN LOCO PARENTIS.**

See "In Loco Parentis."

**PERSON INTERESTED.**

See "Interest."

**PERSON OF COLOR.**

See "Colored Person."

**PERSON OF UNSOUND MIND.**

See "Unsound Mind."

**PERSON RESIDENT.**

See "Resident."

**PERSON WITH A FAMILY.**

A person with a family is one who has a wife and child or either. *Bates' Ann. St. Ohio 1904*, § 720.

**PERSONA.**

The word "persona," in its primitive sense, was applied to the masks worn by the actors in the dramatic performances of Rome and Greece, which masks were made to represent the character which the actor performed; and in the same sense it was subsequently employed in jurisprudence to signify the role or status which a man fills in the social organization. Thus the same man may at different times, and even at the same time, represent different persons or roles, as, in his youth he represents the person of a minor, and after his maturity that of a major, each having different qualities, rights, and obligations. *Brent v. City of New Orleans*, 6 South. 793, 41 La. Ann. 1098.

**PERSONAL.**

The word "personal" means pertaining to the person or bodily form. *Terre Haute Electric Ry. Co. v. Lauer*, 52 N. E. 703, 706, 21 Ind. App. 466.

**PERSONAL ACTION.**

"Personal actions" are defined by Blackstone to be such whereby a man claims a debt or personal duty, or damages in lieu thereof, and likewise whereby a man claims a satisfaction in damages for some injury done to his personal property. A prosecution by indictment is not a personal action. *Commonwealth v. Lehigh Valley R. Co. (Pa.)* 7 Kulp, 229, 230.

A personal action is one brought for damages or other redress for breach of contract, or for injuries of every other de-

scription; the specific recovery of lands, tenements and hereditaments only excepted. *Boyd v. Cronan*, 71 Me. 286, 287; *Hall v. Decker*, 48 Me. 255, 256; *Linscott v. Fuller*, 57 Me. 406, 408.

Personal actions are, as to cause of action, either *ex contractu* or *ex delicto*; as to place where to be tried, local or transitory; and, as to object, in personam or in rem. *Hall v. Decker*, 48 Me. 255, 256 (citing 3 Bouv. Inst. 2641).

"Personal actions" are defined as actions for the recovery of a debt, or damages for a breach of contract, or a specific personal chattel, or a satisfaction in damages for some injury to personal or real property. In such actions the judgment is, if in favor of the plaintiff, that he have and recover, or, if against him, that he take nothing, and for defendant, that he have and recover his costs. A suit brought pursuant to Rev. St. U. S. § 2326 [U. S. Comp. St. 1901, p. 1430], which provides that one who has filed in a land office an adverse claim to an application for patent shall commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, is a purely statutory proceeding, cognizable in equity, and is not a personal action. *Doe v. Waterloo Min. Co. (U. S.)* 43 Fed. 219, 221.

Personal actions are those which are brought for the recovery of a debt or damages for a breach of contract, for a specific personal chattel, or for satisfaction in damages because of some injury to the person, or personal or real property. 1 Chit. Pl. (16th Am. Ed.) 142. They are divided by Pub. St. c. 167, § 1, into three classes—actions of contract, of tort, and of replevin. A claim against a city for damages to an estate caused by the city lowering the grade of certain shade trees, and also for injuring certain shade trees, is not a controversy which may be "the subject of a personal action at law or a suit in equity." *Osborn v. Fall River*, 5 N. E. 483, 484, 140 Mass. 508.

Code, § 2587, provides that where a personal action is brought against defendants, some of whom are residents of the county, and others not, and the cause is dismissed as to the resident defendants, the nonresident defendants are also entitled to a dismissal, with compensation for their trouble, etc. Held, that the term "personal action," in the statute, is used to distinguish from actions in rem. *Everett v. Pottawattamie County Sup'rs*, 61 N. W. 1062, 1063, 93 Iowa, 721.

2 Rev. St. p. 189, § 141, providing that no injunction shall issue to stay proceedings at law in any personal action after judgment, unless a deposit is made of the amount, etc., or a bond in lieu thereof is given, should

be construed to mean an action brought to recover a debt, damages, or personal property; an action being defined to be the legal demand of one's right. Hence a judgment on a bond and warrant of attorney given by the complainant, wherein an execution has been issued, is a judgment in a personal action, since in giving a bond and warrant of attorney, and entering up of a judgment on them, there is an action, in the sense used in the statute, although no suit is pending when such bond and warrant are given, for the very language of the latter instrument anticipates and recognizes the proceedings to be had by virtue of it as an action at law. It authorizes an attorney to appear for the party in some court of record at the suit of the obligee in the bond, there to receive a declaration in an action of debt on the bond, etc., and to confess the same action, or to suffer a judgment passed against him by default. The whole assumes the shape and form of a suit. There is a plaintiff and defendant, and record of the proceedings, and judgment for costs are taxed, and judgment rendered for debt and costs, as in any other suit or action, and execution issues in the usual form. *Farrington v. Freeman* (N. Y.) 2 Edw. Ch. 572.

An action for breach of promise of marriage could not at common law be maintained against the personal representative of either party to the contract. It is an action *ex contractu*, and not in tort, and therefore not within Act March 17, 1855. *Hayden v. Vreeland*, 37 N. J. Law (8 Vroom) 372, 18 Am. Rep. 723.

#### PERSONAL CHATTELS.

See "Chattels Personal."

#### PERSONAL COMMUNICATION.

A personal communication, within the meaning of Code Civ. Proc. § 829, declaring that a surviving party shall not give testimony against the representative of a deceased person concerning a personal transaction or communication between him and the deceased person, is any one which the surviving party claims to have received directly or indirectly from the deceased person, and which the deceased person, if living, could contradict or explain. *Price v. Price* (N. Y.) 33 Hun, 69, 73.

#### PERSONAL CONTRACT.

A "personal contract," as the term is used with reference to contracts of a deceased person, which his executor or administrator is not required to execute, is a contract directly involving some personal characteristic or attribute of the deceased, such as contracts requiring the exercise of knowledge or skill, or which involve a ques-

tion of personal confidence—as, for example, a promise to marry, "the contract of a master to instruct his apprentice, of an author to compose a particular work, of a physician or lawyer to render services. Any contract from which it appears that it is the intention of the parties that the services shall be performed by the person contracting in person alone is a personal contract, and will terminate with his death." *Janin v. Browne*, 59 Cal. 37, 44.

#### PERSONAL COVENANT.

Personal covenants are those which are binding upon the personal representatives of the covenantor, and do not run with the land or pass to the assignee. They are in the language of the present tense, having respect to the date of the deed, and, if not true, are broken as soon as made. The usual personal covenants are, first, that the grantor is lawfully seised; second, that he has a good right to convey; and, third, that the land is free from incumbrances. If at the date of the deed the grantor is not lawfully seised, or if he has not a good right to convey, or if the land is not free from incumbrances, the covenant is broken, and a right of action vests instantly in the grantee. *Carter v. Denman's Ex'rs*, 23 N. J. Law (3 Zab.) 260, 270.

A covenant in an agreement made in a conveyance of land from a father to his son whereby the son agrees to give his sister a home, and maintain her decently wherever she may reside, is a personal covenant, and does not give the sister any right in the land, nor charge her maintenance on it. *Harkins v. Doran* (Pa.) 15 Atl. 928.

Personal covenants are said to be such as do not touch the interest demised, but are merely collateral to it, as a covenant to build a house on some other parcel of land, not leased, or to pay a collateral sum to the lessor or a stranger, in which cases the covenants do not go to assignees, even if they are named in the lease. Stipulations in leases by which the parties to those instruments bind themselves to do acts which in no way affect the use or enjoyment of the premises are merely personal obligations between themselves. *Hadley v. Bernero*, 71 S. W. 451, 454, 97 Mo. App. 314.

#### PERSONAL DEFENSE.

It is a well-known universal rule that in actions *ex contractu* the plaintiff must recover against all the defendants or none, unless where a defense is interposed personal to the party who is making it, as infancy, coverture, lunacy, bankruptcy, and the like. In an action on a promissory note signed by four defendants, a defense interposed by two of the defendants, that they

had been discharged, by arrangement of all parties, from their liability upon the note, is not a personal defense which would authorize a judgment against the other two defendants on plaintiff's failure to recover against the two who interposed such defense. *Aten v. Brown*, 14 Ill. App. (14 Bradw.) 451, 453.

### PERSONAL EARNINGS.

The term "personal earnings," within the meaning of the statute exempting personal earnings in supplementary proceedings, does not include money due from customers to a person engaged in retailing ice, in which business he employs two carts and several men. *Mulford v. Gibbs*, 41 N. Y. Supp. 273, 9 App. Div. 490.

"Personal earnings," within the meaning of Code Civ. Proc. § 2463, exempting earnings for personal services, does not include money received by a saloonkeeper in the conduct of his business. *Prince v. Brett*, 47 N. Y. Supp. 402, 21 App. Div. 190.

"Personal earnings," within the meaning of a statute exempting the personal earnings of a debtor necessary for the support of his family, was construed to include tuition fees due a debtor as proprietor of a private school. *Miller v. Hooper* (N. Y.) 19 Hun, 394, 395.

"Personal earnings," as employed in Rev. St. § 5430, exempting personal earnings of the head of a family, include the wages and compensation or salary of a superintendent of a county infirmary, he being the head of a family. *Beckett v. Wisbon*, 5 Ohio N. P. 155, 5 Ohio S. & C. P. Dec. 257, 258.

The term "personal or professional earnings," in the statute exempting from execution personal or professional earnings, does not include debts due the proprietor and keeper of a public hotel for the boarding and accommodation of guests. *Youst v. Willis*, 49 Pac. 56, 57, 5 Okl. 170.

Code, § 3074, providing that the earnings of a debtor who is a resident of the state and the head of a family, for his personal services, for 90 days preceding the levy, are exempt from execution, applies to services of an artist in painting portraits. It is said of appellant that the price of the pictures was not due for the personal services, because his agreement required him to furnish the canvas, paints, and other materials which were used in producing the pictures. The evidence shows that the cost of all the materials used for that purpose was about \$1.50, or little more than nominal. It was so insignificant that it would not authorize us to interfere with the action of the district court in holding, in effect, that for the purpose of this case the amount due

for the pictures was due for personal services. *Millington v. Laurer*, 56 N. W. 533, 534, 89 Iowa, 322, 48 Am. St. Rep. 335.

### PERSONAL EFFECTS.

Other personal effects, see "Other."

"Personal effects," as used in a will bequeathing to a certain person all testator's jewelry, wearing apparel, and personal effects, means articles similar in kind to jewelry and wearing apparel, and cannot embrace household furniture. Effects, when preceded or followed by words of a narrower import, if the bequest is not residuary, will be confined to species of property ejusdem generis with those previously described. In *re Lippincott's Estate*, 34 Atl. 58, 59, 173 Pa. 368 (citing *Rawlins v. Jennings*, 13 Ves. 39; *Hotham v. Sutton*, 15 Ves. 320, 326; *Rop. Leg.* 210; 2 Shars. Bl. Comm. 384; *Bouv. Law Dict.*); In *re Lippincott's Estate*, 4 Pa. Dist. Ct. Rep. 251, 254.

"Personal effects," without qualifying words, generally include such tangible property as is worn or carried about the person, but, for the most part, as used in wills, the phrase derives its meaning from descriptions of articles and classifications immediately preceding; and where a testator, in the eighth clause of his will, gave his books to his younger brother, and in the ninth devised the remainder of his personal effects, of whatever kind or description, an interest in an insurance business did pass under the term "personal effects." *Brandon v. Yeakle*, 50 N. W. 1004, 1005, 68 Ark. 377.

### PERSONAL ENJOYMENT.

"Personal enjoyment," as used in an instruction in an action for injuries that the jury, in measuring the damages they would assess, should take into consideration any lack of personal enjoyment occasioned by the injury, is too indefinite to furnish a substantial basis on which to rest damages. The questions, what is personal enjoyment, how we are to ascertain to what extent it is possessed by human beings, how can its absence, and the cause thereof be demonstrated, or if a person, for any cause, has been deprived of personal enjoyment, how we are to go about adjusting his loss on a money basis, are unanswerable. *City of Columbus v. Strassner*, 25 N. E. 65, 67, 124 Ind. 482.

### PERSONAL ESTATE.

See "Personal Property."

### PERSONAL EXAMINATION.

In *Atchison & N. R. Co. v. Frazier*, 27 Kan. 463, 465, the court says: "It is insist-

ed that the testimony of the physician, so far as it is expert testimony, must be based upon personal examination, and upon the facts as proved before the jury, or else upon a hypothetical statement. It is true that within what is meant by the phrase 'personal examination' is properly included information derived from statements by the patient of present feelings and pain." *Western Union Tel. Co. v. Morris*, 61 Pac. 972, 973, 10 Kan. App. 61.

Under a statute regulating the powers and duties of the railroad commissioners, and providing that if, in the judgment of the board, "after a careful personal examination of the same," it appears that additional terminal facilities should be afforded, it may institute proceedings to require the same to be furnished, the board of commissioners, after a personal inspection of the premises had been made by the inspector employed by them, and, on his report, instituted such proceedings, the court, in considering the objection that the commissioners had not jurisdiction, because they failed to make the personal examination required by the statute, said: "It was the obvious intention of the Legislature to impose upon the railroad commissioners the duty of a careful personal examination of the subject of repairs or changes upon which they were acting, and it would be unreasonable to hold that the commissioners could not avail themselves of the expert or general knowledge of inspectors they may employ." *People v. Delaware & H. Canal Co.*, 59 N. E. 138, 139, 165 N. Y. 370.

A permission given in a life policy to examine the person of insured after death, to determine the cause of the death, only authorizes an examination for a reasonable time after death, and so long as the body is unburied or not finally disposed of and does not authorize a disinterment for the purpose of such examination. *Ewing v. Commercial Travelers' Mut. Acc. Ass'n of America*, 66 N. Y. Supp. 1056, 1059, 55 App. Div. 241.

"Examine," as used in an accident policy which insured against external accidental injury only, providing that any medical adviser of the company shall be allowed to examine the person or body of the assured as often as he is required in respect to the alleged injury or death, cannot ordinarily be understood to include dissection or an autopsy. *Sudduth v. Travelers' Ins. Co. (U. S.)* 106 Fed. 822, 824.

#### PERSONAL EXPENSES.

An undertaking to reimburse the obligee for personal expenses of coming and defending the suit should be construed to include the expenses of the attorneys of the

obligee in coming on before the trial to take depositions. *Bundy v. Newton*, 19 N. Y. Supp. 734, 65 Hun, 619.

The personal and incidental expenses which, under Cr. Code, § 308, are to be allowed to counsel assigned by the court in a capital case, are limited to such expenses as are incurred by counsel on his personal account. Merely because such expenses have been incurred as will ordinarily be borne by a party defendant in the proper presentation of his case does not, under the limitations of the statute, justify casting the amount of such expenses on the county. Thus the expense for an interpreter, that counsel may understand his client, is a personal and incidental expense, within the meaning of the statute, but the expense for a daily transcript of evidence is not such an expense. *People v. Grout*, 75 N. Y. Supp. 290, 37 Misc. Rep. 430.

Lawyers assigned to the defense of a criminal employed another lawyer to aid them in gathering testimony. Held, that his bill for services did not constitute personal and incidental expenses, within the meaning of Code Cr. Proc. § 308. In re *Waldheimer*, 82 N. Y. Supp. 916, 917, 84 App. Div. 366 (quoting Cent. Dict.).

#### PERSONAL FITNESS.

The personal fitness of a candidate for an office includes his moral character, intellectual ability, social standing, habits of life, and political convictions. *State v. Malo*, 22 Pac. 349, 362, 42 Kan. 54, 120.

#### PERSONAL FRANCHISE.

A franchise which creates a corporation is a personal franchise, while a franchise which authorizes a corporation thus organized to construct and operate a railroad, for instance, is a property franchise. *Sandham v. Nye*, 30 N. Y. Supp. 552, 555, 9 Misc. Rep. 541.

#### PERSONAL GOODS.

"The terms 'personal goods' and 'personal property' are convertible, and, in their general sense, mean the same thing." *State v. Brown*, 68 Tenn. (9 Baxt.) 53, 55, 40 Am. Rep. 81.

"Personal goods," as used in Rev. St. 1881, §§ 1933, 1934, making it larceny to steal the personal goods of another, cannot be construed to include dogs. *State v. Doe*, 79 Ind. 9, 12, 41 Am. Rep. 599.

"Personal goods," as used in 1 Story, Laws, 83, 1 Stat. 112, providing that if any person, etc., upon the high seas, shall take and carry away, with an intent to steal or purloin, the personal goods of another, the



person shall, on conviction, be fined, etc., should be construed as movables belonging to, and the property of, some person, which have an intrinsic value, and as including money, bank notes, and coin. *United States v. Moulton* (U. S.) 27 Fed. Cas. 11, 12 (citing *Perry v. Coates*, 5 Mass. 537).

The term "personal goods," as used in section 128 of the Code, providing for the recovery of personal chattels, reading (2 Rev. St. p. 464, § 71), "When any personal goods are wrongfully taken or wrongfully detained," etc., is broad enough to cover title deeds. *Wilson v. Rybolt*, 17 Ind. 391, 392, 79 Am. Dec. 486.

As used in a receipt by a common carrier for certain baggage of a person which was taken on board a steamboat (the owner having gone on a preceding boat, his baggage not having arrived in time), the words "personal goods," being merely indorsed in pencil marks on the margin of the receipt, do not alter the nature of the carrier's undertaking. They are, at most, but a description of the character of the goods put on board, and would not exempt the ship from liability for the loss of the same. *The Elvira Harbeck* (U. S.) 8 Fed. Cas. 582, 584.

"Personal goods and chattels," as used in a will devising all of the testator's household furniture and personal goods and chattels to a certain person, are restricted in meaning to the property of the same kind as household furniture, and do not include promissory notes and cash on hand. *Peaslee v. Fletcher's Estate*, 14 Atl. 1, 3, 60 Vt. 188, 6 Am. St. Rep. 103.

"In the strict sense of the common law, personal goods are goods which are movable, belonging to or the property of some person, and which have an intrinsic value. Bonds, bills, and notes, which are choses in action, are not deemed, by the common law, goods whereof larceny may be committed, being of no intrinsic value, and not importing any property in possession of the person for whom they are stolen, but only evidence of property. As used in Act 1790, providing a punishment for the taking and carrying away, with intent to steal or purloin, the personal goods of another, it does not include choses in action." *United States v. Davis* (U. S.) 25 Fed. Cas. 781, 783.

The term "personal goods," as used in an indictment for larceny, may include those of another as well as those of the accused, and therefore an information must explicitly state that the goods were the goods of another. *Barnhart v. State*, 56 N. E. 212, 214, 154 Ind. 177.

The term "personal goods," in 1 Stat. 112, making it larceny to take and carry away the personal goods of another, does

not include choses in action; the latter not being the subject of larceny at the common law. *United States v. Davis* (U. S.) 25 Fed. Cas. 781, 783.

## PERSONAL INDIGNITY.

See, also, "Indignities to the Person."

The phrase "indignities to the person" is not equivalent to "personal indignities," and consequently mere personal insults and reproachful language do not constitute a ground of divorce under a statute granting divorce for indignities to the person, though they rank among the grossest personal indignities. *Butler v. Butler* (Pa.) 1 Para. Eq. Cas. 329, 344.

The personal indignities, rendering life burdensome, which will justify a divorce, constitute such a course of conduct or continued treatment as render a wife's condition intolerable, and her life burdensome. The characters of the parties must be taken into consideration, and that condition which renders the life of the party injured burdensome must be shown to exist in fact, and not purely inferred from facts that go to establish personal indignities. *Cline v. Cline*, 10 Or. 474, 475.

Under Webster's definition of "indignity" as "unmerited contemptuous conduct toward another, which manifests contempt for him; contumely, incivility, accompanied with insult," lewd and indecent conduct of a husband toward the daughter of his wife by a former husband does not constitute a personal indignity to the wife. *Cline v. Cline*, 10 Or. 474, 475.

## PERSONAL INJURY.

As chose in action, see "Chose in Action."

As used in an information charging defendant with having unlawfully and feloniously inflicted a personal injury on a certain person, the words "personal injury" will be held to be equivalent to the words "bodily injury," used in the statute, and hence the indictment is sufficient. *State v. Clayborne*, 45 Pac. 303, 14 Wash. 622.

"Personal injuries," in a contract of insurance, meant bodily injuries. *Theobald v. Railway Pass. Assur. Co.*, 26 Eng. Law & Eq. 432, 438.

A personal injury is an injury to the person of an individual, as an assault is distinguished from an injury to one's property. *Terre Haute Electric Ry. Co. v. Lauer*, 52 N. E. 703, 706, 21 Ind. App. 466.

As used in How. Ann. St. § 7397, declaring that actions for negligent injuries to the person shall survive, the word "person" was

evidently used in contradistinction to the word "property," and, as so used, applies to an action under section 7782 for malpractice by one professing to be a physician and surgeon, if such malpractice was negligent, though such section provides that such actions shall be according to the rules of the common law. *Norris v. Grove*, 58 N. W. 1006, 100 Mich. 256.

The phrase "injury to the person," as used in Gen. St. c. 60, § 6, declaring that a judgment, except for malicious prosecution, libel, slander, or injury to the person, shall bear legal interest from its date, should be construed to include injuries to the person arising both *ex contractu* and *ex delicto*. The words should not be confined to those injuries of the latter class, or where the complaint is for trespass *vi et armis*. *McMurtry v. Kentucky Cent. R. Co.*, 1 S. W. 815, 816, 84 Ky. 462.

Const. art. 11, § 10, providing that the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character, means only such wrongs as are recognized by the law of the land, and does not extend to cases of persons who are expelled from churches, secret societies, or temperance organizations, since, though every such expulsion involves, to some extent, a charge of moral turpitude or conduct unbecoming a gentleman or lady, persons who join such societies submit themselves to their jurisdiction, and are subject to the tribunals established by those bodies, and, if aggrieved by a decision against them, they must seek redress within the organization, as provided by the laws and regulations. *Landis v. Campbell*, 79 Mo. 433, 439, 49 Am. Rep. 239.

An instruction that in estimating the damages the jury must consider the personal injuries suffered by plaintiff, the pain and suffering undergone by him in consequence of his injuries, and the permanent injuries sustained by him, does not authorize a double recovery, as the expression "personal injuries" must be understood as meaning the same as "the pain and suffering undergone by him in consequence of his injuries"; the two being contradistinguished from the permanent injuries. *Missouri, K. & T. Ry. Co. of Texas v. Hannig* (Tex.) 41 S. W. 196, 197.

A personal injury includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff or of another. Code Civ. Proc. N. Y. 1899, § 3343, subd. 9; *Morse v. Press Pub. Co.*, 71 N. Y. Supp. 348, 349, 63 App. Div. 61; *Lasche v. Dearing*, 53 N. Y. Supp. 58, 59, 23 Misc. Rep. 722. If an injury to the person either of plaintiff or of another be actionable, it is a personal injury. An action will lie against one who induced plaintiff to marry a woman

by false representations that she was virtuous, when in fact she was at the time pregnant by defendant; it being a personal injury to the husband, resulting from the loss of his full enjoyment of the conjugal society of his wife because of defendant's fraud. *Kujek v. Goldman*, 9 Misc. Rep. 34, 38, 29 N. Y. Supp. 294. The injury occasioned to a husband by the loss of the services of his wife in consequence of injuries received by her through the negligence of the defendant is a personal injury, within Code, § 383, subd. 3, providing a limit of three years for the commencement of an action to recover for personal injuries resulting from negligence. *Maxson v. Delaware, L. & W. R. Co.*, 21 N. Y. St. Rep. 767, 769.

A threat to arrest a person in a civil proceeding is not a threat to injure her person, within the meaning of Pub. St. c. 202, § 29, providing that a party making such a threat shall be liable to prosecution, since a threat to injure the person of another means a threat to use actual physical force upon the person of another. *Commonwealth v. Mosby*, 39 N. E. 1030, 163 Mass. 291.

Under Rev. St. 1851, c. 119, § 73, providing that where the offense involves the commission of, or an attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material; the term "private injury" must not be confounded with "personal injury," for, although every injury to a person is, in one sense, a private injury, yet, in our opinion, the term is not used in this section in so general a sense, but is limited and applicable only to injuries to private property, or such as are distinguishable from injuries to the person. *State v. Boylson*, 8 Minn. 438, 443 (Gil. 325, 328).

#### **Alienation of affections.**

The alienation of a husband's affections, and the consequent loss of the consortium, is not an injury to the person, within the meaning of a statute authorizing actions by married women for injuries to the person. In this connection the court holds that the phrase "injury to the person" is not equivalent to "injury to personal rights," in view of the further provision of the statute authorizing the maintenance of an action for damage to the person or reputation, inasmuch as, if the phrase "injury to the person" was regarded as synonymous with "injury to personal rights," the specification of damage to the person or reputation would be meaningless. *Hodge v. Wetzler*, 55 Atl. 49, 50, 69 N. J. Law, 490.

#### **Bigamy.**

The personal wrong or injury to a wife which will allow her to testify against her

husband, under the exception of 3 How. Ann. St. § 7546, forbidding her testimony against her husband except in cases growing out of a personal wrong or injury by the husband against the wife, does not include bigamy on the part of the husband. *People v. Quantstrom*, 53 N. W. 165, 93 Mich. 254, 17 L. R. A. 723.

#### **Criminal conversation or enticement.**

Within the meaning of Code, § 179, which authorizes the arrest of a defendant in an action for the recovery of damages not arising out of contract, where the defendant is not a resident of this state or is about to remove therefrom, or where the action is for an injury to person or character, etc., would include criminal conversation with the plaintiff's wife. It would include any injury which is an invasion of personal rights, such as the seduction of a daughter or the beating of a servant, etc. *Delamater v. Russell* (U. S.) 4 How. Prac. 234, 235.

The phrase "injury to the person," as used in Laws 1860, c. 90, § 7, p. 158, as amended by Laws 1862, c. 172, p. 343, authorizing a married woman to maintain an action for any injury to her person or character, includes acts which do not involve physical contact with the person injured. Thus criminal conversation with the wife has long been held to be a personal injury to the husband, and seduction of the daughter a like injury to the father, and a married woman may maintain an action against a person who entices away her husband and deprives her of his society. *Bennett v. Bennett*, 23 N. E. 17, 116 N. Y. 584, 6 L. R. A. 553.

"Injuries to the person," as used in Code, § 2157, providing that all personal actions shall survive, except for "injuries to the person," etc., are not limited to actions for direct physical hurts to the body. Adultery or criminal conversation with the wife is an injury to the person of the husband. *Garrison v. Burden*, 40 Ala. 513, 516.

#### **Death.**

"Personal injuries," as used in Laws 1866, c. 572, limiting to one year actions against the mayor, aldermen, etc., of any city having 50,000 inhabitants or over for damages for personal injuries alleged to have been sustained by reason of its negligence, include an action for wrongfully causing death. *Titman v. City of New York*, 10 N. Y. Supp. 689, 690, 57 Hun. 469.

The term "injury to a person," as used in a pass or free ticket on a railway, exempting the railroad company from liability for any injury to the person caused by the negligence of its agents, is not synonymous with the "death of a person." The one presumes a continuation of life, though in an impaired state; the other, the destruction or ending

of life. So that such term does not exempt the railroad company from liability for the death of the person so traveling. *Northern Pac. Ry. Co. v. Adams* (U. S.) 116 Fed. 324, 327, 54 C. C. A. 196.

The father of a minor, who was employed as a switchman of a railroad company, entered into a contract with the company by which he stipulated that he released and forever acquitted the company from all or any claim or liability to him for damages for any injuries sustained by the son. The son was thereafter killed while in the employ of the railway company, and the father brought an action to recover for his death. It was held that, while the words "injury" and "death" were by no means synonymous, yet it was certainly true that, relatively to the father, seeking to recover for the lost services of his minor child, it was immaterial whether the tort from which his loss originated was one which occasioned the child physical injury, or one which, by causing his death, brought about the same result, and hence such a contract was a bar to the action. *New v. Southern R. Co.*, 42 S. E. 391, 392, 116 Ga. 147, 59 L. R. A. 115.

#### **False imprisonment.**

In considering whether an action for false imprisonment was included in a statute providing "that actions hereafter accruing for injuries to persons caused by the wrongful act, neglect, or default of any person," etc., must be brought within two years, the court said: "The statute under consideration relates only to private injuries. The word 'injury' is defined by Bouvier to be a wrong or tort, and private injuries by the same authority are defined to be infringement of the private or civil rights belonging to individuals, considered as individuals. It would be difficult to form a theory upon which a trespass to the person by an assault and battery or wounding, or by a forcible taking and imprisonment, would not be included within the designation of an injury to the person assaulted or imprisoned. Injuries to persons are the result of either public or private wrongs, and the statute under consideration must be construed to embrace all classes of private wrongs which are injuries to the person, arising from any wrongful act, neglect, or default of any other person. A private wrong is a tort, and a tort is defined as a private or civil wrong or injury." *Tomlin v. Hildreth*, 47 Atl. 649, 651, 65 N. J. Law, 438.

#### **Intoxication of husband.**

Taylor St. c. 120, § 5, subd. 2, conferring upon a justice of the peace jurisdiction of actions for injuries to persons, etc., should be construed to relate to injuries to relative rights as well as an invasion of absolute personal rights, and hence a justice has ju-

isdiction of an action by a married woman to recover damages resulting from the intoxication of plaintiff's husband by liquors sold him by the defendant. *Wightman v. De Vere*, 33 Wis. 570, 574.

#### **Libel or slander.**

The "willful and malicious injuries to the person of another" spoken of in Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], which provides that a discharge in bankruptcy shall release all debts, except such as are judgments for fraud, or obtaining property by false pretenses or false representations, or for "willful and malicious injuries to the person or property of another," etc., include injuries inflicted by libel. In this connection, it is difficult to conceive of a greater injury which could be done to a person than to wrongfully and maliciously tarnish or blacken and destroy his good character in the community where he lives. Wounded feelings, mental anguish, loss of social position and standing, personal mortification and dishonor, are clearly injuries that pertain to the person. In so far as we are aware, injuries to the character are always classed in the law with injuries to the person. *McDonald v. Brown*, 51 Atl. 213, 214, 23 R. I. 546, 58 L. R. A. 768, 91 Am. St. Rep. 659.

In the title of the act of May 4, 1895, "to provide for the survival of causes of action for personal injuries other than those resulting in death," the term "personal injuries" includes not only injuries to the physical man, but also injuries to the health and reputation. Such injuries have ever been classed and treated by law writers as personal injuries. The absolute rights of each individual are the right of personal security, the right of personal liberty, and the right of private property. Injuries which affect the personal security are injuries against the life, the limb, the body, the health, or the reputation of the individual. *Houston Printing Co. v. Dement*, 44 S. W. 558, 560, 18 Tex. Civ. App. 30 (citing 3 Bl. Comm. p. 118).

Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], provides that a discharge in bankruptcy shall release a bankrupt from all provable debts, excepting, among others, judgments in actions for willful and malicious injury to the person of another. Held, that a judgment in slander is, under the common-law definition, for an injury to the person, and within the bankruptcy act. *Sanderson v. Hunt* (Ky.) 76 S. W. 179.

#### **Mental injury.**

Personal injuries may be either bodily or mental, but, whether one or the other, they infringe upon the rights of the person, and not of property. Any mental injury is

necessarily an injury to the person. So that under a statute providing that actions for injury to the person, where such injury does not cause the death of the injured party, shall not survive, an action for mental anguish caused by failure to deliver a telegram dies with the person. *Morton v. Western Union Tel. Co.*, 41 S. E. 484, 485, 130 N. C. 299.

As to seamen and employes of the United States government on a dredge which came into collision with a vessel under circumstances rendering both the vessel and the dredge at fault, the seamen were not entitled to recover for personal injuries, except such as constituted substantial physical harm, creating some incapacity for their ordinary work. Allowances under this head could not be made for damages from being thrown into the water or for alleged fright. *The Queen* (U. S.) 40 Fed. 694.

The word "injury," found in Rev. St. c. 25, § 22, enacting that, if any person receive any injury in his person by reason of any defect in a road, he may recover of the party by law obliged to repair the road, signifies a bodily injury, and does not embrace one sustained by mere mental suffering caused by the risk and peril incurred; but yet, if even a slight bodily injury has been suffered, and caused mental suffering to the plaintiff, such suffering is a part of the injury for which recovery may be had. *Canning v. Inhabitants of Williamstown*, 55 Mass. (1 Cush.) 451, 452.

"Injury to the person," as used in Code Civ. Proc. § 3343, subd. 9, defining a personal injury as including libel, slander, or other actionable injury to the person, includes acts which do not involve physical contact with the person injured. Citing *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553. And hence injuries affecting the mind and sensibilities of the individual are included in the term. Sess. Law 1889, p. 64, allowing exemplary damages when the injury complained of shall be attended with circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, by the terms of the act, clearly imports wrongs and injuries other than mere bodily wounds or pecuniary losses, but include, as well, injuries affecting the mind and sensibilities of the individual, which are often more grievous and painful than mere material injuries, so that the phrase "wrongs to the person," in such act, includes the wrongful inducement of the husband to abandon and desert the wife. *Williams v. Williams*, 37 Pac. 614, 619, 20 Colo. 51.

In an action against a street railway company for injuries received by collision of cars, the trial court instructed the jury that "the plaintiff can only recover, if at all, for

the injuries described in the complaint, and cannot recover for other or different injuries; nor can he recover for fright or mental suffering or nervous shock, unless they grow out of, and were the result of, the personal injuries received, if you find he received any." The appellate court said: "The standard dictionaries define the word 'bodily' to mean pertaining to or concerning the body; of or belonging to the body or to the physical constitution; not mental, but corporeal—and the word 'personal,' as pertaining to the person or bodily form. The expression 'great personal injury' has been said to be equivalent to the words 'great bodily harm.' Abb. Law Dict. p. 273. A personal injury is an injury to the person of an individual, as an assault is distinguished from an injury to one's property. 2 Rap. & L. Law Dict. p. 955. If we admit, as claimed by appellant, that the terms 'personal injuries' and 'bodily injuries' are not necessarily equivalent, yet the jury could have understood from the instruction given that the appellee was entitled to recover only for mental suffering growing out of the bodily injuries he received." *Terre Haute Electric Ry. Co. v. Lauer*, 52 N. E. 703, 706, 21 Ind. App. 466.

The word "person," when used in speaking of compensation for civil injuries to person or property or character, means the material person—the fleshly body, and not the spiritual soul. Injury to person, property, or character, and similar expressions, abound in the books, but they never convey the idea of a direct injury to the mind, or a production of mental suffering. *Fay v. Parker*, 53 N. H. 342, 359, 16 Am. Rep. 270.

#### **Seduction.**

"Injury to person," as used in Code, § 291, subsec. 1, authorizing an arrest where the action is for injury to person or character, includes an action by a father for the seduction of his daughter. *Hood v. Suderth*, 16 S. E. 397, 399, 111 N. C. 215 (citing *Hoover v. Palmer*, 80 N. C. 313).

Within Civ. Code, § 3900, providing that actions for injuries done to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, the expression "injuries done to the person" includes not only injuries to the physical body, but every other injury for which an action may be brought, done to the individual, and not to his property. This is shown by the fact that injuries to the reputation are specially excepted from the operation of the limitation provided for actions for injury done to the person, so that an action for the seduction of a daughter is included within the term "injuries done to the person." *Hutcherson v. Durden*, 39 S. E. 495, 497, 113 Ga. 987, 54 L. R. A. 811. See, also, *Delamater v. Russell* (N. Y.) 4 How. Prac. 234, 235; *Bennett v. Bennett*, 23 N. E. 17, 116 N. Y. 584, 6 L. R. A. 553.

#### **Threatening language.**

Under a statute giving a right of action by a wife against a saloon keeper who has sold intoxicating liquor to her husband, thereby causing the wife to be injured in person, threatening language or vulgar conduct, although directed to the wife, but not resulting in the impairment of her health, does not constitute a ground for the recovery of damages. *Calloway v. Laydon*, 47 Iowa, 456, 458, 29 Am. Rep. 489.

#### **PERSONAL JUDGMENT.**

In construing Gen. St. 1878, c. 81, § 28, providing that, in cases for the foreclosure of mortgages, service by publication of the summons may be made upon all parties to the action against whom no personal judgment is sought, the court said, "We think it clear that the expression 'personal judgment' is here used in the sense of a money judgment for the mortgage debt," and held that such statute, in so far as it authorized service of the summons upon persons within the state to be made by publication, instead of a personal service, was invalid. *Bardwell v. Collins*, 46 N. W. 315, 316, 44 Minn. 97, 9 L. R. A. 152, 20 Am. St. Rep. 547.

A judgment against a corporation in a cause in which process was served on it by service on its accredited agent is a personal judgment. *King v. National Min. & Exp. Co.*, 1 Pac. 727, 731, 4 Mont. 1.

#### **PERSONAL KNOWLEDGE.**

"Personal knowledge," within the meaning of a statute authorizing an agent or attorney to verify an answer if all the material allegations thereof are within the personal knowledge of such agent or attorney, means a personal knowledge of the truth or falsity of such allegations; and, if an allegation is a negative one, it necessarily includes a knowledge of the truth or falsity of the allegation denied. *West v. Home Ins. Co.*, 18 Fed. 622, 623.

#### **PERSONAL LABOR.**

Where a furniture broker and uncertified bankrupt was employed to remove the goods of another, in the course of which business he employed several men and vans, supplied packing cases, repaired furniture, and provided materials for this purpose and other articles to a trifling amount, the debt which thereby accrued was not in respect of personal labor. *Crofton v. Poole*, 1 Barn. & Adol. 568.

Rev. St. c. 208, § 9, exempting debts due for the labor of the defendant from the process of foreign attachment, was designed to protect the personal labor of the debtor, and those constituting his family, and under his protection and control, in those cases only

in which they appear so unmixed with other things as to be capable of being distinguished therefrom, and their value ascertained, as a ground of indebtedness, and not where they are undistinguishably combined with materials found, or with labor of other persons, procured upon the responsibility of the debtor, and for the purpose of carrying into execution a work that he has undertaken to do. *Robbins v. Rice*, 18 N. H. 507, 509, 510.

### PERSONAL LIBERTY.

Personal liberty, which is granted to every citizen under our Constitution and laws, consists of the right of locomotion—to go where one pleases, and when—and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens. *Pinkerton v. Verberg*, 44 N. W. 579, 582, 78 Mich. 573, 7 L. R. A. 507, 18 Am. St. Rep. 473; *City of St. Louis v. Roche*, 31 S. W. 915, 917, 128 Mo. 341; *The Civil Rights Cases*, 8 Sup. Ct. 13, 42, 109 U. S. 3, 27 L. Ed. 835.

### PERSONAL LIST.

The personal list, in R. L. § 331, providing that the listers in each town shall arrange in alphabetical order the personal lists of all taxpayers, etc., is that portion of the entire list derived from the owner's personal property. *Taylor v. Moore*, 21 Atl. 919, 921, 63 Vt. 60.

### PERSONAL LUGGAGE.

See, also, "Baggage"; "Luggage."

"Whatever the passenger takes with him for his personal use or convenience, according to the habits and wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, must be considered as personal luggage." *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 29, 25 L. Ed. 531 (citing *Macrow v. Great Western R. Co.*, 6 Q. B. 121). "This would include not only articles of apparel, whether for use or ornament, \* \* \* but also the gun case or fishing apparatus of the sportsman, the easel of an artist on a sketching tour, or the books of the student, and other articles of analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use and convenience, it follows that what is carried for the purpose of business, such as merchandise and the like, or for larger and ulterior purposes, such as

articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier." *Oakes v. Northern Pac. R. Co.*, 26 Pac. 230, 232, 20 Or. 392, 12 L. R. A. 318, 23 Am. St. Rep. 126.

### PERSONAL MORTGAGE.

A personal mortgage is more than a mere security. It is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by a valid performance of the conditions. *Streeter v. Ward*, 12 N. Y. St. Rep. 333, 334.

### PERSONAL NECESSITIES.

Testator devised to W. a certain farm, to be held in trust, with power to lease, sell, or dispose of it, and to pay to O. the rent, interest, or avails in such sums as W. might deem most prudent to meet the personal necessities of O. and guard against his improvidence. The words "personal necessities" obviously were not used in the sense of being synonymous with "individual necessities" but in the sense, and to convey the idea, that the property should be used for the support and maintenance of O. and his family, if he should have one, rather than to permit the use of it in business or for other speculative purposes. *Whitney v. Whitney*, 18 N. Y. Supp. 3, 18, 63 Hun. 77.

### PERSONAL NOTICE.

By "personal notice" is meant the delivery of a notice in writing to another in person. *Loeb v. Huddleston*, 16 South. 714, 716, 105 Ala. 257.

"Personal notice," mentioned in Code Civ. Proc. § 1710, providing, "When personal notice is required, and no mode of giving it is prescribed in this title, it must be given by citation," is personal notice as distinguished from notice which in the first instance only is required to be made by publication. *Ashurst v. Fountain*, 6 Pac. 849, 67 Cal. 18.

A personal notice of a judgment, required by Code, § 353, in order to limit the time to appeal, means a personal notice in writing from the party who has obtained the judgment, and not a notice incidentally derived from a third person or in some other way. *Pearson v. Lovejoy* (N. Y.) 53 Barb. 407, 35 How. Prac. 193, 196.

In laws relating to probate courts and proceedings, the words "personal notice" denote service by a copy given in hand, or left at the place of last and usual abode, seven days, at least, before the time of hearing. *Rev. St. Me. 1883*, p. 534, c. 63, § 33.

**PERSONAL OBLIGATION.**

A decree of divorce, imposing the payment of alimony, is held not to be a personal obligation upon the party against whom the decree is awarded, which the courts of another state are bound to compel him to perform. *Bullock v. Bullock*, 30 Atl. 676, 679, 52 N. J. Eq. (7 Dick.) 561, 27 L. R. A. 213, 46 Am. St. Rep. 528.

**PERSONAL ORNAMENTS.**

A bequest of personal ornaments does not include a pocketbook and a case of instruments. *Willis v. Curtols*, 1 Beav. 189.

**PERSONAL PAIN.**

"Personal pain," as used in an instruction in an action for breach of promise of marriage, telling the jury that in assessing damages they might consider, among other things, personal pain suffered by plaintiff by reason of the breach of the contract, means mental distress or mental suffering, and is not limited to physical suffering. Webster defines pain as mental distress; anxiety; grief; anguish. It may well be said that the pain would be personal—as much so as if it was purely physical. *Robinson v. Craver*, 55 N. W. 492, 495, 88 Iowa, 381.

**PERSONAL PRIVILEGE.**

The term "personal privilege," in Act April 30, 1874, relating to sample merchants' licenses, and providing that such a license shall be a personal privilege, and shall not be transferred, does not mean that the party obtaining such license shall be required to sell in person, and not by another. It only means to declare that such license shall be used for the benefit of the party to whom it is issued. He cannot transfer it to another, nor can any other person sell under it, but certainly there is no inhibition in the statute against sample merchants operating through agents. A sale by an agent is a sale by himself. If he has a license as a sample merchant, he may sell either by himself or by his agent, like any other merchant. *Myrdock v. Commonwealth (Va.)* 26 Grat. 988, 990.

**PERSONAL PROPERTY.**

See, also, "Property."

All my personal property, see "All."

All other personal property, see "All Other."

Other personal property, see "Other."

"Personal property," as defined by Blackstone, is composed of property in possession and property in action. *Adams v. Hackett*, 7 Cal. 187, 203.

In its general or ordinary signification, the term "personal property" embraces all objects and rights which are capable of ownership, except freehold estates in land, and incorporeal hereditaments issuing thereout, or exercisable within the same. *Boyd v. City of Selma*, 11 South. 393, 394, 96 Ala. 114, 16 L. R. A. 729.

"The words 'personal property' embrace not only goods, chattels, coin, bills, and evidences of debt, but, in their strict and more appropriate legal definition, signify the right and interest of the owner or owners in these articles." *Stief v. Hart*, 1 N. Y. (1 Comst.) 20, 24.

The words "personal estate" are used to embrace every description of property not coming under the denomination of real estate. *Bellows v. Allen's Adm'r*, 22 Vt. 108, 110.

"Personal property," using the term in its broad, mercantile sense, is equivalent to assets which are capable of manual delivery, and of which the title, either legal or equitable, can be transferred by delivery. *Conner v. Root*, 17 Pac. 773, 776, 11 Colo. 183.

The phrase "personal estate," in ordinary and constant use, whether among professional persons or laymen, means goods, chattels, securities, and money, and does not mean land or tenements. In *re Bruckman's Estate*, 45 Atl. 1078, 1079, 195 Pa. 363.

The term "personal property," in its general sense, is synonymous with the term "personal goods." *State v. Brown*, 68 Tenn. (9 Baxt.) 53, 55, 40 Am. Rep. 81.

The term "personal property" is now used to designate chattels and every species of property which is not real estate. In *re Althause's Estate*, 71 N. Y. Supp. 445, 447, 63 App. Div. 252.

"Personal estate," as used in the following note: "On demand I promise to pay to the order of the First National Bank of S. \$700.00 at the First National Bank of S., value received, to be paid from my personal estate," means private, individual, separate, and not personal property, as distinguished from real estate. *First Nat. Bank v. Hurlbut* (N. Y.) 22 Hun, 310, 311.

"Personal property" is defined by Dicey, *Conf. Laws*, p. 13, to include "every kind of chose in action, using that term in its very widest sense. It includes, that is to say, every movable which cannot be touched, or intangible movable. Thus it includes debts, in the strictest sense of the term, and also everything, not an immovable, which can be made the object of a legal claim—as, for example, a person's share in a partnership property." The provisions of Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 [U. S.

Comp. St. 1901, p. 3200], providing that any person "who shall be injured in his business or property" by any other person or corporation, etc., may sue therefor in any Circuit Court of the United States, and recover threefold the damages sustained, provides for a suit to recover damages merely for an injury to business or property. *City of Atlanta v. Chattanooga Foundry & Pipe Co.* (U. S.) 101 Fed. 900, 907.

A will recited that testatrix bequeathed to defendant her residence, with all its contents—"furniture, bedding, silver, everything in or about the premises, all personal property wherever it may be." Testatrix then made bequests aggregating \$7,200, which, with her debts, approximated the value of her bank stock—the only thing she had with which to pay the legacies and her debts, unless real estate was sold, for which she made no provision. Held, that the words "all personal property, wherever it may be." were only intended to apply to the household furniture, silverware, and jewelry, and other like personal property. *Bond v. Martin's Adm'r* (Ky.) 76 S. W. 326, 328.

Office furniture, safes, tables, chairs, and desks, none of which are in any way attached to a building, are personality. *Atlantic Safe Deposit & Trust Co. v. Atlantic City Laundry Co.*, 53 Atl. 212, 213, 64 N. J. Eq. 140.

#### Statutory definitions.

Hawaiian Act of 1882, § 16, relative to taxation, expressly declares that the term "personal property" is to be deemed to mean and include all household furniture and effects, goods, chattels, wares, and merchandise of ships and vessels, whether at home or abroad, all moneys in hand, leasehold and chattel interests in lands and real estate, growing crops, public stocks and bonds, and all domesticated animals not specifically taxed; and it is held that under this definition a deed is not personal property. *McBryde v. Kala*, 6 Hawaii, 529, 531.

"Personal property," as used in 1 Starr & C. St. c. 74, pp. 14, 16, defining "pawn-brokers" as persons engaged in the purchase of personal property on condition of selling the same back again at a stipulated price, means only such articles of personal property as may be actually delivered over to the custody of the person who advances money on them, and does not include stock, bonds, notes, mortgages, choses in action, or evidences of debt. *City of Chicago v. Hulbert*, 8 N. E. 812, 813, 118 Ill. 632, 59 Am. Rep. 400.

The words "personal property," as used in Rev. St. c. 120, § 254, providing that taxes assessed on personal property shall be a lien on the personal property of the person assessed, and the words "goods and chattels," as used in section 137, providing that in all

cases the collector's warrant shall authorize the town or district collector, in case any person named in such collector's book shall neglect to pay his personal property tax, to levy the same by distress and sale of the goods and chattels of such person, are to be construed as having the same meaning, and as comprehending every species of personality which may, under the statute, be made the subject of levy and sale under execution issued under a judgment at law. *Loeber v. Leininger*, 51 N. E. 703, 704, 175 Ill. 487.

By Gen. St. 1901, § 7503, it was provided that the term "personal property" shall include all property owned, leased, used, occupied, or employed by any railroad or telegraph company or corporation, situate on the right of way of any railway. *Missouri, K. & T. R. Co. v. Miami County Com'rs*, 73 Pac. 103, 105, 67 Kan. 434.

Laws 1860, c. 1, § 2, as amended by Laws 1861, relating to taxation, provides that the term "personal property" shall be held to mean and include, among other things, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stocks, profits, or means, by whatever name the same may be designated, etc. *Smith v. Webb*, 11 Minn. 500, 507 (Gil. 378, 385).

Acts 1854, § 4, defines the term "personal estate," as used in the act, to include goods and chattels of every description, including steamboats and other vessels, money, debts due or owing from solvent debtors, whether on contract, note, bond, or mortgage, public stocks, and stocks in corporations, whether within or without the state. *Newark City Bank v. City of Newark*, 30 N. J. Law (1 Vroom) 13, 21.

By the statute relating to taxation of moneyed corporations, the terms "personal estate" and "personal property" are defined to mean such portions of their capital as are not invested in real estate. *Farmers' Loan & Trust Co. v. City of New York* (N. Y.) 7 Hill, 261, 275.

The term "personal property" is defined by Laws 1892, c. 677, as including chattels and everything except real property, which is defined as meaning real estate, lands, tenements, and hereditaments, corporeal and incorporeal. *State Trust Co. v. Casino Co.*, 41 N. Y. Supp. 1, 3, 18 Misc. Rep. 327.

"Personal estate" is defined by statute as including all household furniture, moneys, goods, chattels, etc. *People v. Waldron*, 26 App. Div. 527, 528, 50 N. Y. Supp. 523.

1 Rev. St. p. 387, relating to the assessment and collection of taxes, provides (section 3) that "the terms 'personal estate and



personal property,' wherever they occur in this chapter, shall be construed to include all household furniture, money, goods, and chattels, debts due from solvent debtors, whether on account, contract, bond, and mortgage, public stocks, and stocks in moneyed corporations." *Boreel v. City of New York*, 4 N. Y. Super. Ct. (2 Sandf.) 552, 559.

In Const. art. 12, § 2, providing that laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, and also all real and personal property, the latter term includes everything which is the subject-matter of private property, and the previous words "moneys, credits," etc., were inserted by way of precaution and certainty, and not with the view of giving them any new and distinctive character that would take them out of the denomination of personal property. *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1, 17.

The term property, in a statutory definition of theft as a fraudulent taking of the personal property of another, includes money, bank bills, and all articles commonly known as personal property. *Davison v. State*, 12 Tex. App. 214.

"The words 'personal estate' or 'personal property' include goods, chattels real and personal, money, credits, investments, and the evidences thereof." Code, c. 13, § 17. "The words 'personal property,' as used in this chapter, shall include all fixtures attached to the land, if not included in the valuation of such land, entered in the proper land-book, and all things of value, movable and tangible, which are the subjects of ownership." Id. § 46. *State v. South Penn Oil Co.*, 42 W. Va. 80, 104, 24 S. E. 688, 697.

Hill's Ann. Code, § 2731, provides that the terms "personal estate" and "personal property" shall be construed to include household furniture, goods, chattels, moneys and gold dust on deposit, either within or without this state; all boats and vessels, whether at home or abroad, and all capital invested therein; all debts due or to become due from solvent debtors, whether on account, contract, note, mortgage, or otherwise. *Poppleton v. Yamhill County*, 23 Pac. 253, 255, 18 Or. 377, 7 L. R. A. 449.

"Personal property" is defined in Laws 1892, c. 677, § 4, as including chattels, money, things in action, and all written instruments themselves, as distinguished from rights or interests to which they relate, by which any right, interest, lien, or incumbrance in, to, or upon property, or any debt or financial obligation, is created, acknowledged, evidenced, transferred, discharged, or defeated wholly or in part, and everything except real property which may be the subject of ownership. In *re Jones' Estate*, 65 N. E. 570, 573, 172 N. Y. 575, 60 L. R. A. 476.

Under the express provision of Gen. St. 1889, p. 6846, the term "personal property" includes every tangible thing which is the subject of ownership; all tax-sale certificates, judgments, notes, bonds, mortgages, and evidences of debt secured by a lien on real estate. *Dykes v. Lockwood Mortg. Co.*, 43 Pac. 268, 270, 2 Kan. App. 217.

Personal property, by the express provisions of Gen. St. 1889, c. 107, § 2, includes every tangible thing which is subject to ownership, not forming a part or parcel of real estate; all tax-sale certificates, judgments, notes, bonds, mortgages, and evidences of debt; also the capital stock, undivided profits, and all assets of every corporation. *Kingman County Com'rs v. Leonard*, 46 Pac. 960, 57 Kan. 531, 57 Am. St. Rep. 347.

Section 63 of the general act concerning taxes (Revision, p. 1150) provides that the term "personal estate," as used in the act, shall be construed to include goods and chattels of every description, including steamboats and other vessels, money or other debts due the owner from solvent debtors, whether on contract, note, bond, mortgage, or book account, public stocks, and stocks in a corporation, whether such personal estate be within or without this state. *State v. Darcy*, 16 Atl. 160, 161, 51 N. J. Law (22 Vroom) 140, 2 L. R. A. 350.

Every kind of property that is not real is personal. Civ. Code Idaho 1901, § 2349; Rev. Codes N. D. 1899, § 3274; Rev. St. Okl. 1903, § 4025; Civ. Code S. D. 1903, § 190.

The term "personal property" includes everything which is subject to ownership not included with the meaning of the term "real estate" or "improvements." Pol. Code Cal. 1903, § 3617, subd. 4; Mills' Ann. St. Colo. 1891, § 3782, cl. 3; Pol. Code Idaho 1901, § 1313, subd. 4; Pol. Code Mont. 1895, § 3680, subd. 4; Comp. Laws N. M. 1897, § 4019; B. & C. Comp. § 5590; Rev. St. Utah 1898, § 2505.

Under the Hawaiian act of 1882, § 16, relative to taxation, the term "personal property" is expressly declared to be deemed to mean and include all household furniture and effects, goods, chattels, wares, and merchandise, of ships and vessels, whether at home or abroad, all moneys in hand, leasehold and chattel interests in lands and real estate, growing crops, public stocks and bonds, and all domesticated animals not specifically taxed; and it is held that under this definition a deed is not personal property. *McBryde v. Kala*, 6 Hawaii, 529, 531.

The words "personal property" include money, goods, chattels, things in action, and evidences of debt. Pen. Code Ariz. 1901, par. 7, subd. 12; Sand. & H. Dig. Ark. 1893, § 7208; Code Civ. Proc. Cal. 1903, § 17, subd.

3; Pol. Code Cal. 1903, § 17, subd. 3; Pen. Code Cal. 1903, § 7, subd. 12; Civ. Code Cal. 1903, § 14, subd. 3; Horner's Rev. St. Ind. 1901, § 1285; Aurora Nat. Bank v. Black, 29 N. E. 396, 397, 129 Ind. 595; Code Iowa 1897, § 48, subd. 9; Gen. St. Kan. 1901, § 7342, subd. 9; State v. Topeka Water Co., 60 Pac. 337, 342, 61 Kan. 547, 561; Rev. St. Mo. 1899, § 4160; Civ. Code Mont. 1895, § 4662, subd. 3; Pen. Code Mont. 1895, § 7, subd. 11; Code Civ. Proc. Mont. 1895, § 3463, subd. 3; Rev. Codes N. D. 1899, § 5135; Rev. St. Okl. 1903, § 2803; Code Civ. Proc. S. C. 1902, § 445; Civ. Code S. D. 1903, § 2469; Shannon's Code Tenn. 1896, § 63; Duke v. Hall, 68 Tenn. (9 Baxt.) 282, 286; Rev. St. Wis. 1898, § 4972; Hovey v. Elliot, 53 N. Y. Super. Ct. (2 Jones & S.) 331, 340; Campbell v. Perry, 9 N. Y. Supp. 330, 333, 56 Hun, 639.

"Personal property" is defined in Rev. St. 1894, § 1309, as including goods, chattels, evidences of debt, and things of action, but is made by the express terms of the section to apply only in the construction of the Code of Civil Procedure. State Board of Tax Com'rs v. Holliday, 49 N. E. 14, 16, 150 Ind. 216, 42 L. R. A. 826.

The term "personal property" shall be construed to mean goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation or any right or title to property, real or personal, shall be created, acknowledged, assigned, transferred, increased, defeated, discharged, or diminished. Gen. St. Kan. 1901, § 2312; Comp. Laws Mich. 1897, § 11,793; Gen. St. Minn. 1894, § 6842, subd. 15; Code Miss. 1892, § 1513; Rev. Codes N. D. 1899, § 7725; Rev. St. Okl. 1903, § 2698; Pen. Code S. D. 1903, § 820; Rev. St. Utah 1898, § 2498; State v. Barr, 28 Mo. App. 84, 85; People v. Stevens, 3 N. Y. Cr. R. 583, 586; People v. Loomis (N. Y.) 4 Denio, 380, 383.

The term "personal property" shall be held to mean and include all things, other than real property, which have any pecuniary value, and moneys, credits, and investments in any bonds, stocks, joint-stock companies, or otherwise. Civ. Code Ala. 1896, § 3906, subd. 2; Civ. Code S. C. 1902, § 265.

The words "personal estate" shall include chattels real and other estate such as, upon the death of the owner intestate, would devolve upon his personal representative. Ky. St. 1903, § 458; Code Va. 1887, § 5.

The words "personal property" include money, goods, chattels, things in action and evidences of debt, deeds and conveyances. Civ. Code Ala. 1896, § 2; Du Bois v. State, 50 Ala. 139, 140.

Personalty or personal estate includes all such property as is movable in its nature—in fact, everything having value inherent in itself, or the representation of value, and

not included in the definition of realty. Stocks representing shares in an incorporated company holding lands, or the franchise in or over lands, are personalty. Civ. Code Ga. 1895, § 3070.

The term "personal property," whenever used in the revenue act, shall be held to mean and include, first, every tangible thing, being the subject of ownership, animate or inanimate, other than money, and not forming a part of any parcel of real property; second, the capital stock, undivided profits, and all other means not forming a part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means, by whatsoever name the same may be designated, inclusive of every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name and description, used or designed to be used exclusively or partially in navigating any of the waters within or bordering on the state, or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office, or within any collector's district, in the state, or not. Ann. St. Ind. T. 1899, § 4900.

For the purpose of assessment, articles other than land and improvements shall be known as "personal property." Ky. St. 1903, § 2984.

The term "personal property," where used in the article relating to cities of the second class, shall include every tangible thing which is the subject of ownership, not forming a part or parcel of real property, and, where used in the article in its general sense, shall include all taxable property other than real property. Rev. St. Mo. 1899, § 5647.

The term "personal property," whenever used in the chapter relating to revenue, shall be held to mean and include bonds, stocks, moneys, credits, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means, by whatsoever name they may be designated; every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, whether such ship, vessel, or boat shall be within the jurisdiction of the state or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office or within any county of collector's district in the state or not; the stock of nurseries, growing on leased lands, or in the hands of nurserymen, which has been separated from the soil where growing, and every tangible thing, being subject of ownership, whether animate or in-

animate, and not forming any parcel of real property, as hereinbefore defined. Rev. St. Mo. 1899, § 9123.

The term "personal property" includes every tangible and intangible thing which is the subject of ownership, and not real property. Cobbey's Ann. St. Neb. 1903, § 10401.

The expression "personal property" signifies every kind of property which survives a decedent, other than real property, as defined in this subdivision, and includes a right of action conferred by special statutory provision upon an executor or administrator. Code Civ. Proc. N. Y. 1899, § 2514, subd. 13.

The term "personal property" includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien, or incumbrance in, to, or upon property, or any debt or financial obligation, is created, acknowledged, evidenced, transferred, discharged, or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership. Laws N. Y. 1892, c. 677, § 4.

The words "personal property" shall include moneys, goods, chattels, choses in action, and evidences of debt, including all things capable of ownership, not descendible to the heirs at law. Code N. C. 1883, § 3765, subd. 6; *Worth v. Wright*, 122 N. C. 335, 336, 29 S. E. 361.

"Personal property" includes all goods, chattels, moneys, credits, and effects, whosoever they may be; all ships, boats, and vessels, whether at home or abroad, and all capital invested therein; all moneys at interest, whether within or without the state, due the person to be taxed, and all other debts due such persons; all public stocks and securities; all stock in turnpikes, railroads, canals, and other corporations, except national banks out of the state, owned by the inhabitants of this state; all personal estate or moneyed corporations, whether the owner thereof resides in or out of the state, and the income of any annuity, unless the capital of such annuity be taxed within the state; all shares of stock in any bank organized, or that may be organized, under any law of the United States or in this state; and all improvements made by persons upon lands held by them under the laws of the United States, and all such improvements upon land, the title to which is still vested in any railroad company, and which is not used exclusively for railroad purposes, and the improvements of any other corporations whose property is not subject to the same mode and rule of taxation as other property. Rev. Codes N. D. 1899, § 1179.

As used in the chapter relating to taxation, the term "personal property" shall be

held to mean and include, first, every tangible thing, being the subject of ownership, whether animate or inanimate, other than money, and not forming a part of any parcel of real property; second, the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stocks, profits, or means, by whatever name the same may be designated, inclusive of every share or portion, right or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatever name or description, used or designated to be used either exclusively or partially in navigating in the waters within or bordering on this state, whether such ship, vessel, or boat shall be within the jurisdiction of this state or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office, or within any collector's district in this state, or not; third, money loaned on pledge or mortgage or real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely. Bates' Ann. St. Ohio 1904, § 2730.

Within the meaning of personal property which may be the subject of theft are included all domesticated animals and birds, when they are proved to be of any specific value. Pen. Code Tex. 1895, art. 867.

The words "personal estate" shall include all property other than real estate. V. S. 1894, § 10.

"Personal property, for the purposes of taxation, shall be construed to embrace and include, without specially defining or enumerating it, all goods, chattels, moneys, stocks, or estate; all improvements upon lands, the fee of which is still vested in the United States, or in the state of Washington, or in any railroad company or corporation, and all and singular of whatsoever kind, name, nature, and description, which the law may define or the courts interpret, declare and hold to be personal property, for the purpose of taxation, and as being subject to the laws, and under the jurisdiction of the courts of this state, whether the same be any marine craft, as ships and vessels, or other property holden under the laws and jurisdiction of the courts of this state, be the same at home or abroad; all credits, including accounts, notes, bonds, certificates of deposit, judgments, choses in action, and all other debts of whatsoever kind or nature, due or to become due (whether secured or not by mortgage or otherwise): Provided, however, that, in making up the amount of money or credits which any person is required to list or have listed or assessed, he will be entitled to deduct from the gross amount thereof all debts in good faith owing by him, but no

acknowledgment not founded on actual consideration, and no such acknowledgment made for the purpose of being so deducted, shall be considered a debt, within the intent of this section, but no person will be entitled to any deduction on account of any obligation of any kind given to any insurance company for the premiums of insurance, nor on account of any unpaid subscription to any institution, society, corporation, or company; and no person shall be entitled to any deduction on account of any indebtedness contracted for the purchase of United States bonds or other nontaxable property: provided, that credits shall be assessed at their true and actual value: provided, further, that mortgages and all credits for the purchase of real estate shall not be considered as property for the purposes of this chapter." Ballinger's Ann. Codes & St. Wash. 1897, § 1657.

The words "personal estate" or "personal property" include goods, chattels, real and personal, money, credits, investments, and evidences thereof. Code W. Va. 1899, p. 134, c. 13, § 17.

The words "personal property," as used in the chapter relating to the assessment of taxes, shall include all fixtures attached to land, if not included in the valuation of such land entered in the proper landbook; all things of value, movable and tangible, which are the subjects of ownership; and money, credits, and investments as defined. Code W. Va. 1899, p. 198, c. 29, § 46.

#### Bank note.

The term "personal property," in the statute defining robbery as the taking with force and violence from the person of another any money or personal property, with intent to steal or rob, includes bank notes. *Turner v. State*, 1 Ohio St. 422, 426.

#### Book.

As used in Laws 1866, p. 1079, § 5, exempting from taxation certain real estate, such as colleges, academies, etc., and certain goods and chattels, namely, "the furniture thereof and the personal property used therein," the words "personal property" meant chattels of a movable and tangible character, as the books of a college or public library. *First Reformed Dutch Church of New Brunswick v. Lyon*, 32 N. J. Law (3 Vroom) 300, 361.

#### Bridge.

The assessment of a tax against a bridge company, owning a bridge across the Mississippi river from Iowa to Illinois, by the county auditor (after the assessment lists for that year have passed from the assessor), under Code Iowa 1873, § 841, giving the county auditor power to correct the assess-

ment or taxbooks, where such assessment is made as on personal property, when the only property owned by the company is part of its bridge and the approach thereto, is void, since Code Iowa 1873, § 808, makes railroad bridges across the Mississippi river taxable as realty. *Keithsburg Bridge Co. v. McKay* (U. S.) 42 Fed. 427, 429.

#### Building.

While improvements put upon land ordinarily become part of the realty, there is no inexorable law that will prevent the owner from giving license to another to place a building on his land, and agreeing that it shall not thereby become the landowner's property, or part of the land. In *Lowenberg v. Bernd*, 47 Mo. 297, Judge Bliss said that, when one builds a house or fence or places any other erection upon the land of another with his permission, with the intent that it be held as the property of the builder, it continues personal property, and the owner may remove it when the license is withdrawn. *Brown v. Turner*, 20 S. W. 660, 661, 118 Mo. 27.

The general principle of law is that a building permanently fixed in the freehold becomes a part of it; that prima facie a house is real estate belonging to the owner of the land on which it stands, but it may be personal estate where it is erected by the builder with his own money and for his own exclusive use, as disconnected from the use of the land, and with the understanding of the owner of the land and the builder that it was thus erected and is removable at the pleasure of either; and this whether it is on rollers or not. *Curtiss v. Hoyt*, 19 Conn. 154, 165, 48 Am. Dec. 149.

"Personal property," as used in Rev. St. 1879, art. 2971, providing that a fire insurance policy in case of total loss shall be held to be a liquidated demand against the company for the full amount of such policy, and that the provisions of the article shall not apply to personal property, applies to a house erected by the owner on leased land. *Orient Ins. Co. v. Parlin & Orendorff Co.*, 38 S. W. 60, 61, 14 Tex. Civ. App. 512.

#### Check.

The words "personal property," as used in Pen. Code, § 211, declaring that robbery is the taking of personal property from the person of another by means of force, include things in action and evidences of debt. A conspiracy, therefore, to compel a person to sign his bank check, and then to take it from him forcibly, constitutes a conspiracy to rob. *People v. Richards*, 7 Pac. 828, 835, 67 Cal. 412, 56 Am. Rep. 716.

An unsatisfied check or bill of exchange is "personal property," within Pen. Code, § 528, making personal property, etc., the sub-

ject of larceny. *People v. Lovejoy*, 55 N. Y. Supp. 543, 544, 37 App. Div. 52.

#### Choses in action.

The term "personal property" is held to include choses in action. *Sherwood v. Sherwood*, 32 Conn. 1; *Buck v. Miller*, 47 N. E. 8, 9, 147 Ind. 580, 37 L. R. A. 384, 62 Am. St. Rep. 436; *Enzor v. Hurt*, 76 Ala. 595, 596; *Boyd v. City of Selma*, 11 South. 393, 96 Ala. 144, 18 L. R. A. 729; *Trimble v. City of Mt. Sterling (Ky.)* 12 S. W. 1066, 1067; *Cummings v. Cummings*, 51 Mo. 261, 264; *Engel v. State*, 5 Atl. 249, 252, 65 Md. 539; *Woodward v. Laporte*, 41 Atl. 443, 70 Vt. 399. Contra, see *Curtis v. Richland Tp.*, 23 N. W. 175, 176, 56 Mich. 478; *Crawford v. Schmitz*, 29 N. E. 40, 42, 139 Ill. 564; *Leonard v. Lawrence*, 32 N. J. Law (3 Vroom) 355, 356; *Wilmington & R. R. Co. v. Downward (Del.)* 32 Atl. 133, 134, 8 Houst. 227; *Vaughan v. Town of Murfreesborough*, 2 S. E. 676, 677, 96 N. C. 317, 60 Am. Rep. 413.

The provision in Rev. St. c. 74, § 5, respecting the recording of mortgages of personal property, applies only to goods and chattels capable of delivery, and not to defeasible or conditional assignments of choses in action. *Marsh v. Woodbury*, 42 Mass. (1 Metc.) 436.

#### Claim ex contractu or ex delicto.

An administrator has power and it is his duty to sell at public sale the personal property, and the term "personal property," according to its ordinary significance, as well as its statutory definition (Gen. St. p. 999, cl. 9), includes a claim existing in favor of an estate for services rendered. *Lappin v. Mumford*, 14 Kan. 16.

Within the meaning of V. S. 2446, providing that "actions of trespass on the case for damages done to \* \* \* personal estate shall survive," the right of a father to the service of his minor daughter is not personal estate, and his action for her seduction does not survive. *Davis v. Carpenter*, 72 Vt. 259, 47 Atl. 778.

An assignment conveying to plaintiff all the goods, wares, merchandise, and personal property of every kind belonging to the assignor, means visible, tangible property of the same nature as the property specified, and hence it does not pass an interest under a contract. *Kendall v. Almy (U. S.)* 14 Fed. Cas. 295.

Under Rev. St. pt. 1, p. 387, c. 13, tit. 1, § 3, the terms "personal estate" and "personal property," when they occur in that chapter, are to be construed to include all debts due from solvent debtors, whether on account of contract, note, bond, or mortgage, and are taxable under such act. These terms, therefore, include the right which a vendor has to enforce a contract for the sale

of real estate. *People v. Willis*, 133 N. Y. 383, 31 N. E. 225.

The phrase "personal property," as used in a deed by a railroad of all real estate and all personal property, included an equitable or contingent right to receive a possible surplus remaining from the proceeds of a foreclosure sale after satisfaction of the debt. *Gray v. Massachusetts Cent. R. Co.*, 50 N. E. 549, 555, 171 Mass. 116.

#### Claim for land taken under eminent domain.

"Personal estate and personal property," as used by the tax law (Laws 1896, c. 908, § 2, subd. 4), include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond, or mortgage, and debts and obligations for the payment of money due or owing to persons residing within the state, however secured, or wherever such securities shall be held. The claim of an owner of land acquired by the city of New York for a public purpose for compensation for such taking is personal estate and personal property, within this definition, and hence constitutes a property right subject to taxation. *Lyon v. Halsted*, 49 N. Y. Supp. 685, 26 App. Div. 316, 318.

#### Contents of safe.

A devise of all the personal property on testator's farm, including the personal property in the house, would naturally include and carry the contents of a safe. Property is divided into two general divisions—real property and personal property. Had the will failed to dispose of the contents of the safe by a residuary clause, there are authorities justifying giving to such words their broadest meaning, but it is not necessary to adopt that rule in this case, for, if the property in question was not bequeathed to the devisee, it passed to the legatees mentioned in the residuary clause. The testator must be considered to have had in mind, in framing the clause in question, that class of property necessary to carry on the farm which he had also bequeathed. Had he intended to give the contents of the safe, he would have specifically described them, especially as they composed a larger part of his estate; and, in speaking of property consisting of certificates of deposit and money in bank, it is not usual to describe it as personal property. *Ball v. Dixon*, 81 N. Y. Supp. 990, 991, 83 Hun. 344.

#### Corporation stock.

Shares of stock of corporations are property, and by Code, § 3906, subd. 2, come within the term "personal property." *State v. Kidd*, 28 South. 480, 481, 125 Ala. 413.

Shares of stock in a foreign corporation are personal property, and hence subject to taxation as such. *Worth v. Ashe County Com'rs*, 90 N. C. 409, 411.

Shares of stock in a company are personal property, under Gen. St. § 241, and Mills' Ann. St. § 480. *McClaskey v. Lake View Mining & Tunneling Co.*, 31 Pac. 333, 334, 18 Colo. 65.

A share of stock in a corporation is personal estate, and, in the absence of any statute to the contrary, is taxable to the owner as other personal estate at the place of his residence, whether the corporation be foreign or domestic. *Greenleaf v. Board of Review of Morgan County*, 56 N. E. 295, 184 Ill. 226, 75 Am. St. Rep. 168.

Gen. St. c. 39, § 10, declaring that "personal property, for the purposes of taxation, shall be deemed to include all goods, chattels, debts due from solvent persons, moneys, and effects, wherever they may be; \* \* \* all stocks or shares in any bank or banking association; in any turnpike, bridge, or other corporation within or without the state, except such as are exempted from taxation by the laws of the state"—clearly makes the shares of any corporation, whether manufacturing or other, whether without or within the state, liable to taxation, if the owner is an inhabitant of the state, unless such shares are exempted from taxation by the laws of the state. *Dyer v. Osborne*, 11 R. I. 321, 323, 23 Am. Rep. 460.

Stock held in domestic corporations is declared to be personal property by Gen. St. 1878, c. 34, § 114 (Gen. St. 1894, § 2799). *Puget Sound Nat. Bank of Everett v. Mather*, 60 Minn. 362, 363, 62 N. W. 396.

The term "personal property," in the statute of frauds, providing that no contract for the sale of personal property, goods, wares, or merchandise shall be good unless the buyer shall accept the goods, or a part of them, so sold, and shall actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of said bargain or contract be made and signed by the parties to be charged, or their agent, includes corporation stock. *Southern Life Ins. & Trust Co. v. Cole*, 4 Fla. 359, 378.

Under Code, § 2476, giving to the surrogate court of each county jurisdiction to grant letters testamentary, where the decedent died without the state, leaving personal property within that county, and no other, shares of stock are personal property within the county where the corporate property is located. *In re Fitch's Estate*, 54 N. E. 701, 703, 160 N. Y. 87.

"Personal property" is defined by the law as including the capital stock, undivided property, and all of the assets of any company, incorporated or unincorporated, and every share or interest in such stock. *Foster-Cherry Commission Co. v. Caskey*, 72 Pac. 268, 269, 66 Kan. 600.

#### Credits.

The term "personal property," in Revenue Act, § 24, required persons to list their personal property for taxation, and providing the manner of assessing notes, accounts, bonds, and moneys, when construed in connection with section 25, providing that such schedules shall set forth the amount of credits, shall be construed to include credits. *Sellers v. Barrett*, 57 N. E. 422, 424, 185 Ill. 466.

#### Crop.

Formerly the term "personal property" was understood to embrace movables only, which, being of a perishable character, were much less regarded by the law than things which in their nature were immovable and more permanent. Kent's definition of "personal property" is that it includes all subjects of property not of a freehold nature, nor descendible to the heirs at law. According to this definition, a growing crop of corn is personal estate, for the rule is well established that on the death of the owner it goes to the executor or administrator, and not to the heir. *Reed v. Johnson*, 14 Ill. (4 Peck) 257, 258 (citing *Williams' Ex'rs*, 491).

An unripe growing crop of grain is personal property, and is subject to attachment as such in the manner prescribed for the attachment of personal property not capable of manual delivery. *Raventas v. Green*, 57 Cal. 254, 255.

"Personal property," as found in Code, § 4355, providing that an indictment will lie against one tenant in common of personal property for a fraudulent conversion of his co-tenant's undivided interest, does not include a growing crop of corn. *McCall v. State*, 69 Ala. 227, 228.

Growing grain is personal property. *Hershey v. Metzgar*, 90 Pa. 217, 218.

Grain growing or grown is personal property. *Stambaugh v. Yeates* (Pa.) 2 Rawle, 161, 162.

"Personal property" not only includes property which is movable, but more. It is a more comprehensive term than "movable property." Thus crops growing on land are held to be personal property, so far as not to be considered an interest in land, under the statute of frauds. Annual crops, if fit for harvest, may acquire the character and incidents of personal property so far as to be subject to execution as personal chattels. But crops do not become personal property, as a general rule, until they are ready to be harvested until that time they are regarded as partaking of the realty. *Hardeman v. State*, 16 Tex. App. 1, 5, 49 Am. Rep. 821.

Standing corn attached to the land and not cut is not personal property, but savors

of, or rather is a part of, the realty. It is true that for certain purposes, and to a certain extent, standing corn is considered by the common law as personalty. It is liable to be taken and sold under execution, and, as between the executor and heir, it belongs to the executor; but in no other case does the common law view it as personalty. A theft of standing corn is not a theft of personalty. *State v. Helmes*, 27 N. C. 364, 365.

It is well settled in this commonwealth that growing crops are personal property, subject, however, to pass with and as appurtenant to the realty unless severed by reservation or exception therefrom. *Bear v. Bitzer*, 16 Pa. (4 Harris) 178, 55 Am. Dec. 490; *Wilkins v. Vashblinder* (Pa.) 7 Watts, 379. Such was the rule of the common law, and uniformly held in England not to have been altered by the statute against fraud and perjuries. *Backenstoss v. Stabler's Adm'rs*, 13 Pa. (9 Casey) 251, 254, 75 Am. Dec. 592.

#### Debts.

The term "personal property," used in a will, held to include debts due the testator; such debts being all the personal property he had, except his household furniture, and certain money in a bank. *Ritch v. Talbot*, 50 Atl. 42, 45, 74 Conn. 137.

Rev. Laws, § 288, provides that, in assessing stockholders for stock in a manufacturing corporation or company, the value of its real or personal estate represented by such stock and taxes in this state or elsewhere shall be deducted from the whole value of its stock, and the remaining value only shall be taxed. Held, that under this statute the personal estate to be so deducted included all personal estate owned by the corporation in this state, and that debts due to the corporation, over and above debts due by it, were personal estate, within the meaning of the statute. *Waite v. Hyde Park Lumber Co.*, 25 Atl. 1089, 1090, 65 Vt. 103.

"Personal estate," within the meaning of a power to assess and collect a tax upon the personal estate, includes a power to tax money loaned, as "personal estate" is a term of similar import to the term "personal property," which is declared by statute to include all moneys on hand and moneys loaned, whether within or without the state. *Town of Jacksonville v. McConnel*, 12 Ill. (2 Peck) 138, 140.

"Personal property" includes everything which is the subject of property, not of a freehold nature. Where a woman to whom a firm was indebted by note married one of the partners, who settled her estate on her by marriage settlement, waiving all right to all her property, real and personal, the note was a subsisting debt, and personal property, and she was, in equity, entitled to recover of her husband and his partner. *Bennett v. Winfield*, 51 Tenn. (4 Heisk.) 440, 443.

#### Deposit in bank.

A bequest of "all my personal property, except notes, bonds, and accounts," included a deposit in a savings bank, belonging to the testator. *Gale v. Drake*, 51 N. H. 78.

#### Domestic animal.

In construing a statute imposing a penalty on any person who shall knowingly, etc., cut down or remove any tree growing or being on the land of another, or destroy or injure any such tree, or any building, fence, or other improvement, or the soil or growing crop on the land of another, or property, real or personal, belonging to another, as applied to an indictment for shooting and killing hogs, the property of another, the court said: "The Legislature did not intend to limit the operation of the statute to cases of trespass upon the property of the same kind as that specially enumerated in the statute, but by the words 'property, real or personal,' therein contained, it intended to embrace living domestic animals; the usual and ordinary effect of these general words not being confined by the special enumeration of the preceding part of the statute." *Commonwealth v. Percavil* (Va.) 4 Leigh, 686, 687.

#### Same—Dog.

A dog is personal property, within the meaning of 2 Rev. St. p. 690, § 1, providing that every person who shall be convicted of stealing the personal property of another, of the value of \$25 or under, shall be guilty of petit larceny. *Mullaly v. People*, 80 N. Y. 365, 368.

A dog is included within the term "personal property," in the statute declaring all such property to be the subject of larceny. *People v. Campbell* (N. Y.) 4 Parker, Cr. R. 386, 393.

#### Same—Hen.

Destruction or injury of personal property, within the meaning of Gen. St. c. 161, § 85, which provides a punishment for willful and malicious destruction or injury of personal property of another in any manner or by any means not particularly described or mentioned in the chapter, includes poisoning the hens of another, notwithstanding the provisions of section 80 punishing the poisoning of horses, cattle, or other beasts. *Commonwealth v. Falvey*, 108 Mass. 304, 306.

#### Draft.

The term "personal property" is sufficiently comprehensive to include a draft for the payment of money. *Morse v. Slason*, 16 Vt. 319, 325; *La Crosse Nat. Bank v. Wilson*, 43 N. W. 153, 154, 74 Wis. 391.

#### Elevator.

Gen. Laws 1876, c. 4, declares that elevators on the line of any railroad, not in

good faith owned and operated and exclusively controlled by the railroad company, shall be deemed personal property for the purposes of taxation, and shall be listed and assessed in the name of the owner, if known, and, if not, shall be listed and assessed as "owners unknown." Gen. Laws 1878, c. 11, § 16, subd. 29, requires the lists of personal property for taxation to set forth the value of all elevators on lands the title of which is vested in any railroad company. Held, that these statutes related only to elevators belonging to others than railroad companies, standing on the lands of such companies, and a grain elevator standing on the lands of a railroad company owned by it and constituting a part of its real estate was not taxable as personal property of the corporation. *Chicago, M. & St. P. Ry. Co. v. Houston County*, 38 N. W. 619, 620, 38 Minn. 531.

#### **Good will.**

Good will is not personal property, for the purpose of taxation. *People v. Dederick*, 55 N. E. 927, 930, 161 N. Y. 195.

#### **Ice on pond.**

A sale of ice already formed upon a pond or stream is a sale of personal property, and not of real estate. *Higgins v. Kusterer*, 2 N. W. 13, 41 Mich. 318, 32 Am. Rep. 160.

#### **Income.**

"Real or personal estate," as used in a charter of a municipal corporation authorizing the city to tax real or personal estate, does not include income. *City of Savannah v. Hartridge*, 8 Ga. 23, 28.

#### **Insurance policy.**

An assignment for the benefit of creditors of all the personal property, assets, and effects of a firm does not carry with it insurance policies thereon. *White v. Robbins*, 21 Minn. 370, 372.

A policy of insurance, which at the time of its assignment had no surrender value, is not personal property within Ky. St. § 2028, providing that a gift, transfer, or assignment of personal property between husband and wife shall not be valid, as to third persons, unless in writing, and acknowledged and recorded as chattel mortgages are. *Morehead's Adm'r v. Mayfield*, 58 S. W. 473, 474, 109 Ky. 51.

The phrase, in a will, "to be paid out of my personal estate," cannot be construed to include the proceeds of a life insurance policy. *Golder v. Chandler*, 32 Atl. 784, 786, 87 Me. 63.

#### **Land.**

The term "personal property" will be regarded, in law, as including land required

by law, in the carrying out of the terms of a will, to be reduced to money. *Nevitt v. Woodburn*, 51 N. E. 593, 595, 175 Ill. 378.

#### **Land certificate.**

A land certificate, while it symbolizes the right to acquire land, is but personal property. There is a wide difference between a mere right to acquire land, and the land itself afterwards acquired by virtue of that right. *Collins v. Durward*, 23 S. W. 561, 562, 4 Tex. Civ. App. 339.

#### **Leasehold.**

A lease for a term of years is personal property. *Choate v. Tighe*, 57 Tenn. (10 Heisk.) 621, 624.

A lease for years is a chattel real, and, being less than a freehold, is considered as personal estate or property, and, in statutory interpretation, is not included under the word "land," or the phrase "real estate" or "real property," but is included in the phrase "personal property," or the word "chattels." *Meni v. Rathbone*, 21 Ind. 454, 467. See, also, *Barr v. Binford* (Ind.) 6 Blackf. 335, 336, 38 Am. Dec. 146.

"Leases for years have a definite legal character as chattels. Although called 'estates in land,' they have none of their characteristics. Originally the only remedy for ouster was an action for damages. They did not formerly, nor do they now, pass to the heir or personal representatives. In the absence of statute, they may be transferred without any of the formalities required for the conveyance of realty. Leases are personal property, within the meaning of Tax Law, § 220, imposing a tax on the transfer by intestates' succession of any property of the value of \$500 or more, and section 221, exempting transfers to children, unless it is of personal property of the value of \$1,000 or more; and especially is this true in view of section 2 of subdivision 4, declaring that the term 'personal property' includes chattels." *In re Althause's Estate*, 71 N. Y. Supp. 445, 447, 63 App. Div. 252.

A lease is property, and not mere evidence of liability, and therefore a corporation may make a lease which runs beyond the term of its corporate existence. *Brown v. Schleier* (U. S.) 112 Fed. 577, 581.

Under Laws 1892, c. 677, defining "personal property" as including chattels and everything except real property, a lease for a term of years is personal property. *State Trust Co. v. Casino Co.*, 41 N. Y. Supp. 1, 5, 18 Misc. Rep. 327.

A lease of land for a term of years is personal property, the title to which on the death of the holder passes to the administrator of decedent, and not to his heirs.



Mark v. North, 57 N. E. 902, 903, 155 Ind. 575.

A lease for years is a chattel real, and, being less than a freehold, is considered as personal estate or property, and, in statutory interpretation, is not included under the word "land," or the phrase "real estate" or "real property," but is included in the phrase "personal property" or the word "chattel." Meni v. Rathbone, 21 Ind. 454, 467.

#### **Liquor tax certificate.**

The term "personal property" is defined by the statutory construction act of 1892 as including everything except real property which may be the subject of ownership. A liquor tax certificate which may be salable and assignable under the liquor tax law is personal property, within the meaning of Pen. Code, § 571, making the fraudulent disposition of personal property by the mortgagor thereof a misdemeanor. People v. Durante, 19 App. Div. 292, 293, 45 N. Y. Supp. 1073.

#### **Membership in newspaper association.**

Mills' Ann. St. § 3782, defines "personal property" to include everything which is the subject of ownership not included within the term "real estate." Under this section a newspaper contract of membership in an association, the object of which was a reciprocal exchange of local and general news—such newspaper paying its proportion of its expense incident to the maintenance of the association, but having no right of exclusive use of its membership, and no power to assign the same without the consent of the association—was not personal property. Arapahoe County Com'rs v. Rocky Mountain News Printing Co., 61 Pac. 494, 497, 15 Colo. App. 189.

#### **Mining claim.**

The revenue law provides that the term "land," as used in the law, shall not be construed to include mining claims; and hence such claims on government property are not lands, but are subject to taxation as personal property. Waller v. Hughes (Ariz.) 11 Pac. 122, 126.

#### **Money.**

Personal property, for the purposes of taxation, includes money. Schmidt v. Falley, 47 N. E. 326, 327, 148 Ind. 150, 37 L. R. A. 442; Town of Paris v. Farmers' Bank of Missouri, 30 Mo. 575, 578; State v. Gaylord, 41 N. W. 521, 523, 73 Wis. 316.

Money will pass under a devise of personal property. Fry v. Feamster, 15 S. E. 253, 256, 36 W. Va. 454. Contra, see Andrews v. Schoppe, 24 Atl. 805, 807, 84 Me. 170.

Money is personal property, within the exemption laws. Chilcote v. Conley, 36 Ohio St. 545, 548.

The possession of personal property is *prima facie* evidence of ownership, and the term "personal property" applies as well to notes and money as to goods and chattels. Brownell v. Dixon, 37 Ill. 197, 205.

The term "personal property," in a constitutional provision exempting personal property from execution, includes money. Williamson v. Harris, 57 Ala. 40, 42, 29 Am. Rep. 707.

Money is "personal property," within Laws 1842, c. 157, allowing a widow from the estate of her husband other personal property to the value of \$150. In re Durscheidt's Estate, 19 N. Y. Supp. 973, 65 Hun, 136.

The words "personal property," used in Code Civ. Proc. § 2469, relating to receivers' titles to such property, include money. Zimmer v. Miller, 40 N. Y. Supp. 886, 889, 8 App. Div. 556.

#### **Mortgage.**

Mortgages on real estate are taxable as personal property. Gallatin County v. Beattie, 3 Mont. 173, 174; People v. Sanilac County Sup'rs, 38 N. W. 639, 642, 71 Mich. 16; Territory v. Co-operative Building & Loan Ass'n, 62 Pac. 1097, 1098, 10 N. M. 337.

#### **Postage stamp.**

The phrase "personal property belonging to the United States," as found in Rev. St. § 5456 [U. S. Comp. St. 1901, p. 3683], providing punishment for any person who shall rob another of any personal property belonging to the United States, embraces postage stamps remaining in the possession of the government, unissued. Jolly v. United States, 18 Sup. Ct. 624, 625, 170 U. S. 402, 42 L. Ed. 1085.

#### **Promissory note.**

A promissory note is personal property. Cummings v. Cummings, 51 Mo. 261, 264; Boyd v. City of Selma, 11 South. 393, 96 Ala. 144, 16 L. R. A. 729; Fling v. Goodall, 40 N. H. 208; People v. Reed, 11 Pac. 676, 678, 70 Cal. 529; Pacific Trust Co. v. Dorsey, 12 Pac. 49, 50, 72 Cal. 55; Bush v. Groomes, 24 N. E. 81, 82, 125 Ind. 14; Nordyke v. Charlton, 79 N. W. 136, 137, 108 Iowa, 414; La Crosse Nat. Bank v. Wilson, 43 N. W. 153, 154, 74 Wis. 391.

Under Code, § 3765, a promissory note or duebill is personal property. State v. Sneed, 28 S. E. 365, 121 N. C. 614.

The term "personal property," as used in Act April 23, 1873, authorizing a widow to select personal property not exceeding a specified amount, includes promissory notes be-

longing to the deceased husband; and therefore the widow may select promissory notes, and on her making such selection the personal representative of the deceased must turn them over to her. *Darden v. Reese*, 62 Ala. 311, 312.

In construing a bank charter providing that the bank should be capable, in law, of "purchasing and possessing lands, tenements, and hereditaments, and personal estate of any kind whatever," the court said that it was a question of at least much doubt whether the words "personal estate of any kind whatever," taken alone, would embrace promissory notes, and that a contrary opinion would seem to be the result of the authorities in which the question has been involved. *McIntyre v. Ingraham*, 35 Miss. 25, 53.

#### **Property attached to realty.**

Machinery placed by a tenant in a building, and fastened to the floor by cleats or bolts in such a manner that it can be removed without injury to the building, is personal property, and is not covered by a mortgage given on the land and building while the tenant was in possession. *Bartlett v. Haviland*, 52 N. W. 1008, 1009, 92 Mich. 552.

It is a general principle that a fixture erected by a tenant on the demised premises for the purpose of carrying on his trade is personal property. Under this principle, a steam engine set up by a tenant on the demised premises, and used in lieu of horse power for carrying on the manufacture of salt, was personal property. *Lemar v. Miles* (Pa.) 4 Watts, 330, 333.

Ordinarily the distinction between real estate and personal property exists in the nature of the thing itself, and does not depend upon the intention of the parties with respect to it; but, where things originally personal in their nature are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, they are subject to the intention of the parties, who may agree that they shall remain personalty and be subject to removal. *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.* (U. S.) 11 Fed. 1, 7.

Where it does not appear whether a pump and pipe, balance and scales, and a beer pump were annexed to the freehold at all, or, if so, in what manner, they will be considered as *prima facie* personal property, and not fixtures, and as such given to the executors or administrators. *Hovey v. Smith* (N. Y.) 1 Barb. 372, 376.

#### **Railroad track and superstructure.**

By Act Feb. 14, 1855, amendatory of the revenue law, and directing that the track or superstructure of a railroad shall be denominated fixed and stationary personal property, the Legislature evidently intended to create

a species of personal property not before known to the law, and with the purpose, as we think, of subjecting it in certain contingencies to a separation from the soil on which it may be fixed. *Maus v. Logansport, P. & B. R. Co.*, 27 Ill. (17 Peck) 77, 83.

#### **Rents.**

Rents not due on leases for years are not taxable as personal property. *People v. McComber*, 7 N. Y. Supp. 71, 72.

#### **Right to work.**

The word "property" is defined by the Penal Code to include both real and personal property; but it is held that under Pen. Code, § 7, providing that "the words 'personal property' shall include money, goods, chattels, things in action, and evidences of debt," an employé's right to work is not property, so that a complaint charging a foreman with extorting money from an employé by a threat to discharge him did not charge the crime of extortion, defined by Pen. Code, § 911, declaring that fear such as will constitute extortion may be induced by a threat to do an unlawful injury to the person or property of the individual threatened. *In re McCane*, 73 Pac. 1106, 29 Mont. 28.

#### **Rolling stock.**

See "Rolling Stock."

#### **Salary.**

Incomes and profits, labor, wages, or hire, are included under the nomen generalissimum of "personal property," for the right, being attached to a man, and for which, if withheld from him, he has no other remedy, but by a personal action, may very properly and emphatically be denominated personal property. The salary of an officer of a bank was personal property, under a city ordinance laying a tax on "all profit or income arising from the pursuit of any faculty, profession or occupation, trade or employment." *Lining v. City Council of Charleston* (S. C.) 1 McCord, 345, 349.

#### **Scrape.**

The term "personal property" includes scrape, which is crude turpentine formed on the body of the tree. *Lewis v. McNatt*, 65 N. C. 63, 65.

#### **Seat in stock exchange.**

A seat in the New York Stock Exchange is not personal property, under the somewhat restricted definition of the tax law (Laws 1896, c. 908, § 2). *In re Hellman's Estate*, 79 N. Y. Supp. 201, 202, 77 App. Div. 355.

#### **Ship.**

A vessel is personal property, within the statute authorizing any person owning per-

sonal property in common with another, at his election, to have a partition thereof. *Reynolds v. Nielson*, 93 N. W. 453, 456, 116 Wis. 483, 96 Am. St. Rep. 1000.

#### Slave.

"It has been frequently said by this court that the phrase 'personal estate,' in wills or contracts, without any other restrictive expression or provision, should be construed as embracing slaves." *Beatty v. Judy*, 31 Ky. (1 Dana) 101, 102 (citing *Plumpton v. Cook*, 11 Ky. [2 A. K. Marsh.] 450; *Chinn v. Respess*, 17 Ky. [1 T. B. Mon.] 28).

#### Timber.

A contract in writing to sell all the timber on certain land of the vendor at a certain price per cord, to be paid as fast as used, is a contract for the timber cut down and corded, and hence is one in regard to personalty. *New York & E. T. Iron Co. v. Greene County Iron Co.*, 58 Tenn. (11 Heisk.) 434, 443.

Under Pub. Acts 1885, No. 153 (Tax Law) § 2, providing that "personal property shall include all goods and chattels within the state, all ships, boats," etc., standing timber, owned separately from the land, is not assessable as personal property. *Fletcher v. Alcona Tp.*, 40 N. W. 36, 37, 72 Mich. 18.

#### Water mains and telegraph wires.

There are authorities which hold that the mains of a gas company are appurtenant to its lots, and are taxable as realty, unless it is otherwise provided by statute. *Capitol City Gaslight Co. v. Charter Oak Ins. Co.*, 51 Iowa, 31, 50 N. W. 579; *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621. Under the doctrine of such authorities, it would seem that water mains and electric wires should be assessed as part of the realty where there is no statutory provision directing otherwise; and in Iowa such water mains have been held to be real estate, and treated as appurtenances to the waterworks. *Appeal of Des Moines Water Co.*, 48 Iowa, 324. There are other authorities, however, which hold that the gas mains in a city are personalty. In *People v. Brooklyn Board of Assessors*, 39 N. Y. 81, it was said that "the mains are not 'real estate,' as that term is defined in the statute regulating the assessment of taxes, and I do not think they can be held as fixtures, under the common-law doctrine on that subject." In *Memphis Gaslight Co. v. State*, 46 Tenn. (6 Cold.) 310, 98 Am. Dec. 452, the court says: "Pipes laid through the city, under the public streets, by permission of the corporate authorities, do not become the property of the city, or a part of the realty. They are personal property, and the property of the company." In this conflict of authorities, we are inclined to hold that water mains and telegraph wires are

personalty. *Shelbyville Water Co. v. People*, 30 N. E. 678, 679, 140 Ill. 545, 16 L. R. A. 505.

#### PERSONAL RELEASE.

According to Pothier there are two kinds of release, one called a "real release," and the other a "personal discharge." A real release is where the creditor declares that he considers the debt as acquitted. It is equivalent to a payment, and renders the thing no longer due, and consequently it liberates all the debtors of it, as there can be no debtors without something due. A personal release merely discharges the debtor from his obligation, and extinguishes the debt indirectly, where the debtor to whom it is granted was a sole principal, because there can be no debt without a debtor. But if there are two or more debtors in solido, a discharge of one of them does not extinguish the debt. It only liberates the person to whom it is given. The debt is distinguished, however, as to the part of the person to whom the discharge was given, and the other only remains obliged for the remainder. *Booth v. Kinsey* (Va.) 8 Grat. 560, 568 (citing Pothier, p. 111, c. 3, art. 2, §§ 1, 11).

#### PERSONAL REPRESENTATIVE.

The terms "legal representative" and "personal representative," in their commonly accepted sense, mean administrator or executor, but this is not the only definition; they may mean heirs, next of kin, or descendants, and sometimes assignor or grantee. The sense in which the term is to be understood depends somewhat on the intention of the party using it, and is to be gathered not always from the instrument itself, but from the surrounding circumstances. *Griswold v. Sawyer*, 26 N. E. 464, 465, 125 N. Y. 411.

The words "personal representative" signify the executor and administrator of a deceased person, or the officer or other person appointed to take charge of his estate. *Sand & H. Dig. Ark.* 1893, § 7213.

In the construction of statutes the words "personal representatives" shall be construed to include the executor or administrator, or a sheriff or other officer who is required by law, and is ordered by the court, to act when no person will qualify as executor or administrator. *Ky. St.* 1903, § 449.

The words "personal representative" shall be construed to include the executor of a will or the administrator of the estate of a decedent, the administrator of such estate with the will annexed; the administrator of such estate, unadministered by a former representative, whether there be a will or not, a sheriff, sergeant, or other officer who is, under the order of a court of probate, to

take into his possession the estate of a decedent and administer the same, and every other curator or committee of a decedent's estate for or against whom suits may be brought for cause of action which accrued to or against the decedent. Code Va. 1887, § 5.

The words "personal representative" include the executor of a will, the administrator of the estate of a deceased person, the administrator of such estate with the will annexed, the administrator de bonis non of such estate, whether there be a will or not, the sheriff or other officer lawfully charged with the administration of an estate of a deceased person, and every other curator or committee of a decedent's estate for or against whom suits may be brought for causes of action which accrued to or against such decedent. Code W. Va. 1899, p. 133, c. 13, § 17.

The words "personal representatives," as used in Rev. St. 1899, § 4355, providing that all mortgages of real or personal property, or both, with powers of sale in the mortgagee, and all sales made by such mortgagee or his "personal representatives" in pursuance of the provisions of such mortgages, shall be valid and binding, includes the mortgagor's grantees, immediate or remote. Wells v. Bente, 86 Mo. App. 264, 268.

#### Administrator or executor.

One's personal representatives are his executor or his administrator. Valentine v. Tantom (Del.) 32 Atl. 531, 7 Houst. 402.

"Personal representative," as used in Comp. Laws 1885, c. 68, § 5, authorizing a mortgage of real property to be discharged by an entry on the margin of the record signed by the personal representative, etc., of the mortgagee, means his executor or administrator. O'Neill v. Douthitt, 20 Pac. 493, 496, 40 Kan. 689.

A personal representative means an executor or administrator, and there is always a record in the probate judge's office showing who were executors and administrators and for whose estate they act. O'Neill v. Douthitt, 20 Pac. 493, 496, 40 Kan. 689.

The phrase "personal representative" of a deceased person, means his executor or administrator, who, on suing in his representative capacity, stands in the place of the decedent, claiming such rights only as the law permits him to claim for the benefit of the decedent's estate. Adams v. Northern Pac. R. Co. (U. S.) 95 Fed. 938, 940.

The ordinary meaning of the words "representative," "legal representative," "personal representative," is that they refer to the person constituted representative by the proper court, and the burden is upon those

attempting to maintain a different construction to show a different meaning. In the absence of anything appearing in the context, these words, found in a statute or written instrument, must be held to mean the administrator or executor. The heir is not technically a representative of the deceased, unless made so by express appointment or reasonable intentment. He succeeds to property and legal rights by inheritance, and takes the estate because of the death of the owner, but the administrator or executor represents the original owner in the settlement of his estate. Thompson v. United States (U. S.) 20 Ct. Cl. 276, 278.

The term "personal representative" in the evidence act, providing that a party is not incompetent as a witness by reason of the death of the person whose estate is to be affected by the result of the suit, unless the suit is prosecuted or defended by a personal representative, embraces only an administrator, executor, or other person entitled to represent a decedent in the ownership or management of his general estate. Austin v. Collier, 37 S. E. 434, 436, 112 Ga. 247.

An executor is a "personal representative" of his testator, within 4 Rev. St. par. 2, § 28, c. 3, providing that a recorded mortgage shall be discharged by the officer in whose custody it shall be on presentation of a certificate signed by the personal representative of the mortgagee. People v. Fitzgerald, 21 N. Y. Supp. 911.

Each of the terms "legal representatives" and "personal representatives," in its strict literal acceptation, evidently means executors or administrators. Johnson v. Van Epps, 110 Ill. 551, 560.

The ordinary meaning of the term "personal representatives" is executors and administrators, and where a life policy is payable to the beneficiary, his legal representatives or assigns, the title vests in his widow as executrix. Leonard v. Harner 66 N. E. 2, 173 N. Y. 352.

"Personal representatives," as used in Pub. St. c. 68, § 3, authorizing an action by a personal representative of a person whose death was occasioned by the wrongful act of another, includes an administrator. Boutiller v. The Milwaukee, 8 Minn. 97, 101 (Gil. 72, 76).

The words "personal representatives" signify the executor or administrator of a deceased person, or the officer or other person appointed to take charge of his estate. Rev. St. Ark. § 6353; St. Louis, I. M. & S. Ry. Co. v. McCormick, 9 S. W. 540, 541, 71 Tex. 660, 1 L. R. A. 804.

The words "personal representatives," as used in Code Civ. Proc. § 836, providing

for a waiver of the privilege of physicians as to information acquired in a professional capacity by the personal representatives of the deceased, applies only to executors and administrators. *Bell v. Supreme Lodge Knights of Honor*, 80 N. Y. Supp. 751, 754, 80 App. Div. 609.

The term "personal representative," in the statutes of Kansas relative to death by wrongful act, means executor or administrator. *Oates v. Union Pac. Ry. Co.*, 16 S. W. 487, 488, 104 Mo. 514, 24 Am. St. Rep. 348.

The primary sense of the word "representatives," when used in a bequest of personal property, is the same as that of legal representatives or personal representatives and each of them is equivalent to "executors" or "administrators." *Brent v. Washington's Adm'r* (Va.) 18 Grat. 526, 533.

The term "personal representative," when applied to those who represent a decedent, includes executors and administrators, unless the context implies heirs and distributees. *Shannon's Code Tenn.* 1896, § 68.

#### Same—Foreign administrator.

The words "personal representative," as used in Gen. St. Ky. c. 57, p. 550, giving a right of action for damages to the personal representative of any person whose life is lost by the negligence of a railroad company, etc., to be pursued in the same manner that the person himself might have done for any injury where death did not ensue, are not limited to a personal representative appointed in and by the state of Kentucky, but meaning any one appointed in any state, the action being transitory. *Marvin v. Maysville St. R. & Transfer Co.* (U. S.) 49 Fed. 436, 437.

Under Gen. St. Ky. c. 57, § 1, giving the personal representative a right of action for the wrongful death of his decedent, it is held that a foreign administrator is not a "personal representative" within the meaning of the statute. *Maysville St. R. & Transfer Co. v. Marvin* (U. S.) 59 Fed. 91, 94, 8 C. C. A. 21.

Under a statute giving the right of action for damages for death caused by a wrongful act to the "personal representatives" of the deceased, for the exclusive benefit of the widow and next of kin, an administrator appointed in and a citizen of the state may maintain such an action for the death of his intestate against a citizen of another state in a United States Circuit Court in that state. The words "personal representatives" in the statute mean the administrator. The administration of estates is strictly local, but this suit is not any part of such administration. The plaintiff, by becoming administratrix, became the per-

son to whom the right of action was given. The administration merely designated the person; the statute gives the right of recovery. *McCarty v. New York, L. E. & W. R. Co.* (U. S.) 62 Fed. 437.

#### Same—Special or temporary administrator.

The term "personal representative," as used in Rev. St. §§ 4255, 4256, giving a right of action for the wrongful death of a person, and providing that such action must be in the name of the personal representative of the deceased, includes a special administrator. *Swan v. Norvell*, 83 N. W. 934, 107 Wis. 625.

A temporary administrator is, for the time being, the personal representative of the intestate for the purpose of collecting assets, and so continues until permanent letters are granted. He can maintain an action for the homicide of his intestate, the right to which is conferred by statute upon personal representatives under Code Ala. § 2591. *Louisville & N. R. Co. v. Chaffin*, 11 S. E. 891, 893, 84 Ga. 519.

"Personal representative," as used in a statute authorizing an action for the wrongful death of another to be brought by his personal representative, undoubtedly includes an administrator who may be appointed for the purpose of prosecuting such action. Such administrator does not represent the creditors of the estate, but is merely a trustee for those entitled to the damages, for the purpose of collecting and disbursing the same. *Toledo, St. L. & K. C. R. Co. v. Reeves*, 35 N. E. 199, 201, 8 Ind. App. 667.

#### Agent.

An agent of heirs is not their "personal representative," within the meaning of Pub. St. c. 63, § 32, requiring service of notice of sale of foreclosure upon a personal representative of the mortgagor residing within the county where the mortgaged premises are situate. *Jones v. Tainter*, 15 Minn. 512, 517 (Gil. 423, 427).

The term "personal representative" in Gen. St. c. 81, § 5, requiring notice of a mortgage sale of real estate to be served upon the mortgagor, his heirs, or personal representatives, is used in its ordinary meaning of executor or administrator, and does not include an agent of the mortgagor. *Atkinson v. Duffy*, 16 Minn. 45, 49 (Gil. 30, 36).

#### Descendant.

If an inference can be drawn from a will that a testator used the words "personal or legal representatives" to designate individuals answering the description, though not in the strict legal sense of the terms, those persons will be entitled in preference

to executors and administrators. 1 Rop. Leg. 128; Wms. Ex'rs (6th Am. Ed.) 1217, 1225. In *Atherton v. Crowther*, 19 Beav. 448, where there was a remainder to the children of A. living at A.'s death, "but if any of the said children should die in A.'s lifetime, then to the personal representatives of such child, or children, to take per stirpes," and in another clause it was provided that "in case there should be no such children or any representatives of such children living at A.'s death, then to the persons who should be the testator's next of kin," it was held that the words "personal representatives" meant descendants. *Albert v. Albert*, 12 Atl. 11, 15, 68 Md. 352.

Where a testator devised his homestead to two sisters as long as they should live, providing that if either died without "legal representatives" her share to go to the survivor, the term was construed to mean lineal descendants. *Staples v. Lewis*, 41 Atl. 815, 71 Conn. 288.

#### Heir or next of kin.

"Personal representative," as used in a will devising the real and personal estate of the testatrix to trustees in trust for K. for life, with the remainder as she should appoint, and in default of such appointment the trustees should transfer and assign the personal estate to such persons as would be the "personal representative" of K., means the next of kin, and not his executor or administrator. *Baines v. Ottey*, 1 Mylne & K. 465, 469.

Next of kin are not "personal representatives," and cannot come as such into court representing the ancestor. If they were permitted so to do, it is conceived that much inconvenience would result from it; more, probably, than can well be foreseen. There are many instances, it is true, in which the next of kin, as such, come into court pursuing their rights against administrators calling them to account or seeking a distributive share of the estate of the intestate, but their right to do so rests upon very plain principles. The administrator in such cases is accountable to them, and to them only. But they have no right to sue to get in their hands the moneys of the estate, not from the administrator, but from some third person in whose hands the property happens to be, not for the purpose of paying debts, but for appropriating it directly to their own use. *Shaver v. Shaver*, 1 N. J. Eq. (Saxt.) 437, 439.

A testator gave to each of his sons four-fifths of his share devised absolutely, the income and interest of the one-fifth to be paid each during life, and upon the death of a son the share "shall be distributed or go to his personal representatives who would be entitled to his personal estate according to law." One of the sons died, leaving a widow but

no issue. He bequeathed all his estate to her. Held, that the "personal representatives" of the son were his next of kin. *Davies v. Davies*, 11 Atl. 500, 503, 55 Conn. 319.

Where testatrix devised her estate to her husband and children, providing that the executors should retain out of the share of each child one-tenth part thereof, which should be invested for the benefit of such beneficiary, to whom all interest should be paid during the life of the beneficiary, and that, as each child died, his or her retained part should be paid to his or her personal representatives, the words "personal representatives" meant the executor or administrator of a deceased beneficiary, and not the beneficiary's next of kin. *Lyon v. Fidelity Bank*, 38 S. E. 251, 128 N. C. 75.

The words "personal representatives," used in the statute respecting the foreclosure of mortgages by advertisement, means executors or administrators, and not heirs or devisees. *Anderson v. Austin* (N. Y.) 34 Barb. 319, 321.

#### Receiver or trustee in insolvency.

The words "personal representatives," as used in Pub. Acts 1895, c. 212, providing that all conditional sales of personal property which shall not be made in conformity with the provisions of a statute relating to the recording of contracts for the sale of personal property shall be held to be absolute sales, except as between the vendor and the vendee or their "personal representatives," include, in addition to executors and administrators, at least trustees in insolvency and receivers. In *re Wilcox & Howe Co.*, 89 Atl. 163, 166, 70 Conn. 220.

#### Surviving partner.

The "personal representative" of a decedent is defined in the probate practice act, § 533, as "the duly qualified and acting executor, administrator with the will annexed of the estate of the decedent." This language cannot by any just construction include a surviving partner. *Krueger v. Speith*, 20 Pac. 664, 667, 8 Mont. 482, 3 L. R. A. 291.

#### Widow and children.

The terms "legal representative" and "personal representative," in their commonly accepted sense, mean administrator or executor, but this is not the only definition; they may mean heirs, next of kin, or descendants, and sometimes assignor or grantee. The sense in which the term is to be understood depends somewhat on the intention of the party using it, and is to be gathered, not always from the instrument itself, but from the surrounding circumstances; and so it is held that where the aged and heavily indebted father of a family, dependent on him for support, takes a life insurance policy pay-

able to his "legal representatives," it is payable to his widow and children, as it will be presumed that, under the circumstances, he intended to describe them by that term, rather than his executors or administrators. *Griswold v. Sawyer*, 26 N. E. 464, 465, 125 N. Y. 411 (reversing 8 N. Y. Supp. 517, 56 Hun, 12).

The term "personal representatives," in an Illinois statute giving an action for wrongful death to the personal representative of deceased, means the executor or administrator, and therefore the decedent's widow cannot sue in her own name, although she is the sole beneficiary of the amount which may be recovered. *Hagen v. Kean* (U. S.) 11 Fed. Cas. 154.

Under a statute providing that, where any suit is defended by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor as to transactions or communications with such deceased person, it is held that a widow acting as executrix de son tort of her husband is his "personal representative" within the meaning of the act. *Johnson v. Champion*, 15 S. E. 15, 16, 88 Ga. 527.

### PERSONAL RIGHT.

"Personal rights" are not rights of person. The latter are physical, and the former are relative in general, and embrace all of the rights any person may have, and all the wrongs he may suffer. The right of a wife to the society of her husband is a personal right, for the deprivation of which she may maintain an action under the statutes of Ohio giving her a right of action for all violations of her personal rights. *Duffies v. Duffies*, 45 N. W. 522, 524, 76 Wis. 374, 8 L. R. A. 420, 20 Am. St. Rep. 79.

### PERSONAL SAFETY.

"Personal safety," as used in an instruction that, if defendant has good reason to believe that his personal safety can be secured in no other way, he need not wait to be assaulted, but may secure himself from imminent danger even by killing his adversary, if necessary, tells the jury that any sort of injury would justify the taking of human life, and does not necessarily indicate the class of injuries, the danger and fear of which alone will justify, and its use is erroneous. *People v. Howard*, 44 Pac. 464, 466, 112 Cal. 135.

### PERSONAL SECURITY.

At common law the right of "personal security" consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. *Sanderson v. Hunt*, 76 S. W. 179, 25 Ky. Law Rep. 626.

"Personal security" means a security not on property. *Merrill v. National Bank*, 19 Sup. Ct. 360, 371, 173 U. S. 131, 43 L. Ed. 640.

The term "personal security," as used in Act Cong. June 3, 1864, 13 Stat. 101, Brightly, Supp. p. 58, § 8, empowering national banks to "exercise under this act all such incidental powers as shall be necessary to carry on the business of banking \* \* \* by loaning money on personal security," means the security of personal property. *Third Nat. Bank v. Boyd*, 44 Md. 47, 53, 22 Am. Rep. 35.

The words "loan on personal security" in the national banking act are used in contradistinction to real estate security. National banks are not therefore confined, in the taking of security for discounts and loans, to the security offered by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, bills of lading, or other personal chattels for the money loaned. *Pittsburgh Locomotive & Car Works v. State Nat. Bank of Keokuk* (U. S.) 19 Fed. Cas. 785, 786.

U. S. Rev. St. § 5136, cl. 7 [U. S. Comp. St. 1901, p. 3455], authorizes every national bank to carry on a banking business by discounting and negotiating promissory notes, etc., and "by loaning money on personal security." Held, that the words "by loaning money on personal security" should be construed to include all powers incidental to the business, other than those mentioned in the words "by discounting and negotiating promissory notes." The words include the making of a loan on the personal obligation of the borrower, with a warehouse receipt as collateral security thereto. A bank is not to be limited, when taking security for discounts and loans, to the personal undertaking of the borrower, or to the security afforded by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, stock of a corporation, bills of lading, and other personal chattels. *Cleveland v. Shoenman*, 40 Ohio St. 176, 181.

"Personal securities," as used in the charter of a corporation authorizing the trustees of the company to invest the premiums and profits in government or public stock of the United States or of any state, or in the stock of any incorporated city, or in such real or personal securities as they may deem proper, should be construed to include bills of exchange. *Gee v. Alabama Life Ins. & Trust Co.*, 13 Ala. 579, 583.

"Personal security" means a bill of exchange, promissory note, draft, and any other kind and description of personal paper which is used in the transaction of the business of the country, and is so used in a statute authorizing a board of directors or trustees of a bank to invest one-half of the deposits on "personal security." *Colorado Sav. Bank v. Evans*, 56 Pac. 981, 984, 12 Colo. App. 334.

**PERSONAL SERVANT.**

See "Domestic Servants—Domestics."

**PERSONAL SERVICE.**

The term "personal service" has a fixed and definite meaning in law. It is service by delivery of the writ to the defendant personally. Other modes of service may be given the force of such service by legislative enactment, but the use of the words "personal service," unqualifiedly, in a statute, means actual service by delivering to the person and not to a proxy. *First Nat. Bank of Casselton v. Holmes* (N. D.) 94 N. W. 764, 765.

It seems that "personal service" ordinarily means service upon the defendant personally, and does not include service by leaving a notice at his last and usual place of abode. And as used in the bankruptcy act, and the rule of the Supreme Court entitled "Order to Show Cause on Creditor's Petition," directing that a copy of the petition shall be served on the defendant personally, or by leaving the same at his last and usual place of abode, service by leaving a copy of the petition with the clerk of the hotel of which the bankrupt was proprietor, and where he usually resided, was sufficient personal service, within the terms of such act, though the bankrupt was absent in another town, sick and unconscious. *In re Risteen* (U. S.) 122 Fed. 732, 733.

Personal service is the delivery of an original writ, notice, or other paper, or a copy thereof, with original information as to the contents, to the person affected by the service. Under Rev. St. 1878, § 2184, providing that a notice to terminate a tenancy by sufferance shall be served by delivering the same to the tenant, or to some person of proper age residing on the premises, etc., an allegation that such notice was served on defendant personally is sufficient. *Minard v. Burtis*, 83 Wis. 267, 270, 53 N. W. 509.

In Rev. St. 1858, authorizing an entry of judgment by the clerk only on filing proof of personal service, "personal service" means that a copy must be delivered to the defendant personally, and not left at his place of abode. *Moyer v. Cook*, 12 Wis. 335, 336.

"Personal service," as used in a statute requiring personal service of a notice by insurer to insured, meant the actual delivery in some way of the notice to the insured. *McKenna v. State Ins. Co.*, 35 N. W. 519, 520, 73 Iowa, 453.

The term "personal service," in a statute authorizing the notary to forward notice of dishonor of negotiable paper to the indorser in certain instances, and to personally serve the same on the indorser in other instances, does not mean to actually deliver the notice to the person of the indorser in all cases, but

includes a service by leaving it at his residence or place of business. It is used in contradistinction to "service by mail." *Westfall v. Farwell*, 13 Wis. 504, 512.

The words "personal service" in Rev. St. 1858, c. 12, § 5, were said in *Westfall v. Farwell*, 13 Wis. 504, to be designed to include service by leaving a notice at the indorser's residence or place of business, as well as by actual delivery to him, and that they were used in contradistinction to "service by mail." *Adams v. Wright*, 14 Wis. 408, 442-449.

The phrase "personal service" must have the same meaning in all cases where such service is made. There cannot be one rule of construction where property has been attached, and another rule where the suit is instituted to settle a nonresident's claim to real property within the state, or for the purpose of foreclosing his equity of redemption in real estate situated therein. The phrase has a clear meaning, and, when employed to designate the manner of service without the state, it should have the same significance as when used to prescribe the mode of service within the state. Where, in an attachment action, the summons and complaint mailed to the defendant were taken from the post office by her husband and delivered to her in a sealed envelope, there was no "personal service" within the meaning of the statute permitting personal service without the state as a substitute for publication and deposit in the post office. The sealed envelope might, with no different effect upon defendant's rights, have been handed to her by a letter carrier or by some one at the post office. *Rhode Island Hospital Trust Co. v. Keeney*, 48 N. W. 341, 1 N. D. 411.

Substituted service of a summons is not a sufficient compliance with Code, § 638, requiring personal service of the summons made upon a defendant against whose property a writ of attachment has been granted within 30 days from the granting thereof, or that service by publication must be commenced before the expiration of the same time, as the three modes of service are equally well known to the Code, and the express mention of the two and the omission of all reference to the other leads to the inference that the Legislature intended to exclude the mode not named. *Bogart v. Swezey* (N. Y.) 26 Hun, 463, 464.

**PERSONAL SERVICES.**

"Personal services," as used in St. 1848, c. 72, giving lumbermen a lien for their personal services, does not include the use of teams and their needful apparatus. *Coburn v. Kerswell*, 35 Me. 126, 128.

"Personal services," as used in Gen. St. c. 125, § 14, giving lumbermen a lien for per-



sonal services, includes work accomplished by the lumberer's own exertions, aided by the use of the articles of his own property that are essential to the services rendered. *Hale v. Brown*, 59 N. H. 551, 558, 47 Am. Rep. 224.

"Personal services," as used in Gen. St. 1878, c. 8, § 172, providing that the county treasurer shall receive certain percentages for his services, provided that he shall not receive more than a certain amount for his personal services in any one year, include all the labor of performing the duties of treasurer, and receiving, collecting, and disbursing, whether such labor be performed by the treasurer himself or by a deputy or clerk, and all expenses incidental to such performances, save those of which the statute specifically directs the allowance. *Yost v. Scott County Com'rs*, 25 Minn. 366, 367.

"Personal services," as used in a statute providing that no person summoned as trustee should be charged as such on account of the "personal services or earnings" of the wife of the debtor at any time, or on account of any labor performed by the debtor or any of his family after the service of the process, means something more than the term "labor," which has been construed as confined to services where physical toil was the main ingredient, although directed and made more valuable by mechanical skill. Her personal services and earnings may be as well for works of skill and science as for mere physical toil. They are exempt, no matter how earned. *Hoyt v. White*, 48 N. H. 45, 48.

"Personal services," within the meaning of a statute exempting the earnings for personal services from execution, includes the services of physicians or other professional men. *McCoy v. Cornell*, 40 Iowa, 457, 458.

A school-teacher is neither a laborer, clerk, servant, nurse, nor other person within the meaning of the statute providing that in all cases within the jurisdiction of a justice of the peace, where any action is brought by any laborer, clerk, servant, nurse, or other person for compensation claimed due for personal services performed, the plaintiff, if successful, shall be entitled to recover, as part of the costs, a judgment against the defendant for an attorney's fee. *School Dist. No. 94 v. Gautier*, 73 Pac. 954, 957, 13 Okl. 194.

#### PERSONAL SERVITUDE.

"Personal servitudes," as the term is used in the Spanish law, includes use, usufruct, and habitation. *Mulford v. Le Franc*, 26 Cal. 88, 102.

"Personal servitudes" are those attached to the person for whose benefit they are

established, and terminate with his life. This kind of servitude is of three sorts—usufruct, use, and habitation. Civ. Code La. 1900, art. 646.

#### PERSONAL STATUTE.

A "personal statute" is one which follows and governs the party subject to it, wherever he goes, as distinguished from a "real statute," which is one regulating property within the state where it is in force. *Bank of Columbia v. Walker*, 82 Tenn. (14 Lea) 299, 308.

"According to the jurists of Holland and France, a 'personal statute' is that which follows and governs the party subject to it, wherever he goes. The 'real statute' controls things, and does not extend beyond the limits of the country from which it derives its authority. The personal statutes of one country control the personal statutes of another country into which a party once governed by the former, or who may contract under it, should remove; but it is subject to a real statute of the place where the person subject to the personal statute should fix himself, or where the property on which the contest arises may be situated. Bartolus, who was one of the first of whom this subject was examined, and the most distinguished jurist of his day, established as a rule that, whenever the statute commenced by treating of persons, it was a personal one, but if it began by disposing of things, it was real. So that, if a law was written thus, 'The estate of the deceased shall be inherited by the eldest son,' the statute was real; but if it said, 'The eldest son shall inherit the estate,' it was personal. This distinction, though purely verbal and most unsatisfactory, was followed for a long time, and sanctioned by many whose names are illustrious in the annals of jurisprudence, but was ultimately discarded by all. Voet has two definitions: One that a real statute is that which affects principally things, though it also relates to persons; and the other, that a personal statute is that which affects principally persons, though it treats also of things." *Saul v. His Creditors (La.)* 5 Mart. (N. S.) 569, 591, 16 Am. Dec. 212.

#### PERSONAL TAX.

"A personal tax is the burden imposed by the government on its own citizens for the benefits which that government affords by its protection and its laws." *Potter v. Ross*, 23 N. J. Law (3 Zab.) 517, 520; *Jack v. Walker* (U. S.) 79 Fed. 138, 141.

The term "personal tax" is intended to include all taxes, including those due from corporations, except only taxes on real estate as such. *Bates' Ann. St. Ohio* 1904, § 2860.

**PERSONAL THINGS.**

See "Things Personal."

**PERSONAL TORT.**

Torts may be divided into two general classes, the first designated as "property torts," embracing all injuries and damages to property, real and personal; the second known as "personal torts," including all injuries to the person, whether to reputation, feelings, or to the body. But a tort which is not an injury to property is a personal tort, and is not assignable unless specially authorized by statute. A right of action against a sheriff to recover damages for a seizure under execution against property is for a personal tort, and not assignable. *Mumford v. Wright*, 12 Colo. App. 214, 217, 55 Pac. 744, 746.

**PERSONAL TRANSACTION.**

It is impossible to define what, under all circumstances, will constitute a "personal transaction" under Code, § 3639, providing that "no party to any action or proceeding shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased . . . against the administrator of such deceased person," etc. The question is to be determined largely by the facts peculiar to each case presented. We have held that one cannot testify as to facts touching the amount and character of work done for one since deceased, and as to other facts which tend to establish an implied contract. *Peck v. McKean*, 45 Iowa, 18. Later we held that the statute did not exclude proof of facts from which by inference other facts may be found. *McElhenny v. Hendricks*, 82 Iowa, 657, 48 N. W. 1056. In the case of *Dysart v. Furrow*, 57 N. W. 644, 645, 90 Iowa, 59, we said that personal transactions and communications, as contemplated by the statute, are transactions and communications between the parties of which both must have had personal knowledge. Under this statute, the plaintiff in an action for services rendered a deceased person cannot testify for what purpose a check was given him by deceased, where the check is indorsed by him and recites the purpose for which it was given. In an action against an administrator for services rendered deceased, plaintiff cannot testify that words written on a check given by deceased and indorsed by him were not there at the time the check was delivered to him, it being in regard to a personal transaction within the statute. In *re Brown's Estate*, 60 N. W. 659, 662, 92 Iowa, 379; *Cole v. Marsh*, Id.

A "personal transaction," as the term was used in the statute, meant the doing or

performing of some business between parties, or the management of any affair. To be a personal transaction in such a case, the matter testified about must have involved some act by or between two parties, or some act by one party for the benefit or detriment of another, and in which said other was in some way interested. Thus, if the witness is not asked to testify as to any transaction had with the decedent, but only states what she saw and the conversation she heard between the deceased and others, it cannot be said that her testimony was incompetent under the section. *Denning v. Butcher*, 59 N. W. 69, 71, 91 Iowa, 425.

The words "personal transaction," in that provision of the Code (sections 36, 39) relating to evidence on the part of the plaintiff, in a suit to establish a claim against an estate, as to communications or transactions between himself and deceased, was used in the sense of some business or negotiation. *Martin v. Shannon*, 60 N. W. 645, 92 Iowa, 374.

The term "personal transaction," as used in the statute declaring that a witness shall be incompetent to testify to a personal transaction with a deceased person, means transactions and communications between the parties of which both must have had personal knowledge; that is, the doing or performing of some business between parties, or the management of any affair. The term does not exclude the witness from testifying to matters touching the deceased, knowledge of which he acquired from observation alone. In *re Brown's Estate*, 60 N. W. 659, 662, 92 Iowa, 379.

As used in Code, § 399, rendering incompetent the testimony of any party to or person interested in an action, as to any personal transaction with a deceased person, the term "personal transaction" does not mean private transaction, and the fact that the party against whom the testimony is offered was present at the interview, and is living and might be examined at the trial, does not authorize a party to the action, or one who is interested in the event thereof, to testify as to what was said to him by the testator at such interview. *Howell v. Taylor* (N. Y.) 11 Hun, 214, 215 (quoted in *Byerer v. Smith*, 66 N. Y. Supp. 968, 970, 55 App. Div. 405).

"Personal transaction," as used in a statute rendering a witness incompetent to testify as to personal transactions with decedent, means not only conversations had with decedent in reference to the matter in issue, but also conversations between decedent and another person in the presence of witness and overheard by witness. *Robinson v. James*, 29 W. Va. 224, 235, 11 S. E. 920, 925.

In an action by the executor of a wife's estate against the executor of the husband's

estate, a witness who was a beneficiary of both, but whose precise interest in the estate of plaintiff's decedent did not appear, was incompetent as a witness under Code Civ. Proc. § 829, relating to testimony as to personal transactions or communications with one deceased. *Farrar v. Farmers' Loan & Trust Co.*, 83 N. Y. Supp. 172, 173, 85 App. Div. 367.

The term "personal transaction" describes the whole of the negotiation or treaty, between the original parties to it, out of which the cause of action arose. *Cheatham v. Bobbitt*, 24 S. E. 13, 14, 118 N. C. 343.

#### PERSONAL WARRANTY.

"Personal warranty" is that which takes place in personal actions; it arises from the obligation which one has contracted to pay the whole or part of a debt due by another to a third person. *Flanders v. Seelye*, 105 U. S. 718, 726, 28 L. Ed. 1217 (citing Code Prac. La. art. 382). See, also, *Hardy v. Pecot*, 28 South. 936, 937, 104 La. 130.

#### PERSONAL WRONG.

See "Personal Injury."

#### PERSONALLY.

In 2 Rev. St. p. 3, § 3, giving remedy by a statute to any creditor having a demand against a nonresident debtor personally, whether liquidated or not, arising on contract or on a judgment rendered within this state, the word "personally" was used to distinguish from demands which were against debtors in a representative capacity, as executors and administrators. In *re Hurd* (N. Y.) 9 Wend. 465. It had no reference to the state or condition of the demand itself; that is, whether it be a debt due or to become due in simple contract, in bond, or in judgment. *Oakley v. Aspinwall*, 4 N. Y. Super. Ct. (2 Sandf.) 7, 19.

#### PERSONALLY APPEARED

"Personally appeared," as used in an affidavit, means that the signer appeared before the notary administering the oath. *Clement v. Bullens*, 34 N. E. 173, 159 Mass. 193.

The term "personally appeared," in an acknowledgment which states that the person named therein as acknowledging the instrument in question personally appeared before the officer taking it, is a substantial compliance with the statute requiring the certificate to state that such person is personally known to such officer. *Warder v. Henry*, 23 S. W. 776, 117 Mo. 530.

The word "personally," in a certificate of a justice of the peace that plaintiff person-

ally appeared and acknowledged said instrument, implies, in the absence of any opposing evidence, that the instrument was signed in the presence of the justice of the peace as required by statute. *Campbell v. Inhabitants of Upton*, 113 Mass. 67, 71.

#### PERSONALLY KNOWN.

"Personally known," as used in an officer's certification to an acknowledgment, is equivalent to "personally acquainted with," and means a knowledge independent and complete in itself, and existing without other information. *Kelly v. Calhoun*, 95 U. S. 710, 713, 24 L. Ed. 544.

"Personally known," as used in an Iowa statute requiring the acknowledgment of a justice of the peace to state that the party making the acknowledgment was personally known by him to be the identical person named in the instrument, should not be construed to mean a familiar knowledge or acquaintance, but merely to be satisfied that he is the person named therein, and such belief may be gained on a mere introduction. *Wyllis v. Haun*, 47 Iowa, 614, 621.

#### PERSONALLY SERVED.

Rev. St. 1858, c. 12, § 5, requiring the notary to "personally serve" the notice upon indorsers, etc., does not require an actual delivery to the person of the indorser in all cases, but includes a service by leaving it at his residence or place of business. *Westfall v. Farwell*, 13 Wis. 504, 509.

Leaving a copy of the paper to be served with the person to be served is one method of personal service, and another method is by reading the paper to the person served. *Green v. State*, 14 N. W. 620, 56 Wis. 583.

In the statute providing that, when the complaint is filed, the plaintiff may fix the day during the term on which the defendant shall appear, which day, when so fixed, shall be stated in the summons when issued, and the action shall be docketed in its order, and, if summons shall be "personally served," 10 days before such day, or publication shall be made 3 weeks, 30 days before such day, such action shall thereupon stand for issue and trial at such term, the phrase "personally served" has reference to personal service, as distinguished from publication, and, in this sense, service by copy left at the last and usual place of residence is personal service, as well as service by reading to the party. *Dunkle v. Elston*, 71 Ind. 585, 589.

#### PERSONALTY.

See "Personal Property."

#### PERSONAM.

See "In Personam."

**PERSONS VOTING.**

The term "persons," in a statute authorizing the issuance of county bonds whenever a majority of the persons voting at any election vote therefor, though broad enough, when standing by itself, to include infants and adults, males and females, white and colored, citizens and aliens, is, in the connection in which it is used, to be construed to mean the electors voting at such election. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 17 Kan. 29, 39.

**PERSUADE.**

The word "persuade," as used in the pleadings in an action and acted on by the courts, imports an initial, active, and wrongful effort. *Nash v. Douglass* (N. Y.) 12 Abb. Prac. (N. S.) 187, 190.

The use of the word "persuade" in an affidavit that A. was about to persuade, and trying to persuade, two of B.'s hired negroes to leave his place, states a violation of Clay's Dig. 419, § 5, making it criminal to knowingly aid any negro or other slave to run away or depart from his master's service. To "persuade" a slave to leave is to ask him to depart, for by the term "aid" is comprehended all those appliances which may be resorted to to induce or assist a slave in running away. *Crosby v. Hawthorn*, 25 Ala. 221, 223.

Within a statute punishing any person who shall persuade a slave to leave his master, "persuade" should not be construed to mean "advise," so that the mere act of advising a slave to leave his master's service with the intent that he might enjoy freedom would constitute an offense. "Advise" has not the same meaning as "persuade." "Persuade" embraces within its meaning more than "advise," and we could not treat it as the synonym of "advise" without dispensing with what the word clearly implies is a part of the offense. *Wilson v. State*, 38 Ala. 411, 414.

The word "persuade" has been construed to carry a persuasion into effect." *Respublica v. Ray* (Pa.) 3 Yeates, 65, 66.

"Persuaded," as used in 1 Smith's Laws, p. 435, providing that if any person or persons, knowingly and willfully, shall aid or assist any enemies at open war with this state, etc., by persuading others to enlist for that purpose, he shall be adjudged guilty of high treason, means to succeed, and that there must be an actual enlistment of the person persuaded in order to bring the defendant within the intention of the clause. *Respublica v. Roberts* (Pa.) 1 Dall. 39, 1 L. Ed. 27.

The expression "persuaded in his own mind" is equivalent to "satisfied," "convin-

ced," and does not indicate a state of doubt or conjecture. *Clark v. Baird*, 9 N. Y. (5 Seld.) 183, 198.

**PERSUASION.**

See "False Persuasion"; "Fraudulent Persuasion."

"Persuasion," as used in Const. Bill of Rights, art. 6, providing that no person of any religious persuasion, sect, or denomination shall ever be compelled to pay toward the support of the teacher or teachers of any sect or denomination, means "a creed or belief, or a sect or party adhering to a creed or system of opinions." *Hale v. Everett*, 53 N. H. 9, 62, 16 Am. Rep. 82 (citing Webst. Dict.).

The word "persuasion," as used in a will leaving a certain sum to be paid quarterly to the minister of a "Congregational persuasion," means a minister of a Congregational denomination. When taken separately and independently, there is no doubt a difference in the meaning of the two words; but used in connection with a denominational name of a religious sect to designate that sect, the two terms must mean the same thing. If it had been established that the denomination has a creed implied in the term "Congregational," then the term "minister of the Congregational denomination" must necessarily mean one who holds to such creed; and, where this is not shown, then the word "persuasion" cannot refer to any creed of the denomination, for none belongs to it, and must refer to what distinguishes the denomination; that is, their belief in matters of polity and discipline. *Attorney General v. Town of Dublin*, 38 N. H. 459, 543.

The use of the word "persuasion," instead of "threats," in the separate and apart acknowledgment of the wife to a mortgage of the homestead, is a fatal defect, and renders the mortgage a nullity as a conveyance of title to the lots. *Marx v. Threeth*, 30 South. 831, 832, 131 Ala. 340.

**PERTAINE.**

The word "pertain" means to belong or pertain, whether by right of nature, appointment, or custom; to relate, as things pertaining to life; so that a statute exempting property "appertaining" to a school did not necessarily exempt all the property it owned, but only such as was used for the purposes of the school. *People v. Board of Directors of Chicago Theological Seminary*, 51 N. E. 198, 199, 174 Ill. 177.

**PERTENENCIA.**

"Pertendencia," as used in relation to the quantity of land which the discoverer of a new mine may acquire round about it, is a

square of 200 varas, or 550 feet. *Castillero v. United States*, 67 U. S. (2 Black) 17, 168, 17 L. Ed. 360.

## PERTINENT HYPOTHESIS.

"Pertinent hypothesis," as used in the law, is an hypothesis which, if sustained, would logically influence the issue. *Whitaker v. State*, 17 South. 456, 106 Ala. 30 (citing 1 Whart. Ev. § 20).

## PESSENDIDE.

The word "pessendide" is Turkish for "warranted" or "approved." *Coats v. Shepard*, 3 N. Y. Leg. Obs. 404, 405.

## PETIT.

"Petit" means small, minor, inconsiderable; used in several compounds, and sometimes written "petty." *Black, Law Dict.*

## PETIT JURY.

A petit jury is ordinarily one selected to try issues, civil and criminal, under the direction of the ordinary process of the courts. *Moschell v. State*, 22 Atl. 50, 53, 53 N. J. Law (24 Vroom) 498.

A petit jury is a body of men, twelve in number in the superior court, and six in number in the courts of justices of the peace, drawn in the superior court by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact; but in a justice's court the jury is drawn according to the mode specially provided for such court. *Balinger's Ann. Codes & St. Wash.* 1897, § 4733.

The terms "trial juror" and "trial jury" are respectively equivalent to the terms "petit juror" and "petit jury," as used in the Constitution and laws of the state. *Code Civ. Proc. N. Y.* 1899, § 3343, subd. 19.

## PETIT LARCENY.

As felony, see "Felony."

As trespass, see "Trespass."

At common law, larceny is divided into grand and petit larceny, the former being committed when the goods stolen were of the value of more than 12 pence, and the latter when the value of the goods did not exceed that sum. *Ex parte Bell*, 19 Fla. 608, 612.

"Petit larceny" is defined by the statute, *Burns' Rev. St.* 1894, § 2007, as the felonious stealing, taking, and carrying, leading, or driving away of the personal goods of another, of the value of any sum less than \$25.

*Barnhart v. State*, 154 Ind. 177, 178, 56 N. E. 212, 213.

Larceny in the second degree is petit larceny. *People v. Righetti*, 4 Pac. 1155, 1186, 66 Cal. 184.

## PETIT MISDEMEANOR.

The term "petit misdemeanor," as used in the Constitution declaring that in all criminal cases except in petit misdemeanors punishable by fine not exceeding \$3, the right of trial by jury shall remain inviolate, is synonymous with the phrase "trivial breaches of the peace," as used in the statute authorizing justices of the peace to inquire into, and in a summary way to punish by fine not exceeding \$3, trivial breaches of the peace. *State v. McCorty* (Ind.) 2 Blackf. 5, 6.

## PETITIO PRINCIPII.

"Petitio principii" is a supposition of what is not granted. Case upon Statute for Distribution (Va.) 1 Wythe, 302, 309.

## PETITION.

See "Supplemental Petition."

Affidavit distinguished, see "Affidavit."

As process, see "Process."

A petition, in common phrase, is a request in writing; and in legal language describes an application to a court in writing in contradistinction to a motion which may be made by a word of mouth. *Shaft v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 544, 547, 23 Am. Rep. 138; *Fenstermacher v. State*, 25 Pac. 142, 19 Or. 504; *Bergen v. Jones*, 45 Mass. (4 Metc.) 371, 376.

Petition, under Civ. Code, § 732, subd. 36, embraces an answer or reply in which a counterclaim or set-off is demanded. *Paducah Hotel Co. v. Long*, 17 S. W. 853, 854, 92 Ky. 278.

A "petition," as used in the statute, is generally understood to mean a written application addressed to the court or judge praying for the exercise of some judicial power, or to a public officer, requesting the performance of some duty imposed on him by law, or the exercise of some discretion with which he is vested. *Lawrey v. Sterling*, 69 Pac. 460, 463, 41 Or. 518; *Bergen v. Jones*, 45 Mass. (4 Metc.) 371.

To petition, within the meaning of Ky. St. § 2554, providing for local option elections upon a written petition signed by voters of the territory to be affected equal to 25 per cent. of the votes cast in each of said precincts at the last preceding general election, is simply to make a request to the

court in writing, and the gist of the statute is that, before the county shall be subjected to the expense of such an election, it shall be demonstrated that at least 25 per cent. of the voters of the county desire such an election; and in this case this object was accomplished quite as well when the names of the petitioners appeared on 26 different papers of the same import as if they had all been attached to a single petition. *Smith v. Patton*, 45 S. W. 459, 460, 103 Ky. 444.

10 & 11 Vict. c. 102, § 10, enacting that the circuits of certain commissioners should be abolished on a certain day, and that, "if thereafter any insolvent debtor shall petition" the court for relief, the court may refer such petition to the judge of a county court, means "if a petition is presented"; and where an execution creditor petitions the court for the relief of insolvent debtors the court has power to make the order. *Regina v. Dowling*, 8 El. & Bl. 605, 607.

"Petition," as used in the bankruptcy act, shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of the act, or by creditors alleging the commission of an act of bankruptcy by a debtor named therein. U. S. Comp. St. 1901, p. 3419.

"A person against whom a petition has been filed," as used in the bankruptcy act, includes a person who has filed a voluntary petition. U. S. Comp. St. 1901, p. 3418.

#### PETITION FOR CERTIORARI.

A petition for certiorari partakes of the qualities of a bill of review or an application for a new trial. It must not be based on mere irregularities alone, but it must set out the facts which show that the party used diligence to pursue his remedy, or a good, equitable excuse for the want of such diligence; and such facts must show what are the merits of his cause, and the means of establishing them by proof, by which the determination that has been made against him will probably be changed on another trial. *Bodman v. Harris*, 20 Tex. 21, 33.

#### PETITION FOR FORECLOSURE.

As pleading, see "Pleading."

#### PETITION FOR INJUNCTION.

A "petition for an injunction," under the Nuisance Act, Pub. St. c. 205, §§ 4, 5, providing that any building that is used for the sale of intoxicating liquors is a common nuisance, which the Supreme Court may abate by injunction or on petition of twenty legal voters, is a civil proceeding, and the issues thereunder are to be determined by a preponderance of the evidence. *State v. Collins*, 44 Atl. 495, 497, 68 N. H. 299.

#### PETITION FOR NEW TRIAL.

A petition for a new trial is addressed to the discretion of the court before whom the trial took place. It must allege facts which show that substantial justice was not or may not have been done. It cannot rely on error merely technical. On the contrary, its very foundation is that a judgment technically alleged is substantially unjust. *State v. Brockhaus*, 43 Atl. 850, 851, 72 Conn. 109.

A petition for a new trial under the statute is in the nature of an appeal, and will be dismissed in an action where there were two joint plaintiffs and only one of them presents a petition. *Gencarelle v. New York, N. H. & H. R. Co.*, 44 Atl. 174, 21 R. I. 216.

#### PETITION FOR REHEARING.

Bill of review distinguished, see "Bill of Review."

A petition for a rehearing is a pleading under the rules of appellate procedure. The office of a petition for a rehearing is to specifically present points for the consideration of the court. A general statement that the court erred in the conclusions asserted in the opinion is insufficient. The petition should state what conclusions counsel supposed to be erroneous. *Elliott on Appellate Procedure*. Louisville, N. A. & C. Ry. Co. v. *Carmon*, 50 N. E. 893, 20 Ind. App. 471.

#### PETITION IN ERROR.

A "petition in error" is a new action to reverse the action below, while an appeal is the same action as in the lower court. *Foster v. Borne*, 58 N. E. 66, 63 Ohio St. 169.

In Nebraska, under the form of procedure established by the Code in that state, it is held that a petition in error starts a new action, nothing being involved in it except the errors assigned. In this respect it differs from an appeal, which is a further proceeding in the same action, and brings up all the parties necessary to the determination of appellant's rights in the matter. *Clark v. Lancaster Co. (Neb.)* 96 N. W. 593, 598.

#### PETITION IN INSOLVENCY.

A "petition in insolvency" and an "adjudication of insolvency" are two entirely and essentially different things. There can be no adjudication of insolvency without a petition, either voluntary or involuntary; but there may be a petition without an adjudication. While it is true that the adjudication relates back, for certain purposes, to the date of the petition, yet the two things are distinct events that may happen after a considerable interval of time. Wages earned within three months anterior to a petition for insolvency do not come within Code, art. 47,

§ 15, giving preference to wages contracted not more than three months anterior to an adjudication of insolvency. *Roberts v. Edie*, 36 Atl. 820, 822, 85 Md. 181.

## PETITORY ACTION.

A "petitory action" is one in which the plaintiff desires to enforce his right of property or his title to the subject-matter in dispute, as distinguished from a possessory action, where the right to the possession is a point in litigation, and not the mere right of property. The term is chiefly used and applied to suits in admiralty, by which the plaintiff seeks to recover a vessel claiming title wrongfully held by another. *The Tilton* (U. S.) 23 Fed. Cas. 1277, 1278.

## PETROLEUM.

See, also, "Mineral"; "Oil."

Petroleum oil is a fluid found in the porous sand rock of the earth. *Wagner v. Mallory*, 62 N. E. 584, 585, 169 N. Y. 501.

Petroleum or rock oil is essentially composed of carbon and hydrogen, and is a liquid inflammable substance exuding from the earth, and is collected in various parts of the world, on the surface of the water, in wells and fountains, or oozing from cavities in rocks. It frequently contains paraffine, a substance in a pure state resembling spermaceti, but, when mingled with a small quantity of petroleum, it assumes the consistence of butter. *Kier v. Peterson*, 41 Pa. (5 Wright) 357, 361.

Petroleum or mineral oil in place is as much a part of the realty as timber, coal, iron, or as salt water. *Williamson v. Jones*, 19 S. E. 436, 441, 39 W. Va. 231, 25 L. R. A. 222.

### As a mineral.

Petroleum oil is a mineral, and while it is in the earth it forms a part of the realty, and when it reaches a well and is produced on the surface it becomes personal property, and belongs to the owner of the well. *Kelley v. Ohio Oil Co.*, 49 N. E. 399, 401, 57 Ohio St. 317, 39 L. R. A. 765, 63 Am. St. Rep. 721; *Northwestern Ohio Natural Gas Co. v. Ullery*, 67 N. E. 494, 496, 68 Ohio St. 259.

Petroleum is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands. *Gill v. Weston*, 1 Atl. 921, 923, 110 Pa. 312.

Petroleum oil is a fluid found in the porous sand rock of the earth. It is true it is a mineral substance; but it widely differs from such minerals as coal, iron, and copper, having a fixed location in the earth like the

rock itself; hence a lessee acquires no title to the oil until it is taken from the ground under a lease granting him the exclusive right to mine and excavate oil. *Wagner v. Mallory*, 62 N. E. 584, 585, 169 N. Y. 501.

### As a rock oil.

Petroleum is an oily substance of great economical value, especially as a source of light, appearing naturally oozing from crevices in rocks, or floating on the surface of water, and also obtained in very large quantities in various parts of the world by boring in rock. It is the same as rock oil. *Murray v. Allard*, 43 S. W. 355, 357, 100 Tenn. 100, 39 L. R. A. 249, 66 Am. St. Rep. 740.

Petroleum is a rock or earth oil. *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26, 29. It is not a coal oil, at least there is no general belief among men of science that it is. *Bennett v. The North British & Mercantile Ins. Co.* (N. Y.) 8 Daly, 471, 472.

### Gasoline.

"Crude petroleum consists of a number of different oils, all more or less volatile, which are separated from each other by a process of distillation; and of these gasoline, being the most volatile, and consequently the most explosive, is the one driven off at the lowest temperature." As used in a fire policy prohibiting the keeping of petroleum on the insured premises, the term includes gasoline. *Kings County Fire Ins. Co. v. Swigert*, 11 Ill. App. 590, 598.

## PETTIFOGGING SHYSTER.

The term "pettifogging shyster" is one applied to unscrupulous legal practitioners who disgrace their profession by doing mean work and resort to sharp practice to do it. *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251, 256.

## PETTY-BAG OFFICE.

In the ordinary or legal court the officina justitiæ is kept, out of which issue all original writs that pass under the great seal. Those writs that related to the subject were originally kept in a hamper, and those that related to the interests of the crown were kept in a little bag. Hence arose the distinction between the "hamper office" and the "petty-bag office." These offices are at all times open to the subject, who may at any time demand and have ex debito justitiæ any writ that he may call for. The denomination "officina justitiæ" was adopted to signify that all justice between man and man proceeded from that source; it being, as it is styled in the books, the shop, mint, or manufactory of justice. *Yates v. People* (N. Y.) 6 Johns. 337, 363.

## PETTY CHAPMAN.

A "petty chapman" is a trading person going from town to town, or to other men's houses, and traveling either on foot or with a horse or horses, or otherwise carrying to sell or expose to sale any goods, wares, or merchandise. *Martin v. Town of Rosedale*, 29 N. E. 410, 411, 130 Ind. 109 (citing *Graffy v. City of Rushville*, 8 N. E. 609, 107 Ind. 502, 57 Am. Rep. 128; *Commonwealth v. Ober*, 66 Mass. [12 Cush.] 493).

"Petty chapmen" are persons traveling from town to town with goods and merchandise, and are the same as "hawkers" or "peddlers." *Emmons v. City of Lewiston*, 24 N. E. 58, 59, 132 Ill. 380, 8 L. R. A. 328, 22 Am. St. Rep. 540.

## PETTY OFFICERS.

Mates are "petty officers" within the exception in Rev. St. § 1579 [U. S. Comp. St. 1901, p. 1083], prohibiting the allowance of rations to persons not actually on duty on seagoing vessels. *United States v. Fuller*, 16 S. Ct. 386, 160 U. S. 593, 40 L. Ed. 549.

## PEW.

Pews "are inclosed seats in churches, and it is said that according to modern use and idea they were not known until long after the Reformation, and that inclosed pews were not in general use before the middle of the Seventeenth century, being for a long time confined to the family of the patron. In England the right of property in a pew is a mere easement or incorporeal right, and hence the doctrine in England that an action or case only would lie for the disturbance of the occupant. In this country the owner of a pew has an exclusive right to its possession and enjoyment, not as an easement, but by virtue of an individual right of property; and hence trespass quare clausum lies for a violation of the owner's right of possession. In the absence of any statutory provision, this kind of property is to be considered as real estate in all cases arising under the statute of frauds or of conveyances or of descents and distributions." *O'Hear v. De Goesbriand*, 33 Vt. 593, 606, 80 Am. Dec. 653.

Blackstone informs us that pews in a church are somewhat of the same nature as a monument or tombstone, or a coat of armor, or ensign of honor hung in a church. They are in the nature of heirlooms, and may descend by custom immemorial from the ancestor to the heir. 2 Bl. Comm. 429. This description can be applicable only to the tangible property, to the material of which the pew is constructed. It has no applicability to the right of burial in a particular part of the churchyard, or to the right of

occupying a particular pew in the church. The exclusive right of occupying a particular seat or pew is an incorporeal hereditament. It is in the nature of an easement; a right or privilege in the hands of another. For an interruption of this right an action on the case for a disturbance, as in other cases of injury to incorporeal hereditaments, is the only remedy. 1 Chit. Pl. 162; Com. Dig. "Action on the Case for Disturbance," A 3. It seems that in England the right to a pew is never a mere personal right. It can exist only as appurtenant to a house in the parish. Unless the right be claimed as appurtenant to a house, and it be so averred in the declaration, no action at common law will lie. The remedy in such case is of a spiritual nature, and must lie in the ecclesiastical court. In this country the owner of a pew has not an absolute and unlimited interest in the property. He owns neither the soil beneath nor the space above it. His interest is both qualified and limited. The absolute ownership is in the corporation, or in the trustees in whom the title is vested. The title of the pewholder is usufructuary. He has strictly no title to the pew itself. He can use it only for the purposes to which it has been dedicated, and in the mode prescribed or agreed upon at the time of the purchase. It is in reality a mere easement—a privilege or use in the freehold of another. Still it is an hereditament, although incorporeal, and as such, when vested in the owner and in his heirs, it is real estate. *Trustees of Third Presbyterian Congregation v. Andruss*, 21 N. J. Law, 325, 328.

Property in a pew in a church, although real estate, is not subject to the same rules and principles as farm property. "If it were so, the rights of the parish over the meeting house could not be exercised on the most urgent occasions without interfering with the rights of each pewholder. The pewholder has an exclusive right to occupy his pew, and to maintain trespass or a writ of entry against any one who disturbs him in his seat. But he does not own the soil over which his pew is built, nor the space above it; for there may be other pews in a gallery above him, whose owners have equal right with himself. The building and the soil being the property of the parish, they may, when necessary, take it down, and rebuild upon the same spot; or may alter the form and shape of it for the purpose of making it more convenient. If in doing this, not wantonly, but for useful purposes, the pews are destroyed, they must provide an indemnity for the pewholders on just and equitable principles." *Gay v. Baker*, 17 Mass. 435-438, 9 Am. Dec. 159.

## PEWTER.

"Pewter" is an alloy of lead and tin. *United States v. Ullman* (U. S.) 28 Fed. Cas. 323, 326.



## PHARMACY.

As medicine, see "Medicine."

"Pharmacy," as used in the title of Laws 1885, c. 147, "An act to regulate the practice of pharmacy, the licensing of persons to carry on such practice, and the sale of poisons in the state," cannot be construed as meaning the science or art of preparing and compounding medicines, as distinguished from their sale, but it includes the sale to the public of drugs and medicines. In this country the business of pharmacist or apothecary and druggist is one, and the same person who prepares and compounds medicines also sells them; so that in popular speech all three are used interchangeably as practically synonymous, and it was with the regulation of pharmacy as an occupation or business in its relations to the public that the Legislature had to do, and hence a provision in the act regulating or prohibiting the sale of drugs or medicines was not invalid as not being expressed in the title. *State v. Donaldson*, 42 N. W. 781, 41 Minn. 74.

## PHARMACEUTICAL CHEMIST.

Scientific authorities appear to agree that the term "pharmaceutical chemist" embraces that of pharmacist. The latter is one who possesses the knowledge and skill necessary to compound and dispense medicines; while the former, in addition to such knowledge and skill, is also able to analyze them, and detect any adulteration. The knowledge of analytical chemistry is added to that necessary to a dispensing pharmacist; and, as the one necessarily includes the other, the graduation of one as a pharmaceutical chemist necessarily conferred the honor of a graduate in pharmacy. *State Board of Pharmacy v. White*, 2 S. W. 225, 227, 84 Ky. 626.

## PHARMACIST.

In this country the business of pharmacist or apothecary or druggist is all one, and the same person who prepares and compounds medicines also sells them; so that in popular speech all three are used interchangeably as practically synonymous. *State v. Donaldson*, 42 N. W. 781, 41 Minn. 74.

## PHENACETIN.

Phenacetin is an acetyl derivative of paramidophenetol; its chemical meaning being monoacetylparamidophenetol, although it is sometimes called also "acetphenetidin." It is a valuable antipyretic and antineuralgic remedy, and was so recognized immediately by the medical profession. It does not depress or injure the nervous system, and is therefore used in the treatment of many diseases. *Dickerson v. Maurer* (U. S.) 108 Fed. 233, 235.

## PHENOMENAL.

"Phenomenal," as used in an instruction that, unless a storm was a phenomenal one, such as builders do not contemplate and do not provide against, the builder is liable if a building fall by reason of that storm, means an extraordinary storm, such as builders do not provide against or contemplate in planning their architecture. It certainly would not be strictly accurate to speak of a storm as a phenomenon, or as phenomenal in its character. Phenomenal means pertaining to a phenomenon in appearance. Phenomenon, in a general sense, means an appearance, anything visible, whatever is presented to the eye by observation or experiment, or whatever is discovered to exist; as "the phenomenon of the natural world," "the phenomenon of heavenly bodies" or the "terrestrial substances." It sometimes denotes a remarkable or unusual appearance, whose cause is not immediately obvious. *Diamond State Iron Co. v. Giles* (Del.) 11 Atl. 189, 197, 7 Houst. 557.

## PHILANTHROPIC PURPOSES.

"Philanthropic purposes," as used in a devise of property to trustees to be applied to the promotion of agricultural or horticultural improvements or other philosophical or philanthropic purposes, is not in itself widely variant from "charitable." The rule of interpretation which may restrict "benevolence" to the sense of a legal charity is equally applicable here. *Rotch v. Emerson*, 105 Mass. 431, 433.

## PHILOSOPHICAL APPARATUS.

Ophthalmoscope as, see "Ophthalmoscope."

Philosophical apparatus and instruments are instruments or apparatus involving the illustration of some principle of natural philosophy or natural science. *Manasse v. Spalding* (U. S.) 24 Fed. 86.

There is undoubtedly a clear distinction between mechanical implements and philosophical instruments or apparatus. Implements for mechanical or professional use in the arts are such as are more usually employed in the trades and professions for performing the operations incidental thereto, while philosophical apparatus or instruments are such as are more commonly used for the purpose of making observations and discoveries in nature and experiments for developing and exhibiting natural forces and the conditions under which they can be called into activity. In re *Massachusetts General Hospital* (U. S.) 95 Fed. 973, 974. The phrase does not include implements for mechanical or professional use in the arts which

are employed for performing operations incidental to the practice of arts. *Oelschlaeger v. Robertson*, 11 Sup. Ct. 148, 137 U. S. 436, 34 L. Ed. 744; *United States v. Presbyterian Hospital* (U. S.) 71 Fed. 866, 867, 18 C. C. A. 338.

## PHILOSOPHICAL PURPOSES.

"Philosophical purposes," as used in a devise of property to trustees to be applied to the promotion of agricultural or horticultural improvements of other philosophical purposes "must be understood as referring to practical and useful sciences, and not to those which are abstract, speculative, or metaphysical merely." *Rotch v. Emerson*, 105 Mass. 431, 433.

## PHILOSOPHY.

"Philosophy" claims to be the science of the whole. The task of co-ordination in the broadest sense is undertaken by philosophy. Philosophy corrects in this way the obstructions which are inevitably made by the scientific specialists. The relation existing between philosophy and the sciences will be to some extent one of reciprocal influence. The sciences may be said to furnish philosophy with its matter, but philosophical criticism reacts upon the matter thus furnished, and transforms it. *United States v. Massachusetts General Hospital*, 100 Fed. 932, 937, 41 C. C. A. 114 (citing *Ency. Britannica*).

There is a distinction between "philosophy" and "science." Philosophy has reference to the fundamental part of any science; to general principles connected with a science, but not forming part of it. Science, on the other hand, signifies knowledge co-ordinated, arranged, and systematized. It is knowledge gained by systematic observation, experiment, and reasoning. In re *Massachusetts General Hospital* (U. S.) 95 Fed. 973, 976.

## PHOSPHORIC ACID.

See "Soluble Creosote."

## PHOTOGRAPH.

Photographs are the paper copies taken from the original plate called the "negative," made sensitive by chemicals, and printed by sunlight through the camera. It is the result of art guided by certain principles of science. Photographs are not the original likenesses. Their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. A photograph, like a portrait or miniature painted from life, and proved to resemble the person, is admissible in evidence to identify the person photographed.

*Udderzook v. Commonwealth*, 76 Pa. (28 P. F. Smith) 340, 352.

Where a series of pictures representing the launching of a vessel, taken by means of a camera on a celluloid film in rapid succession, from which a positive reproduction was made by light exposure on another celluloid sheet adapted to be used in a magic lantern to reproduce the same scene, the sheet on which it was taken was a "photograph," and subject to copyright as such. *Edison v. Lubin* (U. S.) 122 Fed. 240, 242, 58 C. C. A. 604, (reversing *Edison v. Lubin* [U. S.] 119 Fed. 993, 994).

## PHOTOGRAPHER.

A "photographer" is an artist, not an artisan. He is not a mechanic and his apparatus is not exempt as the tools of a mechanic. *Story v. Walker*, 79 Tenn. (11 Lea) 515, 517, 47 Am. Rep. 305. See, also, *City of New Orleans v. Robira*, 8 South. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141; *Mullinnix v. State*, 60 S. W. 768, 42 Tex. Cr. R. 526.

## PHOTOGRAPHIC PRINTING.

"Photographic printing is the printing of photographs on prepared paper by the operation of light and the use of negatives. It is not printing as the term is used in 4 Stat. 436, giving a person inventing any print or engraving the right of printing, reprinting, and publishing the same for twenty-eight years." *Wood v. Abbott* (U. S.) 30 Fed. Cas. 424, 425.

## PHOTOGRAPHY.

"Photography" is defined as the science which relates to the action of the light on sensitive bodies in the production of pictures by the fixation of images and the like. (*Webst. Dict.*) It is also said to be the art of producing images of objects by an application of chemical change produced in certain substances by the action of light, or, more generally, by radiant energy. (*Cent. Dict.*) And hence photography is not a mechanical pursuit within the exemption laws. *City of New Orleans v. Robira*, 8 So. 402, 403, 42 La. Ann. 1098, 11 L. R. A. 141.

## PHYSIC.

"Physic" means medicine, or to treat with medicine, or the science of nature and of natural objects, and is derived from the Greek word "phusis—nature." In re *Hunter*, 60 N. C. 372, 373.

In an act providing that all debts owing by any person at the time of his decease shall be paid in the following way: First, physic, funeral, expenses, etc., the term "physic" is not confined to drugs administered, but includes every service or medical aid

rendered by a physician to his patient. *Rouse v. Morris* (Pa.) 17 Serg. & R. 328.

## PHYSICAL

The term "physical effect," used by a number of authorities in reference to nuisances, is not intended to be restricted in its application and meaning solely to the visible signs made upon the subject-matter of the owner's property rights, but should be understood as covering every right appurtenant to the ownership of realty or personal effects, including the paramount right of uninterrupted or undisturbed enjoyment thereof. One may be entirely deprived of this latter right, notwithstanding the tortious act by which this result is brought about leaves no visible traces of injury inflicted so far as the corpus of the property is concerned. The term "physical" is used to distinguish the kind of injury meant from those which have purely a mental effect. *Austin v. Augusta Terminal Ry. Co.*, 108 Ga. 671, 709, 34 S. E. 852, 867, 47 L. R. A. 755.

## PHYSICAL DISABILITY.

"Physical disability," as used in Laws 1881, c. 256, § 1, providing that all associations which have or hereafter may issue any certificate, etc., whereby upon the disease or sickness or "other physical disability" of a member any money or other property may be paid to the member or others dependent on him, shall be subject only to the provisions of the act, includes the disability arising from old age; and hence the fact that an insurance association issues policies payable when the assured attains the age of 70 years does not place the company beyond the operation of the act. *Supreme Counsel of Order of Chosen Friends v. Fairman* (N. Y.) 62 How. Prac. 386, 390.

## PHYSICAL FORCE.

The term "physical force" in relation to assaults is synonymous with the term "violence," and the two are used interchangeably. An assault with actual violence is an assault with physical force put in action exercised on the person assailed. *State v. Wells*, 31 Conn. 210, 212.

## PHYSICAL INCAPACITY.

"Physical incapacity" as a ground for annulment of a marriage is such a physical defect or incurable disease existing at the time of marriage as will prevent sexual coition, and does not include pregnancy. *Franke v. Franke* (Cal.) 31 Pac. 571, 574.

"Physically incapacitated," as used in Code 1886, § 2322, declaring that either party to a marriage is entitled to a divorce when the other was physically incapacitated from

entering into the marriage state at the time of the marriage, means substantially the same as "impotent." It means powerless or wanting in physical power to consummate the marriage; inability to accomplish copulation, when it proceeds from incurable physical imperfection or malformation. *Anonymous*, 7 South. 100, 89 Ala. 291, 7 L. R. A. 425, 18 Am. St. Rep. 116.

## PHYSICAL INJURY.

The term "physical injury" is the synonym of "bodily harm" or "bodily hurt." There must be some tortious act on the part of the employees of a railroad company by which physical injury is occasioned in order to justify damages for mental suffering and fright. There can be no recovery in any case of mental distress or fright resulting from negligence where there is no bodily injury contemporaneous therewith. Sickness resulting from fright and mental anger is not a physical injury within the meaning of this rule. *Deming v. Chicago, R. I. & P. Ry. Co.*, 80 Mo. App. 152, 157.

## PHYSICAL NECESSITY.

"Physical necessity" cannot correctly be said to exist in cases where an agent is called on to exercise judgment and discretion to act or not to act. Take the case of the master of a ship in a storm of eminent peril, where a jettison seems required, or masts are to be cut away to save the ship from foundering at sea. The master is called on to act; but even in such an extremity he has a choice, and when he acts, he acts, properly speaking, on his judgment, under a moral, rather than a physical, necessity. But in ordinary cases where a master orders repairs or supplies for the ship it would be an entire deflection from the true use of language to call it a case of physical necessity. So far as the master is concerned, it is his duty to procure suitable repairs and supplies, in order to enable him to save the ship and prosecute the voyage; and this sense of duty, when it becomes imperative by its urgency on his conscience and judgment, constitutes what is most appropriately called a moral necessity. No one can correctly say in such a case that the master is under a physical necessity to make the repairs or to procure the supplies. *The Fortitude* (U. S.) 9 Fed. Cas. 479, 481.

## PHYSICIAN.

See "Employé"; "Family Physician"; "Laborer"; "Regular Physician"; "Trader—Tradesman."

A physician is defined to be a person who has received the degree of Doctor of Medicine from an incorporated institution; one lawfully engaged in the practice of

medicine. The word, in its popular sense, means one who professes or practices medicine for the healing art; a doctor. A physician is not necessarily a graduate of a medical school. *Harrison v. State*, 15 South. 563, 564, 102 Ala. 170.

In England physicians are a class of persons who have a diploma from a college of physicians, and are entitled to the honorary distinction of Doctor of Medicine. *Graham v. Gautier*, 21 Tex. 111, 117.

A physician or surgeon is defined by statute to be one who prescribes or administers medicine for, or in any manner treats, diseases or wounds for pay. *Richardson v. State*, 2 S. W. 187, 188, 47 Ark. 562.

A physician is one qualified and authorized to prescribe remedies for diseases. He gives prescriptions for medical purposes; and the sale of liquor on a prescription given by him is a sale of liquor for medical purposes. *Prowitt v. City of Denver*, 52 Pac. 286, 287, 11 Colo. App. 70.

"Worcester defines physician as one who professes or practices medicine, and such is the general acceptance of the term;" so that an indictment charging that defendant did "practice medicine" sufficiently alleges that he practiced as a physician. *Whitlock v. Commonwealth*, 15 S. E. 893, 894, 89 Va. 337.

A physician is in common parlance one skilled in both medicine and surgery. The statute of New Jersey on the subject requires that any one receiving license to practice as a physician or surgeon shall be skilled both in medicine and surgery and in anatomy. *Castner v. Shker*, 33 N. J. Law (4 Vroom) 507, 510.

A physician is one who practices the art of healing disease and of preserving health; a prescriber of remedies for sickness and disease. He is presumed to be familiar with the anatomy of the human body in its entirety; to understand the science of physiology and the laws of hygiene; and to be able to minister, as far as may be, to the relief of pain, disease, and physical ailments of all sorts and kinds whatsoever. And while it is true that many physicians devote themselves entirely to some branch of the medical profession for which they have made special preparation, yet the fact that they have first qualified themselves generally for the practice of medicine and surgery in all its branches, and obtained a license to pursue such practice, must be held to entitle them to operate upon the teeth and jaw, as well as upon other parts of the human organism, as a dentist. *State v. Beck*, 43 Atl. 366, 367, 21 R. I. 288, 45 L. R. A. 269.

#### Dentist.

"Physician," as defined by Webster, is one authorized to prescribe remedies for and

treat diseases, a doctor of medicine; and a dentist is not a physician within Code, § 1117, prohibiting the sale of liquor on Sunday except on "a prescription from a physician." *State v. McMinn*, 24 S. E. 523, 524, 118 N. C. 1259.

"Physician," within the meaning of How. Ann. St. § 7516, providing that communications to persons authorized to practice medicine or surgery shall be privileged, does not include a dentist, but the act only applies to general practitioners, and all those whose business as a whole comes within the definition of physician or surgeon. *People v. De France*, 62 N. W. 709, 711, 104 Mich. 563, 28 L. R. A. 139.

The word "physician" is derived from the Greek word "physis,—nature," and, in a restricted sense, means one who administers medicine to cure disease; but in its proper sense it has a broader signification, and means one who, by a knowledge of the nature and structure of the human system, and of the nature and properties of substances, cures the injuries and diseases to which it is subject. A surgeon dentist is a physician within the meaning of the act of Congress exempting from conscription "all physicians who now are, and for the last five years have been, in the actual practice of their profession," as the word "physician" includes not only doctors who administer medicine and physic, but surgeons, who, by a knowledge of the nature and structure of the human system, are able to amputate an injured and diseased limb, or to extract a ball with skill and as much safety to life and as little pain as the case admits of. *In re Hunter*, 60 N. C. 372, 373.

#### Homeopath.

Inasmuch as medicine is a progressive, rather than an exact, science, the law cannot supply any positive rules for the interpretation of medical science in determining the legal significance of the word "physician." When used in a contract, the word must be construed to mean any person who makes it his regular business to practice physic, and included a homeopath. *Corsal v. Maretzek* (N. Y.) 4 E. D. Smith, 1, 7.

A statute authorizing "physicians and surgeons," not less than five in number, to organize medical societies, means all who practice physic and surgery, and who are recognized by the people as physicians and surgeons, and cannot be limited to one school of practitioners in preference to all others. Those who practice medicine in the state belonging to the school of homeopathy are so numerous, and their reputation for learning and skill in their profession is so well established, that it cannot be said that they are not included in or designated as physicians and surgeons by the terms of the statute.

Raynor v. State, 22 N. W. 430, 435, 62 Wis. 289.

### Osteopath.

The term "physician" in the statutes in reference to the practice of medicine refers to those exercising the calling of treating the sick by medical agencies, as commonly practiced through the state at the time the act was passed. The term does not include an osteopath, as osteopathy teaches neither therapeutics, materia medica, surgery, nor bacteriology, but rests entirely upon manipulation of the body for the cure of disease. Nelson v. State Board of Health, 22 Ky. Law Rep. 438, 441, 57 S. W. 501, 504, 108 Ky. 769, 50 L. R. A. 383.

### PHYSIOLOGY.

"Physiology" is the science of the functions of all the different parts and organs of animals and plants, the offices they perform in the economy of the individual, and their properties. In re Hunter, 60 N. O. 372, 373.

### PIAZZA.

Defendant was indicted under a statute imposing a penalty upon "any person who shall commit larceny in any dwelling house." The larceny was committed by taking clothes from the railing on the outer edge of an open piazza in front of the dwelling house and attached to it. The court said: "Such a piazza is not a house, and cannot be a dwelling house. It may be attached to the house, and may in one case be a part of the house, but it is not of itself a house. To be in such a piazza is not to be in the house. It is rather an entrance of the house than the house itself. A larceny committed in the piazza cannot be said to be committed inside of the house. The piazza is not within the spirit of the law which attaches a sanctity to the house, and adds to the punishment on account of that sanctity." Henry v. State, 39 Ala. 679-681.

### PICKED EWES.

The words "picked ewes" in a contract for the sale of 1,000 picked ewes was construed to mean selected ewes, and to authorize a selection to be made from the seller's flock, and not to mean ewes free from disease. Labbe v. Corbett, 6 S. W. 808, 811, 69 Tex. 503.

### PICKET—PICKETING.

A "picket" is a body of men belonging to a trades union, sent to watch and annoy men working in a shop not belonging to the union, or against which a strike is in progress. This word had no such meaning originally, but

this definition is the result of what has been done under it and the common application that has been made of it. Beck v. Railway Teamsters' Protective Union, 77 N. W. 13, 22, 118 Mich. 497, 42 L. R. A. 407, 74 Am. St. Rep. 421.

The "picketing" of a factory by employes on a strike is the placing of relays of guards in front of the factory or the place of business of the employer for the purpose of watching who should enter or leave the same. Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n, 46 Atl. 208, 209, 59 N. J. Eq. 49.

### PICKING HER POCKET.

"Picking her pocket," as used in an information charging a person with attempting to steal, take, and carry away money and personal property of a woman by "picking her pocket," is uncertain and equivocal. Pockets are picked by cutting them off and removing them, by cutting them open so as to expose their contents, and by thrusting the hands into them. So various other acts are done by the intended thief or his confederate to divert or engross the attention of the victim, such as gathering around him in a crowd, or jostling him, or creating in some other way confusion or alarm while the pocket or its contents are secured. State v. Wilson, 30 Conn. 500, 504.

### PICKLED HERRING.

Pickled herrings are herrings preserved in a brine of vinegar, salt, and spices. This is the meaning of the words "herrings, pickled or salted," as used in the tariff act of 1883. Hansen v. Robertson (U. S.) 29 Fed. 686, 687.

### PICKPOCKET.

Bouvier defines the word "pickpocket" as follows: "A thief; one who in a crowd or in other places steals from the pockets or person of another without putting him in fear." State v. Dunn, 71 Pac. 811, 66 Kan. 483.

### PICNIC.

The word "picnic" implies in its usual and broad signification a mere pleasure trip, and implies that the carriage of persons for such purpose is within the Sunday laws. Dugan v. State, 25 N. E. 171, 172, 125 Ind. 130, 9 L. R. A. 321.

### PICO.

Pico is a gambling game similar to keno, and is a gambling device within the mean-

ing of a statute prohibiting such devices. *Euper v. State*, 35 Ark. 629, 630.

## PICTURE.

See "Family Pictures."

"Webster treats the word 'picture' as derived from Latin 'pingere,' 'pictum,' to paint, and as synonymous with 'pictura,' and defines the word as meaning that which is painted, a likeness drawn in colors—hence any graphic representation, as of a person, a landscape, or a building; and he adopts the language of Bacon in which he says that pictures and shapes are but secondary objects, showing that in his view the picture presents the objects to the observer as a whole, whereas the manuscript only describes the parts or elements of the object, leaving the mind of the reader to aggregate those parts or elements into an entire figure or whole. Webster treats the word 'manuscript' as derived from the Latin words 'manus,' the hand, and 'scribere,' to write, 'scriptum,' and as synonymous with manuscriptum; meaning literally something written with the hand; a book or paper written with the hand, or a writing of any kind, in contradistinction to a printed document." The word "picture" is not included in the word "manuscript" in section 9 of the copyright act. *Parton v. Prang* (U. S.) 18 Fed. Cas. 1273, 1275.

A picture is one of the ways of representing a person or thing. It attempts imitation, rather than description. Pictures antedated letters, and their use was probably one of the earliest methods of communicating thoughts and perpetuating events, and the right of privacy does not always attach to pictures of persons. *Atkinson v. John E. Doherty & Co.*, 80 N. W. 285, 288, 121 Mich. 372, 46 L. R. A. 219, 80 Am. St. Rep. 507.

A "negative" is a picture. *People v. Ketchum*, 103 Mich. 443, 445, 61 N. W. 776, 777, 27 L. R. A. 448, 50 Am. St. Rep. 383.

## PIECE.

See "Ball Piece."

The words "piece" and "parcel," as used in Acts 1891 (Ex. Sess.) c. 26, § 17, providing that where taxes are collected for the filing of the bill for the collection of taxes a fee of one dollar to the attorney for each piece or parcel of land shall be paid by the owner, mean the same thing, and are used to designate that particular area of real estate which should be certified to the attorney as having been properly valued and taxed separate and apart from all other real estate. *State v. Baldwin University*, 37 S. W. 1, 2, 97 Tenn. 358.

"Piece of land," as used in a will devising all testator's messuage or dwelling house and premises with the piece of land thereto adjoining, means a small portion of land, and imports a portion of land as separate and distinguished from other land, not, indeed, of the same owner, but of other owners. *Josh v. Josh*, 5 J. Scott (N. S.) 454, 465.

The terms "piece or parcel of real property" and "piece and parcel of land," wherever used in the title on taxation, shall be held to mean any quantity of land in possession of, owned by, or recorded as the property of, the same claimant, person, company, or corporation. Rev. St. Tex. 1895, art. 5064.

The terms "piece or parcel of real property" or "piece or parcel of land" mean any contiguous quantity of land in the possession, owned by, or recorded as the property of the same claimant, person, or company. Rev. Codes N. D. 1899, § 1176; *Ballinger's Ann. Codes & St. Wash.* 1897, § 1658.

## PIER.

See "Bridge Pier."

The Century Dictionary defines a "pier" to be a projecting quay, wharf, or other landing place; and, without some qualifying adjective, this is the ordinary meaning of the word. It may be a solid stone structure, or an outer shell of stone or wood filled in with earth; or it may be a framework formed by fastening a platform of planks upon piles driven into the soil at the bottom of the water. In either event, it is a projection of the land. It is conceivable that a pier might also be built to float upon the surface of the water, but it is then a floating pier, and needs the adjective before the description is complete. *The Haxby* (U. S.) 94 Fed. 1016.

A structure erected for ferry purposes, which was composed of rails or piles driven into the soil under water, and covered on the upper ends, to which it was fastened, by a horizontal flooring of plank, by which to reach ferry boats, extending to the bulkhead used for ferry purposes, and of rows of piles driven into such soil in front of such covered piles for the purpose of guiding and receiving the ferry boats, is not a pier, within the meaning of Sess. Laws 1857, entitled an act to establish bulkhead and "pier" lines for the ports of New York. *Stevens v. Rhineland*, 28 N. Y. Super. Ct. (5 Rob.) 285, 308.

Whether the term "pier" in a contract for the construction of the piers for a drawbridge does not include the center or drawpier, by reason of a custom in the trade, is a question for the jury. *Texas & St. L. R. Co. v. Rust* (U. S.) 19 Fed. 239, 243.

Webst. Dict. defines a "pier" as a projecting wharf or landing place, and within

this definition is included a structure erected by a ferry company which extends beyond the bulkhead line. *People v. New York & S. I. Ferry Co.* (N. Y.) 7 Hun, 105, 108.

## PIGEON.

As poultry, see "Poultry."

## PIGNUS.

"In the civil law the term 'pignus' (pawn) was, in an accurate sense, applied to cases where there was a pledge of the thing, and possession was actually delivered to the person for whose benefit the pledge was made, and 'hypotheca' (hypothecation) where the possession of it was retained by the owner, and 'pignus' was especially used in such cases where the thing was immovable." *The Nestor* (U. S.) 18 Fed. Cas. 9, 12.

## PIKE POLE.

A "pike pole" is an instrument with a handle, about five or six feet long, containing a steel point at the end, which is used, among other purposes, in undermining gravel banks. *Allen v. Logan City*, 10 Utah, 279, 284, 37 Pac. 496.

## PILE.

The word "pile" is synonymous with "battery," and therefore the word "pile-Leclanche" is the designation in French of Leclanche's battery. *Leclanche Battery Co. v. Western Electric Co.* (U. S.) 23 Fed. 276, 277.

A mortgage of the machinery and fixtures in and about the sawmill, and also "lumber piled on said premises," being more particularly described as block 113, city of P., was evidently intended to mean lumber stacked in the usual way upon the mill premises; but it is not sufficiently certain to render the mortgage operative and effectual to bind any lumber, unless it is shown by extrinsic proof that the mortgagor at the time the mortgage was executed had lumber answering to such description. The description, standing alone, means nothing definite. *Gregory v. Northern Pac. Lumbering Co.*, 17 Pac. 143, 145, 15 Or. 447.

## PILE DRIVER.

A pile driver is a machine for driving piles by raising, by means of power applied to the machinery, a heavy weight and driving it upon the pile. It is manifest that one who drives a post by means of an axe or sledge is not engaged in the occupation of pile driver, either in the capacity of pile driver or employé, and therefore such a person is not a pile driver employé within the meaning of

a life policy using such term in its natural qualification of risks of various hazards. *National Acc. Soc. of City of New York v. Taylor*, 42 Ill. App. 97, 102.

## PILFER.

The words "to pilfer," in their plain and popular sense, mean to steal. To charge another with pilfering is to charge him with stealing. *Becket v. Sterrett* (Ind.) 4 Blackf. 499, 500.

## PILLAGE.

The term "pillage" imports latrocinatio, or robbery by force or violence, and not a simple larceny merely. Merlin defines it to be the plundering, ravaging, or carrying off of goods, commodities, or merchandise by open force or violence. *American Ins. Co. v. Bryan* (N. Y.) 26 Wend. 563, 573, 37 Am. Dec. 278 (citing 23 Merl. Repert. art. "Pillage").

## PILOT.

See "Branch Pilot"; "Licensed Pilot."

A "pilot" is defined to be, first, an officer serving on board of a ship during the course of a voyage, and having the charge of the helm and of the ship's route; and, secondly, an officer authorized by law, who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port. *People v. Francisco* (N. Y.) 10 Abb. Prac. 30, 32; *State v. Turner*, 55 Pac. 92, 93, 34 Or. 173; *Chapman v. Jackson* (S. C.) 9 Rich. Law, 209, 212; *The Wave v. Hayer* (U. S.) 29 Fed. Cas. 464, 468 (citing Abb. Shipp. 148).

### As a public officer.

A "pilot" is one who steers a ship or vessel—a guide—and in no sense exercises or discharges the functions of a public office. No portion of the sovereignty of the country attaches to his position or duty. It is neither legislative, executive, nor judicial, and does not, therefore, fall legitimately within the scope of a quo warranto information as to public officers. *Attorney General v. McCaughey*, 43 Atl. 646, 648, 21 R. I. 341 (citing *Dean v. Healy*, 66 Ga. 503).

A pilot is not an officer, within the meaning of the Constitution and statutes of Florida, but he is a person invested by law with peculiar powers and privileges connected with commerce, for the exercise of which a qualification is required by the state. The privileges and powers which he has being of a public nature, resulting from legislative grant of franchise, and if he exercise such franchise without the qualification prescribed by statute, an information in the nature

of a quo warranto may be brought by the Attorney General. *State v. Jones*, 16 Fla. 306-310.

Pilots of the harbor of San Francisco are public officers. They are appointed by virtue of an act of the Legislature for a fixed term to their employments, have definite duties prescribed, fixed rules of compensation, are required to give bond, and are entitled to do all the business of pilots for the harbor of San Francisco. *People v. Woodbury*, 14 Cal. 43, 45.

#### Master of towboat.

The master of a towboat engaged in a bona fide towage service is not a pilot. *State v. Turner*, 56 Pac. 645, 34 Or. 173.

#### PILOTAGE.

See "Half Pilotage."  
As impost, see "Imposts."

Pilotage is compensation for services performed by a pilot. *Gloucester Ferry Co. v. Commonwealth of Pennsylvania*, 5 Sup. Ct. 826, 832, 114 U. S. 196, 29 L. Ed. 158; *Southern S. S. Co. v. Port Wardens*, 78 U. S. (6 Wall.) 31, 34, 18 L. Ed. 749.

"Pilot vessel engaged on her station or pilotage duty," within Act Cong. March 3, 1885, art. 9 (23 Stat. c. 354), providing for the maintenance and protection of a pilot vessel while engaged on her station or pilotage duty, includes pilot boats when at anchor, and also cruising, looking, or waiting for ships wanting pilots, though hundreds of miles off from the port to which they belong. *The Haverton* (U. S.) 31 Fed. 563, 568.

#### PILOT'S WATER.

"Pilot's water or pilotage ground" means the access to a bay, inlet, river, harbor, or port, beginning at the exterior point where a pilot may take leave of an outward bound vessel, and extending to where inward bound vessels anchor. It is not synonymous with the term "cruising ground," which means the distance from a certain extent of coast which a pilot may take them by his commission. *The Whistler* (U. S.) 13 Fed. 295, 298.

The term "pilot's water" does not include a shoal running out into the sea, which is not an entrance into a bay, inlet, harbor, or port, though within the cruising ground, unless it has been expressly made to include such shoal by statute. *Lea v. Alexander* (U. S.) 15 Fed. Cas. 91.

#### PIMP.

The ordinary meaning of the word "pimp" is one who provides for others the means of gratifying lust; a panderer. *Wel-*

*deman v. State*, 30 N. E. 920, 921, 4 Ind. App. 397.

"Pimp" is defined by Webster and Worcester as "one who provides gratification for the lust of others; a procurer; a panderer." This is the commonly accepted definition of the term, and, if it has acquired any other meaning by local usage, that usage and meaning must be proven as a fact, and cannot be judicially noticed by the court. *People v. Gastro*, 42 N. W. 937, 939, 75 Mich. 127.

"Pimp" is defined as one who provides gratification for the lust of others, and is a term of opprobrium, so that its use in an information charging the violation of an ordinance was scandalous, and it should have been stricken. *City of Butte v. Peasley*, 45 Pac. 210, 18 Mont. 303.

#### PINE LAND BROKER.

A "pine land broker" is a person engaged as a middleman, whose business it is to bring sellers and purchasers of pine land together, and induce a sale for which he charges a commission from one or both parties. *McDonald v. Maltz*, 44 N. W. 337, 78 Mich. 685.

#### PINE TIMBER.

A declaration for the sale and delivery of "pine timber" is not supported by evidence of the sale and delivery of spruce timber. *Robbins v. Otis*, 18 Mass. (1 Pick.) 368, 370.

#### PIN.

The term "pins, solid head or other," in the tariff act of 1883, fixing a duty on pins, solid head or other, does not include iron and steel wire hairpins, as previous tariff acts treated hairpins as distinct from pins, solid head or other, and therefore such hairpins, not being enumerated, are dutiable as manufactured articles or wares not specifically enumerated, composed wholly or in part of iron, steel, etc. *Robertson v. Rosenthal*, 10 Sup. Ct. 120, 121, 132 U. S. 460, 33 L. Ed. 392.

Within the meaning of the revenue laws, black-headed pins are "pins, metallic," and dutiable as such, and not as "manufactures of glass, or of which glass shall be the component material of chief value." *Worthington v. United States* (U. S.) 90 Fed. 797 (following *Steinhardt v. United States* [U. S.] 92 Fed. 139).

#### PIN POOL.

The game of pin pool is played on a table on which five pins are set in a small square, one being in the center of the square,



and each pin being numbered from one to five, respectively. The game is played by a number of persons, each one of whom uses a cue, and balls, wherewith the pins are knocked down, and the player is credited on his score with the respective number of the pins thus knocked down. At the beginning of the game the game keeper puts a number of marbles in a leather bottle, on each one of which is a number printed, and after thoroughly shaking it up he gives one to each of the players. These balls indicate the order of players among the players, and each one is entitled to credit on his score for the number marked on his ball. When, in the progress of the game, one of the players makes a total score of the precise number fixed as the winning number, he is entitled to the pool, which consists of the total amount the players contributed thereto. The game is not a gambling one, in the sense of the Constitution and the law. *State v. Quaid*, 43 La. Ann. 1076, 10 South. 183, 26 Am. St. Rep. 207.

## PINT.

In common understanding a charge of a sale of "one pint" of brandy means a sale of that particular quantity, and not of more. That a pint is less than five gallons is a part of the English language. *State v. Lavake*, 6 N. W. 339, 26 Minn. 526, 87 Am. Rep. 415.

## PIONEER.

A patent representing a marked advance in the art is called a "pioneer." *Ford v. Bancroft* (U. S.) 98 Fed. 309, 312, 39 C. C. A. 91.

"Pioneer," as used in connection with a patent, is commonly understood to denote one covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what has gone before. *Boyden Power-Brake Co. v. Westinghouse*, 18 Sup. Ct. 707, 170 U. S. 537, 42 L. Ed. 1136.

## PIOUS GIFT.

See "Legacy to Pious Uses."

Mr. Binney, in his great argument in the case of *Vidal v. Girard's Ex'rs*, 43 U. S. (2 How.) 127, 11 L. Ed. 205, defined a pious or charitable gift to be whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish. The love of God is the basis of all

that is bestowed for his honor, the upbuilding of his church, the support of his ministers, the religious instructions of mankind. The love of his neighbor is the principle that prompts and consecrates all the rest. This definition was approved by the Supreme Court of Pennsylvania. *Pennoyer v. Wadhams*, 25 Pac. 720, 722, 20 Or. 274, 11 L. R. A. 210 (citing *Price v. Maxwell*, 28 Pa. [4 Casey] 23, 35).

## PIPE.

See "Standpipe."

## PIPE CUTTER.

A "pipe cutter" is a tool, worked by hand, which grasps the pipe to be cut between two jaws, one or both of which is provided with a knife, and is then revolved around the pipe, the jaws being gradually brought nearer together, as the cut progresses, by means of a set-screw or other device. *Saunders v. Allen* (U. S.) 60 Fed. 610, 9 C. C. A. 157.

## PIPE LINE.

"Pipe line," as used in a deed conveying all the grantor's right and title to all buildings, "tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever," situated on any portion of a ranch, means a line of pipe running upon or in the earth, carrying with it the right to the use of the soil in which it is placed. *Dietz v. Missouri Transfer Co.*, 80 Pac. 380, 383, 95 Cal. 92.

## PIPE LINE COMPANY.

The term "pipe line company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association or corporation, wherever organized or incorporated, when engaged in the business of transmitting natural gas or oil through pipes or tubing, either wholly or partially, within this state. *Bates' Ann. St. Ohio 1904*, § 2780-17.

## PIRACY.

Piracy consists of those acts of robbery or depredation on the high seas which if committed on the land would have amounted to a felony, and is sometimes spoken of as a marine felony. It is therefore robbery on the high seas. *Dole v. Merchants' Mut. Marine Ins. Co.*, 51 Me. 465, 467; *United States v. Tully* (U. S.) 28 Fed. Cas. 226, 229; *United States v. Smith* (U. S.) 27 Fed. Cas. 1134, 1135; *Talbot v. Janson*, 3 U. S. (3 Dall.) 133, 159, 1 L. Ed. 540; *United States v. Jones*

(U. S.) 26 Fed. Cas. 653, 655; *United States v. Chapels* (N. Y.) 2 Wheeler, Cr. Cas. 205, 222.

Piracy is defined as an assault on vessels navigating on the seas, committed *animo furandi*, whether the robbery or forcible depredation be effected or not, and whether or not it be accompanied by murder or personal injury. *Dole v. New England Mut. Marine Ins. Co.* (U. S.) 7 Fed. Cas. 837, 847 (citing 1 Phillim. Int. Law, 379).

"Piracy" is only a sea term for robbery, piracy being a robbery within the jurisdiction of admiralty. *United States v. Smith*, 18 U. S. (5 Wheat.) 153, 161, 5 L. Ed. 57.

"Piracy" is an offense against the law of nature, which is in this respect the law of nations. *Adams v. People*, 1 N. Y. (1 Comst.) 173, 177.

Piracy consists of depredations committed on the high seas, without authority from any sovereign power. It is not necessary that the motive be plunder, or that the depredations be directed against the vessels of all nations indiscriminately, it being sufficient that the act is an act of depredation on the sea with a felonious purpose. *United States v. The Ambrose Light* (U. S.) 25 Fed. 408, 412, 415.

Piracy is considered by President Woolsey as a name applied to indiscriminate plundering and robbery, either upon the high seas or upon the coasts, where the high seas are used as the basis of operation, thus precluding the idea of a revolutionary or political sentiment. *The City of Mexico* (U. S.) 28 Fed. 148, 150.

To constitute piracy, the taking must be felonious. A commission cruiser, by exceeding his authority, is not thereby to be considered a pirate. It may be a marine trespass, but not an act of piracy, if the vessel is taken as a prize, unless taken feloniously and with intent to commit a robbery. *Davison v. Sealskins* (U. S.) 7 Fed. Cas. 192, 193.

The crime of robbery committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, or persons within a vessel belonging exclusively to the subjects of a foreign state, is not piracy, within the true intent and meaning of the act for the punishment of certain crimes against the United States. *United States v. Kessler* (U. S.) 26 Fed. Cas. 766, 771 (citing *Palmer's Case*, 16 U. S. [3 Wheat.] 610, 4 L. Ed. 471).

A person who commits hostility under a commission to a party to a recognized civil war is not guilty of piracy. *The Chapman* (U. S.) 5 Fed. Cas. 471, 474.

Every illegal act or transgression committed on the high seas will not amount to

"piracy." What is called robbery on land is piracy if committed at sea, and as every robbery on land includes a trespass, so does every piracy at sea. Consequently, if there be an unlawful taking, it may be piracy or trespass, according to the circumstances of the case. *Talbot v. Janson*, 3 U. S. (3 Dall.) 133, 152, 1 L. Ed. 552.

If a party of emigrants on a voyage to Australia change their minds and prefer going to California, and, to effect their object, murder the captain and crew and seize the vessel, such act is an act of piracy, within the meaning of a policy of insurance stipulating against perils by pirates. *Palmer v. Naylor*, 10 Exch. 382, 388.

#### Privateering distinguished.

The distinction between privateering and piracy is the distinction between captures *jure belli*, under color of governmental authority, and for the benefit of a political power organized as a government *de jure* or *de facto*, and mere robbery on the high seas, committed from motives of personal gain, like theft or robbery on land. In the one instance the acts committed inure to the benefit of the commissioning power, and in the other to the benefit of the perpetrators merely. A capture of a vessel and cargo by a Confederate privateer was held not to be within the terms of the insurance policy against perils of the sea, fires, pirates, assailing thieves, jettison, etc., but to be included in the exception "that said company shall not be liable for any claim for or loss by seizure, capture, or detention." *Fisfield v. Insurance Co. of Pennsylvania*, 47 Pa. (11 Wright) 166, 169, 86 Am. Dec. 523.

#### Slave trading.

The act of trading in slaves, however detestable, is not the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country in its coasts and vessels indiscriminately. It is not piracy. And the right of search, which is strictly belligerent in its character, and can never be exercised by a nation at peace, except against professed pirates, until permitted by treaty, does not extend to the searching of vessels of a friendly nation supposed to be engaged in the slave trade. *The Antelope*, 23 U. S. (10 Wheat.) 66-118, 6 L. Ed. 268; *United States v. Darmand* (U. S.) 25 Fed. Cas. 754, 760.

#### Musical composition.

The "piracy" of a musical composition is the composition of an air which is substantially the same with another. If you take from the composition of a composer all the bars consecutively which form the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order, or broken by the intersection of

others, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, in common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear, and adding variations makes no difference in the principle. *D'Almaine v. Boosey*, 1 Younge & C. 288 (cited and quoted in *Daly v. Palmer* [U. S.] 6 Fed. Cas. 1137).

### PIRATICAL AGGRESSION.

A "piratical aggression," within Act Cong. March 3, 1819, c. 75, authorizing the condemnation of any vessel which shall have attempted any piratical aggression, is an aggression unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means the act belonging to the class of offenses which pirates are in the habit of perpetrating, whether they do it for the purposes of plunder, or for the purposes of hatred, revenge, or wanton abuse of power. *United States v. The Malek Adhel*, 43 U. S. (2 How.) 210, 232, 11 L. Ed. 239.

### PIRATE.

"A pirate" is said to be one who roves the sea in an armed vessel without any commission from any sovereign state, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. For this reason pirates, according to the law of nations, have always been compared to robbers, the only difference being that the sea is the theater of the operations of one, and the land of the other. *United States v. Bacon* (U. S.) 24 Fed. Cas. 963, 965; *Davison v. Sealskins* (U. S.) 7 Fed. Cas. 192, 193; *Dole v. New England Mut. Marine Ins. Co.* (U. S.) 7 Fed. Cas. 837, 847.

A "pirate," according to the most approved definitions, is a sea robber; one who robs on the high seas irrespective of country or conditions; an indiscriminate plunderer for the sake of gain. *Fifield v. Insurance Co. of Pennsylvania*, 47 Pa. (11 Wright) 166, 187, 86 Am. Dec. 523.

A "pirate" is one who renounces every country and ravages every country on its

coast and vessels indiscriminately. A "pirate" is otherwise defined as one who, without a commission from any public or recognized authority, shall ravage the coast or vessels of any country indiscriminately. Charge of the court in the case of *The Wanderer* (Pa.) 3 Phila. 527, 538, 539.

### PISCARIA.

See "Common of Piscary."

"The term 'piscaria' is used as including all fisheries, without regard to their distinctive character or to the method of taking the fish." *Moulton v. Libbey*, 37 Me. 472, 497, 59 Am. Dec. 57 (cited in *Caswell v. Johnson*, 58 Me. 164, 166).

### PISCARIAL RIGHTS.

"Piscarial rights," of whatever nature and in whatever manner acquired, are always subservient to the rights of the public or to the rights of navigation. *Moulton v. Libbey*, 37 Me. 472, 497, 59 Am. Dec. 57.

### PISTOL

See "Belt Pistol"; "Pocket Pistol."

As a deadly weapon, see "Deadly Weapon."

As a weapon, see "Weapon."

A pistol is a small, light firearm. The pistol earliest in use was a matchlock arm, the arm containing a match for firing it. This was succeeded by the flint and steel lock, and then by the percussion lock. *Atwood v. State*, 53 Ala. 508, 509.

"Pistol," as used in Act Feb. 16, 1875, prohibiting the carrying of any "pistol" whatever as a weapon, means such as is usually carried in the pocket or of a size to be concealed about the person, and used in private quarrels and brawls, and not such as is in ordinary use and effective as a weapon of war, and useful and necessary for the common defense. Pistol is from *Pistola*, a town in Italy where pistols were first made. A pistol is a small firearm, or the smallest arm used, intended to be fired from one hand, differing from a musket chiefly in size. *Fife v. State*, 31 Ark. 455, 461, 25 Am. Rep. 556 (citing *Webst. Dict.*).

#### Disabled weapon.

"Pistol," as used in a statute relating to the carrying of a pistol on the person, cannot be construed to include a pistol which has no cylinder, the cylinder not being attached to it nor in the person's possession. *Cook v. State*, 1 Tex. App. 19.

"Pistol," as used in a statute prohibiting the carrying of concealed firearms or pistols, must be a pistol having such a de-

gree of perfectness that it may reasonably be carried and used as a weapon. It does not include a pistol that has no mainspring or other necessary parts of a lock, and can only be fired off by the use of a match, or in some other such way. *Evins v. State*, 46 Ala. 88, 89.

A pistol, within the meaning of a statute forbidding the carrying of a pistol, does not include a pistol with a broken main spring, and the carrying thereof to a gun shop for repairs is not a violation of the statute. *Underwood v. State*, 29 S. W. 777.

As the term "pistol" is used in Rev. Code, § 3555, prohibiting the carrying of concealed pistols, it includes a pistol which is so much out of order that it cannot be discharged by the trigger. *Atwood v. State*, 53 Ala. 508, 509.

"Pistol," as used in Code, § 4527, making it penal to carry about the person, unless in an open manner and fully exposed to view, any pistol, except a horseman's pistol, includes a pistol the main spring of which is disabled so as to render a discharge of the weapon impossible in the ordinary mode of using firearms. "Pistol" is a word in general use by the whole population, and is consequently to be understood in its ordinary signification. With this as a standard, any object which would usually be called a pistol in speaking of it is a pistol. An object once a pistol does not cease to be one by becoming temporarily inefficient. Its order and condition may vary from time to time without changing its essential nature or character. *Williams v. State*, 61 Ga. 417, 418, 34 Am. Rep. 102.

#### PISTOL CARTRIDGE.

In a law imposing a license of \$300 on dealers in pistols or pistol cartridges, by the term "pistol cartridges" is meant not merely such cartridges as are or may hereafter be called pistol cartridges, but pistol cartridges in fact, such as are adapted to and are or may be used for pistols of the size and caliber in ordinary use, including especially those capable of being carried about the person. The name of a thing may be but a mere device and amount to but little, as dealers have power to name their own articles of traffic, and would be tempted to affix a spurious nomenclature in order to elude the law. *Union Metallic Cartridge Co. v. Teague*, 3 South. 709, 710, 83 Ala. 475.

#### PIT BOSS.

The term "mine manager" in Act June 18, 1801, providing for the examination of mine managers, etc., is defined by the act as intended to mean any person who is charged with the general direction of the under-

ground work, or of both the underground and top work, of any coal mine, and who is commonly known and designated as "mine boss" or "foreman" or "pit boss." *Woodruff v. Kellyville Coal Co.*, 182 Ill. 480, 483, 35 N. E. 550.

#### PITCH.

By a vote of the original proprietors of the township, a committee was appointed "to run out the common lands, showing all the lands that have been pitched, and all the common land that is left," and authorizing the committee "to lay out all meets and bounds to each person that has made his pitch, 100 acres to each right, and to make a return accordingly." "Pitch," as here used, means the selection of the general location of a claim or share by entry and occupation. *Garland v. Rollins*, 36 N. H. 349, 352.

#### PLACE.

See "Abiding Place"; "Conspicuous Place"; "Dwelling Place"; "Foreign Place"; "Gambling Place"; "Home Place"; "In Place"; "In Place Of"; "Ordinary Place"; "Public Place"; "Suitable Place"; "Traveled Place." Any place, see "Any." Other place, see "Other."

The word "place" has a variable meaning. In particular it means in any given instance, its use depending upon the connection and circumstances. It may not be identity of spot. "The extent of locality is to be determined by the connection in which the word is used." *State v. Heard*, 64 Mo. App. 334, 339 (citing And. Law Dict. and Webst. Dict.). Webster defines "place" as an area; any portion of space regarded as distinct from other space; two adjoining places are but one place when consolidated. *Prentiss v. Davis*, 22 Atl. 246, 248, 83 Me. 364.

The word "place" expresses simply locality, and not kind. Hence qualifying words are necessary to indicate the kind of place. Thus, a statute exempting from taxation "places" of religious worship characterizes the place by religious worship, and without religious worship held in it the place has no character, so that the exemption is determined entirely by the use to which the place is put, and would not include buildings for such church purposes as Sunday schools, lectures, and parsonages. *Mullen v. Erie County*, 85 Pa. 288, 291, 27 Am. Rep. 650, 4 Wkly. Notes Cas. 502, 503.

"Place," as used in an agreement to give a certain person a certain sum if he should send to the promisor a party to buy his place at R., usually imports real property, yet it does not necessarily do so. It is sus-

ceptible of various meanings. If the promisor had been the owner of the real estate in which the business was carried on, but not of the business itself, the expression "his place at R." would clearly have indicated the realty which he owned. On the other hand, if land had been the property of another, but the saloon business, with its good will and fixtures, had belonged to the promisor, then "his place at R." would have been an apt expression to describe his saloon and fixtures. The fact that he owned both the business and the property in which it was carried on makes the meaning of the words used uncertain. *Axford v. Meeks*, 36 Atl. 1036, 59 N. J. Law, 502.

Rev. St. art. 4311, provides that any officer taking the acknowledgment of a deed must place his official certificate thereon. Held, that the word "place" means to assign a place to, to fix, to settle; and a certificate of acknowledgment written on a piece of paper and pasted on a deed was a compliance with the statute. *Schramm v. Gentry*, 63 Tex. 583, 585.

#### As city or town.

As used in Gen. St. c. 3, § 7, cl. 8, subjecting to a penalty whoever brings into and leaves any poor and indigent person in any place in the state where he is not lawfully settled, knowing him to be poor and indigent, "place" is synonymous with "city" or "town." *Inhabitants of Palmer v. Wakefield*, 102 Mass. 214, 215.

The word "place" may mean a city or town. Rev. Laws Mass. 1902, p. 89 c. 8, § 5, subd. 17.

The word "place" in the statutes may mean city or town, unless some other meaning is implied by the context. Pub. St. N. H. 1901, p. 65, c. 2, § 30.

#### As county.

"Place" is a very indefinite term in public usage. It is used of an area or portion of land marked off by boundaries, real or imaginary, as a region or locality. It is applied to a city, town, or village, and is used of a building with adjoining grounds. As used in Const. art. 5, § 26, preventing the Legislature from passing local or special laws changing the names of persons or "places," it will be held to include counties. *State v. Thomas*, 64 Pac. 503, 504, 25 Mont. 226.

"Place," as used in the revised act of March 3, 1863, providing that, when foreign goods brought or sent into the United States are obtained otherwise than by purchase, they shall be invoiced at the actual market value thereof at the time and place when and where they were procured or manufactured, does not mean any locality more limited than the country where the goods are

bought or manufactured. *Cluquot's Champagne*, 70 U. S. (3 Wall.) 114, 142, 18 L. Ed. 116.

#### As homestead.

"Place," as used in a contract to purchase of a certain person his place at S., should be construed in its popular and correct meaning, as the place where one resides; his homestead. *Hodges v. Kowing*, 18 Atl. 979, 980, 58 Conn. 12, 7 L. R. A. 87.

#### As lot with several buildings.

"Place," as used in St. 1890, c. 230, providing that the officers of a city may license persons to keep more than four horses in certain specified buildings or places therein, and whoever, not being licensed, uses any building or place for a stable for more than four horses, may be enjoined, includes any inclosure, whether covered or not; and hence one cannot, unlicensed, keep four horses in each of several buildings on the same lot, the word "place" referring in such instance to the whole lot. *Inhabitants of Brookline v. Hatch*, 45 N. E. 756, 757, 167 Mass. 380, 36 L. R. A. 495.

#### As similar place.

"Place," as used in a city ordinance providing for the punishment of any person who shall be guilty of any violent, riotous, or disorderly conduct, or who shall use any profane, abusive, or obscene language in any street, house, or place within the city, implies a particular place of similar character to a street or house, and not anywhere in the city. *Barton v. City of La Grande*, 22 Pac. 111, 112, 17 Or. 577.

The word "places," as used in 9 Anne, c. 20, reciting the mischiefs arising from persons intruding into public offices, in cities, towns corporate, and places, and providing for the issuance of writs of quo warranto, extend only to offices in places of the same kind with those before enumerated, i. e., public offices in cities and towns corporate. *Rex v. Wallace*, 5 Term R. 375, 380.

The phrase "place adjacent," in a statute prohibiting any rogue or vagabond from frequenting any river, canal, or dock, or any quay, dock, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort or any avenue leading thereto, or any street, highway, or "place adjacent," means place adjacent to a street or highway, and not adjacent to a place of public resort. *Regina v. Brown*, 17 Adol. & El. 833, 837.

#### As store and surrounding premises.

Where the prosecutor was the owner of a store and farm, or pasture land near by, across which a well-used path lay, and in a

dispute with defendant ordered him to leave the premises, and notified him not again to put his foot upon the prosecutor's "place," it will be presumed that the defendant, where he testified that he had never been forbidden to cross the pasture, understood the word "place" to refer to the store and its surrounding premises, and not to the pasture, so as not to constitute a notice not to cross the pasture. *Murphey v. State*, 41 S. E. 685, 686, 115 Ga. 201.

#### As term of office.

"Place," as used in Rev. St. § 1208, providing that, where the office of sheriff and coroner both become vacant, the county commissioners may fill the vacancy in the office of sheriff by the appointment of a suitable person to hold for the unexpired term of the sheriff whose place the appointment is made to fill, includes the full term made vacant by the death of a sheriff elected, who died before he had qualified, and before the commencement of the term to which he had been elected. *State v. McGregor*, 10 N. E. 66, 67, 44 Ohio St. 628.

#### Construction of railroad.

The word "places," in Act April 2, 1872, requiring all railroad corporations to state the places from and to which the road is to be constructed, maintained, and operated, "is sufficiently definite to locate any locality within the state." *Attorney General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. (12 C. E. Green) 631, 644.

The words "house or place," in the statute requiring the complaint for a search warrant to be on oath that the goods are concealed in some house or place, is not equivalent to the term "premises," and therefore an affidavit stating that the stolen goods are on certain premises is not a compliance with the statute. *Humes v. Taber*, 1 R. I. 464, 470.

#### Election purposes.

"Places," as used in a statute authorizing the qualified electors of unincorporated "places" to organize themselves into plantations for election purposes, may apply to any such place organized as a plantation, notwithstanding it consists of more than one township. The statute was mindful of inhabitants, rather than territory. Its purpose was to serve the interests of settlers, rather than to devise any scheme touching territory. For that reason, the word "place" should be liberally construed. *Prentiss v. Davis*, 22 Atl. 246, 248, 83 Me. 364.

#### Federal jurisdiction.

The term "places," in Const. art. 1, § 8, authorizing Congress to exercise exclusive jurisdiction over all places purchased by consent of the Legislature of the state in

which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, does not include land rented to the United States to be used temporarily as a camp. *United States v. Tierney* (U. S.) 28 Fed. Cas. 159, 160.

#### Gaming.

"Place," as used in St. 1887, c. 448, § 2, authorizing the arrest of all persons present, whether playing or not, if the implements of gaming are found in said place, refers to the house or building which the warrant authorizes the officers to enter, and is not confined to the room where such persons are found when arrested. *Commonwealth v. Warren*, 37 N. E. 172, 173, 161 Mass. 281.

A furnished room in a hotel which one rented and occupied, and permitted others to use to play cards for money in, was his "place," within a city ordinance prohibiting any one to permit his place or house to be used as a place for gaming with cards for money or other stake. *City of Greenville v. Kemmis*, 36 S. E. 727, 730, 58 S. C. 427, 50 L. R. A. 725.

A violation of Code, art. 30, § 56, providing that no person shall keep any gaming table, or any house, vessel, or place for the purpose of gaming, is shown by an indictment that defendant kept "a certain place, to wit, a certain room in his hotel," for gambling. *Wheeler v. State*, 42 Md. 563, 567.

#### Liquor laws.

"Place," as used in Acts 1882, c. 220, § 1, providing that no license shall be granted for the sale of intoxicating liquors in any building or place within 400 feet of any public school, "is intended to cover the case where there is no building, but where a tent, booth, excavation in the ground, or some other thing is resorted to for the purpose of selling liquor." *Commonwealth v. Jones*, 8 N. E. 603, 604, 142 Mass. 573.

In Rev. St. art. 5060c, providing that every person desiring to engage in the sale of liquors shall make application for a license, designating the place in which it is proposed to engage in the sale, "place" does not mean house, but only the general locality in which the business is to be carried on—either city, town, village, or hamlet, as the case may be. *Green v. Southard*, 61 S. W. 705, 706, 94 Tex. 470.

"Place of business," as used in Sayles' Civ. St. art. 3226a, § 4, requiring persons desiring to engage in the sale of liquors to enter a bond conditioned that such person shall keep an open, quiet, and orderly "house or place for the conduct of such business," includes not only the house or room in which the liquor is kept for sale, but any arbor or structure kept by defendant for the purpose of the business of selling liquors. *Whitcomb*

v. State, 21 S. W. 976, 977, 2 Tex. Civ. App. 301.

"Places," as used in Pub. St., providing that "all places, buildings or tenements used for the illegal keeping or sale of intoxicating liquor shall be deemed common nuisances," should be construed to include a hotel used for that purpose. "In common speech, a hotel is a 'place,' and the enumeration of places, buildings, and tenements does not necessarily have the effect to require that a building shall not be described as a place. No doubt the word 'place' may include what could not properly be described as a building or tenement, but it does not follow that it may not include both." *Commonwealth v. Purcell*, 28 N. E. 288, 154 Mass. 388.

The term "place where spirituous liquors are retailed," within the meaning of the statute prohibiting the playing of cards at such a place, does not include a room in a building in which intoxicating liquors are sold, if the room is not connected with the saloon, and is rented to a different person. *Galbreath v. State*, 36 Tex. 200.

The term "house or place where spirituous liquors are retailed," in a statute prohibiting the playing of cards at any house or place where spirituous liquors are retailed, includes a room in the second story of a two-story house, which is accessible only by means of a flight of stairs leading up to it on the outside, and which is used by one of the proprietors of the house as a sleeping apartment, the lower room being used by the proprietors for retailing spirituous liquors. "We are of the opinion that it comes both within the letter and spirit of the prohibition. The upper story not only constituted a part of the house, but was used by the proprietors as an appendage to the prosecution of their business. We think the obvious design of the statute would be defeated if parties could evade the law by playing in a room other than that in which the retailing is carried on, but which constitutes a part of the same house, and is used by the same concern in the prosecution of their business." *Johnson v. State*, 19 Ala. 527.

The phrase "place where spirituous liquors are sold," in a statute prohibiting the playing of cards in such a place, does not include a room on the second floor of a house, rented and occupied by a tenant as a sleeping apartment, merely because the lower story is used by another person for the sale of spirituous liquors. *Dale v. State*, 27 Ala. 31.

A blacksmith shop used by the owner simply as his own private shop, and which, although 20 feet from a public road, had the door fronting thereon closed at the time of the game, which occurred at night, is not a place where spirituous liquors were sold or

given away, within Cr. Code, § 4052, prohibiting gaming at such places, where only two persons played the game, and the only other persons present were the owner and a looker-on, and there was no evidence that any other game was ever played there, or that defendant or any other person ever had liquors in the shop at any other time, although he gave a drink of whisky to those present at the time of such game. *Graham v. State*, 16 South. 934, 935, 105 Ala. 130.

In regular hotels and eating houses the word "place," as used in the chapter relating to intoxicating liquors and cigarettes, shall be held to mean the room or part of room where such liquors are usually sold or exposed for sale, and the keeping of such a room or part of room securely closed shall be held, as to such hotels and eating houses, as the closing of the place. *Bates' Ann. St. Ohio* 1904, § 4364-20.

#### **Master and servant—Place for work.**

The word "place," as used in the rule that a master must provide a safe place for his servants in the performance of their duties, means the premises where the work is being done, and does not comprehend the negligent acts of fellow servants by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow servant renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damage to some one makes a particular spot or place dangerous or unsafe. *Hermann v. Port Blakely Mill Co. (U. S.)* 71 Fed. 853, 856.

Plaintiff, a riveter employed by defendant, fell from a scaffold. Defendant furnished the scaffold for the riveters in his employ, and had men for the special purpose of placing them where the riveters desired. The scaffold from which the plaintiff fell was improperly hung, and he was not present while defendant's servants were hanging it, and it was shown that before he went thereon he was told that it was all right. Held that, inasmuch as it was the duty of the defendant to suspend and adjust the scaffold properly, it became a "place," as distinguished from a mere appliance which the defendant was bound to furnish plaintiff, though the scaffold changed its location with the exigencies of the work. *Cadden v. American Steel Barge Co.*, 60 N. W. 800, 803, 88 Wis. 409.

In discussing the duty of a master to furnish a safe place for servants to work, it was held that a platform along the inside of an icehouse, consisting of movable sections raised or lowered by cables and drums, each section operated in front of a room in which ice is stored, and capable of being

arranged so as to render the platform as a whole an inclined plane, down which ice blocks could move with their own weight, and on the edge of which platform laborers for storing ice were working, did not constitute a "place to work" within the meaning of the rule governing the master's liability to his servant. It was rather a part of the appliance or instrumentality whereby the work was to be done. *Fink v. Slade*, 72 N. Y. Supp. 821, 823, 66 App. Div. 105.

The rooms of a factory are "places for work" which a master is bound to make safe for the benefit of employés by the exercise of reasonable care. *Ballard v. Hitchcock Mfg. Co.*, 24 N. Y. Supp. 1101, 1104, 71 Hun, 582 (citing *Butler v. Townsend*, 126 N. Y. 110, 26 N. E. 1017).

#### National banking law.

The word "place," as used in an act of Congress providing that all shares of a national bank held by individuals or corporations may be included in the assessments made by the state authorities at the place where such banks are located, and not elsewhere, refers to municipal locality, and applies to the smallest district, possessed of the power of taxation, in which the banking house is located. *Fox v. Haight*, 81 N. J. Law (2 Vroom) 399, 415.

"Place," as used in Act Cong. June 3, 1864, c. 106 (13 Stat. 111), which created national banks, and declaring that the shares in each of said banks should be taxable in the place in which the bank should be located, without regard to the legal domicile of the shareholders, meant the state within which the bank was located, and the Legislature of each state may determine and direct the manner and place of taxing of the shares of national banks located within said state. *Providence Institutions for Savings v. City of Boston*, 101 Mass. 575, 580, 3 Am. Rep. 407.

"Place," as used in Act Cong. June 3, 1864, allowing state taxation of shares of a national bank at the place where such bank is located, and not elsewhere, refers to the state, the object being to determine what state shall have jurisdiction to tax the owners of such stock. *Clapp v. City of Burlington*, 42 Vt. 579, 582, 1 Am. Rep. 355.

"Place where its operations of discount and deposit are to be carried on," as used in Rev. St. U. S. § 5134, subd. 2 [U. S. Comp. St. 1901, p. 3455], requiring an association formed for the purpose of conducting a national bank to designate in its organization certificate the "place where its operations of discount and deposit are to be carried on," means the town or city where such transactions are to be had, and not the office or building in such town or city. *McCormick* 6 Wds. & P.—33

*v. Market Nat. Bank*, 44 N. E. 381, 383, 162 Ill. 100.

#### Notice of place of accident.

"Place," as used in Act 1870, requiring the giving of a notice stating the time when and the place where an injury received on a highway was sustained, is intended to be confined to a locality less extensive than the entire highway in the town, and means a locality sufficiently narrow and particular as to inform the officers of the town of the whereabouts of the place of injury. *Law v. Town of Fairfield*, 46 Vt. 425, 432.

A statute providing, in actions against a railroad for the killing of or injury to live stock, etc., that the time when and the "place" where the accident occurred must be alleged in the complaint, is complied with by an averment that the accident occurred at a certain locality along the line of the road, describing its distance and direction from the named depot or other known point, but a mention of the county merely in which the accident occurred is insufficient. *East Tennessee, V. & G. R. Co. v. Carloss*, 77 Ala. 443, 447.

"Place," as used in Laws 1893, c. 202, providing that notice must be given of an intention to sue a railroad company for damages, which must state the place where such damage occurred, means that the notice must point as directly and plainly to the place of the injury as is reasonably practicable, having regard to its character and surroundings (citing *Weber v. Town of Greenfield*, 74 Wis. 234, 42 N. W. 101; *Sowle v. City of Tomah*, 81 Wis. 349, 51 N. W. 571), and hence a notice stating that damages happened in a certain township and range, through which the railroad runs for a distance of three miles, is not sufficiently certain. *Ryan v. Chicago & N. W. Ry. Co.*, 77 N. W. 894, 895, 101 Wis. 506.

#### Notice of sale.

"Place," as used in Gen. St. c. 57, § 35, requiring a notice of the time and place of an administrator's sale to be published and posted in the manner specified, does not mean merely the town in which the sale was to be made. *Hartley v. Croze*, 37 N. W. 449, 450, 38 Minn. 325.

#### Receipt of letters.

A receiving house is not a post office, but it is a "place" for the receipt of letters; and the whole shop is to be considered as the place for the receipt of letters, and not the mere letter box. *Rex v. Pearson*, 4 Car. & P. 572.

#### Selection of county seat.

"Place of the county seat," as used in the Constitution, requiring a selection by the



qualified electors of the place of the county seat by ballot, etc., should not be construed to mean a place which is platted and has a fixed and definite exterior and topographical boundary, but is sufficiently designated if a particular settlement having a name is selected. *Fall River County v. Powell*, 58 N. W. 7, 8, 5 S. D. 49.

#### **Vessel.**

The word "place," as used in a statute relating to searching for stolen goods in any store, shop, warehouse, or other building or place in a town, includes a steamboat or vessel moored at the wharf. *State v. McNally*, 34 Me. 210, 222, 56 Am. Dec. 650.

"Place," as used in Rev. St. § 5339, subd. 1 [U. S. Comp. St. 1901, p. 3627], providing that every person who commits murder within any fort, arsenal, dockyards, magazine, or in any other place or district of the county under the exclusive jurisdiction of the United States, shall suffer death, includes the United States battleship *Indiana*, moored at a dock within territory which had not been purchased by the United States, but over which exclusive jurisdiction had been ceded to the United States by the New York Legislature. *United States v. Carter* (U. S.) 84 Fed. 622, 625.

#### **PLACE (Verb).**

The phrase "any incumbrance be placed on the property" in a policy of insurance declaring that it should be void "if any incumbrance be placed on the property," should not be construed to mean a judgment which was recovered against the owner of the property without his affirmative act, but only incumbrances placed on the property by the insured's affirmative act, such as the execution of a mortgage or other lien, and not liens cast on the property by operation of law. Such language should not be construed as synonymous with the condition providing that the policy should be void if the property was in any way incumbered. *Lodge v. Capital Ins. Co.*, 58 N. W. 1089, 1090, 91 Iowa, 103.

Where a parish apprentice bound for seven years to A. served him for four years, when A. agreed with B., who carried on the same business in another parish, that the pauper should work for B., B. to pay A. a certain sum out of the pauper's earnings, there was a "placing out or putting away" of the apprentice, within St. 57 Geo. III, c. 139, § 9, and no settlement was gained by the service under B. *Reg. v. Inhabitants of Wainfleet, All Saints*, 11 Adol. & El. 658.

"Placing a fence," within the meaning of a statute authorizing the intervention of the township committee when a difficulty may arise touching the placing of a partition fence, does not apply to a case where the

partition fence is already placed. "If the statute had contemplated such a placing, it would have spoken, not of placing, but of altering, changing, straightening, or placing upon the true line, such fence." *Miller v. Barnet*, 5 N. J. Law (2 Southard) 547, 550.

#### **As estimate.**

A homestead declaration, stating that "we place the value of said land at a sum not to exceed \$1,600," is a sufficient compliance with Civ. Code, § 1263, requiring the declaration of a homestead to contain an estimate of its actual cash value. *Schuyler v. Broughton*, 18 Pac. 436, 437, 76 Cal. 524.

#### **As obtain.**

"Place," as used in reference to "placing a loan," means merely to obtain it, and the phrase, if not otherwise qualified, imports nothing one way or the other as to the payment of expenses of searching the title to the property upon which the loan is to be made. *Helberger v. Johnson*, 53 N. Y. Supp. 1057, 1058, 34 App. Div. 68.

#### **As sell or realize.**

"Placed," as used in an order directing a person to pay to a certain other person or order the amount of his bills when mortgages of \$3,800 on Joy lots are placed, does not mean the recording or transferring of the mortgages, but means sold or realized. *Bailey v. Joy*, 132 Mass. 356, 357.

#### **PLACE CERTAIN.**

Rev. St. c. 32, § 10, requires demand of payment of negotiable paper only when made payable at a place certain. Held, that the term of "place certain," within such statute, should be construed to mean the name of a resident or place of business, and hence a note payable at "Mount Vernon," which the court took judicial notice to mean the name of a town only, was not payable at a "place certain" within the statute. *Greenleaf v. Watson*, 22 Atl. 165, 83 Me. 266.

#### **PLACE LANDS.**

"Place lands" are the lands granted in aid of a railroad company, which are within certain limits on each side of the road, and which become instantly fixed by the adoption of the line of the road. There is a well-defined difference between "indemnity lands" and "place lands." *Jackson v. Lamoure County*, 46 N. W. 449, 1 N. D. 238.

#### **PLACE OF ABODE.**

See "Actual Place of Abode"; "Last Place of Abode"; "Usual Place of Abode."

Home synonymous, see "Home."

In an act relating to the service of process, the words "place of abode" do not necessarily mean where the defendant sleeps, but, rather, where he is usually to be found. *Haslope v. Thorne*, 1 Maule & S. 103, 104; *Blackwell v. England*, 8 El. & Bl. 541, 549.

In construing a statute providing that letters of administration shall be granted in the county in which the mansion house or "place of abode" of the deceased is situated, the court said: "We understand the phrase 'place of abode' as implying something more than a place of temporary sojourn. It contemplates residence, and implies permanence. A mere temporary sojourn in a city for pleasure or business, away from one's established residence, to which an early return is contemplated, is not a place of abode within the purview of the statute." *Sanders v. Greenstreet*, 23 Kan. 425, 431.

Under the act of assembly of March, 1772, made to secure justices of the peace from vexatious suits for anything done in the execution of their office, requiring that notice be given of any intended writ of process on account of anything so done, which shall state the place of abode of the party sending it, a notice signed "Joseph Lloyd, Attorney for Thomas Kennedy, No. 79 So. 5th, St.," is clearly defective. A subscription of this sort would indeed be evidence that the party was there when he wrote it, but it is not evidence under the act that it was his place of abode. *Kennedy v. Shoemaker (Pa.)* 1 Browne, 61, 65.

#### As place of business.

The Common Law Procedure Act 1852 (15 & 16 Vict. c. 56) § 6, enacting that summons shall be indorsed with the name and "place of abode" of the attorney, is satisfied by naming the place of business of the attorney, though it is not the place where he sleeps. *Ablett v. Basham*, 5 El. & Bl. 1019, 1024.

#### As place of residence.

St. 5 & 6 Wm. IV, c. 76, § 32, declaring that every burgess entitled to vote in the election of counselors may vote by delivering a voting paper containing the Christian name and surnames of the persons for whom he votes and their "places of abode," should be construed to mean place of residence of the candidate, as distinguished from his place of business; and hence, though the candidate's place of business be extensive, and the premises where it is carried on be in the same ward as the residence, and though the proprietor be better known by his place of business than by his place of residence, such place of business cannot be his usual place of abode if he does not reside there. *Reg. v. Hammond*, 17 Adol. & E. (N. S.) 772, 780.

"Place of abode," as used in Registration of Voters' Act 6 & 7 Vict. c. 18, requiring a notice of objection to a voter to state the objector's place of abode, means the objector's place of residence at the time of signing the notice of objection, and is not therefore fulfilled by signing the place of abode of the objector as stated in the register. *Melbourne v. Greenfield*, 7 O. B. (N. S.) 1, 17.

Under a statute authorizing service of summons by leaving a copy at the place of defendant's "abode," a return that the same was left at a house or usual place of "residence" was sufficient, the expressions being substantially synonymous. *State v. Toland*, 15 S. E. 599, 600, 36 S. C. 515.

In holding that a return of service of a declaration showing that it had been served by leaving a copy at the most notorious place of "abode" of the president of the defendant corporation was sufficient under the statute requiring such a service to be made by leaving the notice at his most notorious place of "residence," it was said that by the Georgia statutes "notorious place of residence" and "notorious place of abode" are legal synonyms. *Water Lot Co. v. Bank of Brunswick*, 30 Ga. 685, 686.

By the express provisions of Rev. Code 1855, p. 732, § 53, the place where the family of any person shall permanently reside in the state is deemed his "place of abode." *Tiller v. Abernathy*, 37 Mo. 196, 198.

#### PLACE OF AMUSEMENT.

All other places of public accommodation and amusement, see "All Other."

A building in which the retailing of liquors is permitted, in one end of which a stage is erected, with chairs and tables scattered throughout the room and in a gallery therein, on the outside of which building large signs proclaim the fact that vocal and instrumental concerts take place within, and that the attractions are changed weekly and the admissions free, while within, upon holidays and during the nights of all days, beginning about 8 o'clock, a crowd assembles to whom printed programmes are given setting out the names of men and women who are to sing or perform upon musical instruments, which performances consist of songs, comic and sentimental, the performance often being arranged across the stage, jokes being bandied from one to the other, some of the songs being what are termed "character songs"—that is, they are in dialect—and to a greater or less degree the singers, by gesture or manner, personate other characters—is a place of amusement within Act July 9, 1881 (P. L. 162), authorizing the revocation of a retail liquor license when a theater or "place of amusement" is main-

tained on the premises. The question whether the exhibition constitutes the house a theater or place of amusement within the meaning of the act is not to be decided as a point of etymology. It is a broad question of fact, to be determined in view of all circumstances and surroundings. While the performances in the building were but feeble and cheap imitations of the theater, the exhibitions nevertheless were generally theatrical in character, and the place was therefore a place of amusement. In *re Gartenstein's License*, 4 Pa. Dist. R. 37, 40.

The word "amusement," as used in Act May 31, 1881, prohibiting the sale of liquor in places of amusement, is not to be interpreted in its broadest sense, nor is the act to be applied to every place where entertainment, diversion, and relaxation is had; but, in obedience to the authority already referred to, it is to be confined to the particular kind of amusements referred to in the statute, and those of a kindred character. "It has no application, in my mind, to clubhouses or beer gardens as they usually exist, where the guests, in addition to refreshments, are regaled with music, or other places where music alone is furnished; but it was intended to embrace, and clearly does embrace, such places as that kept by respondent, where representations in the nature of theatrical representations are exhibited upon a stage by persons dressed up in the costumes of actors, and surrounded by many of the accompaniments and adjuncts which belong to theatrical exhibitions." In *re Hastings & Ward* (Pa.) 15 Phila. 420, 39 Leg. Int. 440; *Commonwealth v. Mehler* (Pa.) 19 Phila. 529.

A druggist who keeps in his place of business a soda fountain, from which he dispenses the kinds of liquid usually sold from soda fountains, does not keep a "place of accommodation and amusement" within the meaning of Act June 10, 1885, § 1, by which the full and equal enjoyment of the accommodations of restaurants, eating houses, inns, etc., and all other "places of accommodation and amusement," are required to be extended to all persons within the jurisdiction of the state, regardless of color, etc. *Cecil v. Green*, 43 N. E. 1105, 1106, 161 Ill. 265, 32 L. R. A. 566.

#### PLACE OF BURIAL.

See "Burial Place."

#### PLACE OF BUSINESS.

See "Established Place of Business"; "Principal Place of Business"; "Usual Place of Business."

Other place of business, see "Other."

A place of business is a place actually occupied either continually or at regular peri-

ods by a person or his clerks or those in his employment, and hence a room to which a man is accustomed to resort, but in which he does not carry on any regular trade or employment, cannot be considered as his place of business. *Stephenson v. Primrose* (Ala.) 8 Port. 155, 167, 33 Am. Dec. 281.

That is not properly a place of business, in the commercial understanding of the term, which has no public notoriety as such, no open or public business carried on at it by a party, but only occasional employment by him there two or three times a week in a house occupied by another party, the party being only engaged in settling up his old business. *Bank of Columbia v. Lawrence*, 26 U. S. (1 Pet.) 578, 582, 7 L. Ed. 269.

"Place of business," as used in Rev. St. c. 7, § 13, providing that, if partners have places of business in two or more towns, they may be taxed for the proportions of property employed in such towns, means a place where the business was carried on under their own control and on their own account. *Little v. City of Cambridge*, 63 Mass. (9 Cush.) 298, 301.

St. 1870, c. 218, § 1, provides that all persons using scales, weights or measures for the purpose of selling merchandise shall have them adjusted and recorded by the sealer of weights in the city or town in which they have their usual place of business. Held, that the word "place" meant that specific place within a city or town at which a person transacted business, and hence where a provision dealer had a shop in N., but most of his customers lived in W., and he measured provisions in his market wagon as he delivered them to his customers, his weights should be sealed at N. *Palmer v. Kelleher*, 111 Mass. 320, 321.

Partners who reside in H., but saw logs at a permanent sawmill, dam, and mill privilege in D., have a place of business in the latter town, within Pub. St. c. 11, § 24, providing that, if partners have places of business in two or more towns, they shall be taxed in each of such places for the proportion of property liable therein. *Inhabitants of Duxbury v. Plymouth County Com'rs*, 52 N. E. 535, 172 Mass. 383.

"Place of business," as used in Pub. St. c. 11, § 24, providing that, if a partnership have a place of business in two or more towns, they shall be taxed in each for the proportion of property there, should be construed in the ordinary popular sense of the words, and hence partners in the shoe business, who had their principal place of business in one town, cannot be said to have a place of business in a reformatory in another town, though persons not prisoners were employed to work exclusively at the reformatory in cutting stock for the prisoners, who were under contract to work for such shoe

manufacturers, and though a record was kept at the reformatory of the stock received and shipped there, and though the cutters were paid there. *Cloutman v. Inhabitants of Concord*, 40 N. E. 763, 163 Mass. 444.

A room with the occupant's name on the door post of the building and on the glass panel of the door of the room, the rent of which was paid by a person bearing the name, who had been seen and had his mail delivered there up to the day in question, though there was evidence that he spent but little time therein, is such person's place of business, within Pub. St. c. 77, § 16, requiring notice of nonpayment to be sent to the place of business of the indorser. *Lamkin v. Edgerly*, 24 N. E. 49, 50, 151 Mass. 348.

"Place of business," as used in Act April 12, 1871, whereby one is permitted to bear arms on his place of business, has reference to some particular locality appropriated exclusively to a local business, such as the farm, store, shop, etc., and does not authorize the carrying of weapons in the woods while hunting stock. *Baird v. State*, 38 Tex. 599, 601.

#### As actual place of business.

As used in the statute providing that the certificate of formation of a limited partnership "shall be filed in the office of the clerk of the county in which the principal place of business shall be situated," the term "place of business" means the place at which the principal business of the partnership is actually located and conducted, and the designation in the certificate of one city as the place of business and there filing the articles is insufficient where in fact the actual place of business was located in a different city and county. *Adam v. Musson*, 37 Ill. App. 501, 503.

#### As city or town.

The term "place of business" within the meaning of Const. art. 14, § 4, and Act 1886-87, giving force thereto, which require foreign corporations to file with the Secretary of the State an instrument designating at least one known place of business in the state, and an agent or agents residing thereat, means the city where the designated agent resides, and it is not necessary to designate the store or office of such agent. *McLeod v. American Freehold Land Mortg. Co. of London*, 14 South. 409, 100 Ala. 496.

The word "place" in a provision of a statute requiring the annual report of a corporation to be published in some newspaper published nearest the place of business of the corporation, when there is no newspaper published in the town, city, or village where the business of the corporation is carried on, means the town, when the business is car-

ried on in a town; and the publication in a newspaper published nearer to a point in a town than any other newspaper is to the same point is a substantial compliance with the requirement, although other newspapers may be published nearer to some other point in the town. *Cameron v. Seaman*, 69 N. Y. 396, 403, 25 Am. Rep. 212.

#### Chief office equivalent.

Code, § 92, provides as one of the grounds of attachment that defendant is a corporation whose chief office or place of business is out of the state. In construing this section the court held that the expressions "chief office" or "place of business," while not strictly synonymous, must be regarded as equivalent; saying, "The essential characteristics of each might be very different." The former would ordinarily be the place where the officials charged with the general management of its affairs might meet and direct them, while the latter might be the same, or the place where its business operations were carried on under the direction and supervision of an unauthorized agent. The two designations are mentioned in the disjunctive, but it is clear that one must be considered the equivalent of the other, although each may be maintained at a separate place. *Rocky Mountain Oil Co. v. Central Nat. Bank*, 67 Pac. 153, 154, 29 Colo. 129.

#### Residence not synonymous.

The term "place of business" is not synonymous with "residence," and therefore a finding that a party has a place of business in a certain place is not sufficient to show a residence at such place. *Routenberg v. Schweitzer*, 61 N. Y. Supp. 84, 29 Misc. Rep. 653.

#### Burglary.

The term "place of business" in the statute making the crime of burglary include the breaking and entering of any dwelling, storehouse, or other "place of business" of another, where valuable goods, wares, produce, or any other article of value are contained or stored, includes any place of business where valuable goods are contained or stored, although such business may not be of the kind which is carried on in conducting a storehouse. It is not necessary, in order to sustain the charge of burglary, to prove that the house broken into and entered was the place of business used for the purpose of containing or storing goods alleged to have been stolen, but if the goods were in fact contained or stored in such a house at the time it is sufficient to support the indictment; and this is also sufficient although the business done in the house be not carried on with or in the articles or goods stolen. *Bethune v. State*, 48 Ga. 505, 510.

The term "place of business" within the meaning of a statute making the breaking and entering of certain designated buildings, or any building used as a "place of business," cannot be said as a matter of law to include all millhouses, and therefore an indictment for breaking and entering a millhouse must state whether it was a place of business. *McElreath v. State*, 55 Ga. 562.

#### **Administrator or executor.**

An administrator's place of business where claims against the estate must be presented must be construed to be the place where the administrator transacts the business of the estate, though he may be engaged in transacting other business elsewhere. *Roddan v. Doane*, 28 Pac. 604, 605, 92 Cal. 555.

"Place of business," as used in Code Civ. Proc., requiring creditors of an estate to present their claims to the executor at the "place of his residence or business," means the place where the executor transacts the business of the estate, though he may be engaged in transacting some kind of business elsewhere. *Bollinger v. Manning*, 21 Pac. 375, 377, 79 Cal. 7.

#### **Clerk.**

"Place of business," as used in Laws 1862, c. 484, § 23, providing that no person who shall have a place of business in the city of New York shall be deemed a nonresident under the provisions of the act in reference to long and short summons, does not necessarily mean one who carries on some business at some particular place in the city, of which he is the sole proprietor, but a person who is regularly and permanently employed as a clerk in a store in the city of New York has a place of business in that city within the meaning of the statute. *Lewis v. Davis* (N. Y.) 8 Daly, 185, 186.

#### **Manufacturer.**

The word "place" in the internal revenue acts, as applied to the place where the business of a manufacturer authorized by license under those acts to carry on his business, is not used as an equivalent for "town," "city," "county," or "state." The term must be regarded in reference to its common acceptance, and although the statute at times uses "house" or "premises" as its equivalent, this gives but little aid to the interpretation except when business is ordinarily carried on in a house or store; for "premises" is not more restricted in its meaning than the word "place" itself. Suppose, for example, a manufacturer of maple sugar having the privilege of drawing sap from a large tract of land gathers the sap and brings it to a single kettle for boiling, it would be said that the place of boiling was his place of business. Suppose, then, that his supply of

sap was so great that he required two kettles, or four, he would not be required to take out a separate license in order to use each additional kettle. Nor would it be required if each additional kettle were used in different parts of a grove of maples from which the sap was gathered. The mere fact that a manufacturer of salt used more than one set of boilers or evaporating pans, or more than one smoke flue or chimney, does not make him liable to pay more than one license fee as being a manufacturer at more than one place. *Salt Co. of Onondaga v. Wilkinson* (U. S.) 21 Fed. Cas. 273, 274.

Where a manufacturing company had several factories which were managed and the output of which was mainly sold from an office in a certain town, a factory and adjacent storehouse in a different town nevertheless constitutes a place of business within Pub. St. c. 11, § 24. *Barker v. Inhabitants of Watertown*, 187 Mass. 227.

The term "place of business" in section 9 of the act of Congress of July 13, 1866 (14 Stat. 113), exempting from special tax sales by manufacturers of their own goods, wares, and merchandise at their principal office or place of business, means the place of business for the sale of the goods; and where all the goods of the manufacturer are sold through an agent, who sells simply by sample, the place of business of such agent is the principal place of business referred to in the statute. *Tucker v. Slack* (U. S.) 24 Fed. Cas. 277, 278.

#### **School teacher.**

A school teacher who regularly attends to her duties has a place for the regular transaction of business in person in the county, within the meaning of Code Civ. Proc. § 2458, subd. 1, providing that execution must be issued to the sheriff of the county where the judgment debtor has a place for the regular transaction of business in person; and such place is a schoolhouse where she is employed. *Burke v. Burke*, 58 N. Y. Supp. 676, 677, 27 Misc. Rep. 684.

### **PLACE OF CONTRACT.**

When a contract is made through correspondence, one of the parties being in one state and the other in a different state, it sometimes becomes difficult to determine in which state the contract has been made. The test is generally held to be the acquiescence or final agreement of minds by which the contract is concluded, and the place where that is conferred is the "place of the contract" for most purposes. With reference to contracts of insurance where applications or proposals are taken in one state by an agent having no authority to conclude the contract or bind the company, and are forwarded to the domicile of the company,

and there accepted and the policy issued, the contract is ordinarily to be treated as having been made at such domicile, and to be performed there. *Whart. Conf. Laws*, § 415; *Bliss, Ins.* § 362; *May, Ins.* § 66. This is true, however, only because the act of the company in signifying its acceptance of the proposal completes the contract; and when, as sometimes happens, other things are to be done before the parties are to be bound, the contract is held to have been made when and where such other things transpired. *Fidelity Mut. Life Ass'n v. Harris*, 57 S. W. 635, 638, 94 Tex. 25, 86 Am. St. Rep. 813.

The phrase "place of contract" within the meaning of the rule that parties are presumed to contract with reference to the meaning of words and terms used by them as such words and terms are understood at the place of their contract, means the place of its making, unless its terms indicate another place for performance, when such other place is the one called for by such expression, and the parties are presumed to have agreed to be governed by the usage at such place. *Shores Lumber Co. v. Stitt*, 78 N. W. 562, 564, 102 Wis. 450.

#### PLACE OF DESTINATION.

See "Destination."

#### PLACE OF DOING BUSINESS.

The phrase "place of doing business," as used in *Civ. Code*, § 2145, providing that an action may be brought against an insurance company "in any county where said insurance company may have an agency or place of doing business," is the legal equivalent of the term "agency," and the word "agency" meant "the place of doing business," and an allegation that an insurance company "had an agent and transacted business" in a certain county was a sufficient averment of the jurisdiction. *Atlanta Acc. Ass'n v. Bragg*, 29 S. E. 706, 707, 102 Ga. 748.

#### PLACE OF DRAMATIC ENTERTAINMENT.

A room where a dramatic song is performed, and to which persons, paying for tickets, are admitted for the purpose of hearing it, is for the time a "place of dramatic entertainment," though the room be ordinarily used for different purposes. *Russell v. Smith*, 12 Adol. & E. 217, 237.

A place of dramatic entertainment, within a statute providing penalties for the representation of a dramatic piece of a certain person at a place of dramatic entertainment without his consent, is places where dramatic entertainments are represented, to which the

public are admitted. *Lee v. Simpson*, 3 C. B. 871, 883.

#### PLACE OF EMPLOYMENT.

St. 49 Geo. III, c. 126, § 3, forbidding the buying of offices, including nominations to an office, commission, or "place of employment," would include a cadetship in the Madras infantry. The words "place" and "employment" are so general as to comprehend those and every other advantageous position that the party can gain by nomination to a specific thing. *Regina v. Charretie*, 13 Q. B. 447, 461.

#### PLACE OF EXECUTION.

The "place of execution," when used in reference to the place where a defendant shall suffer death, is the place which the law determines, so that a judgment which directs that defendant be taken to the place of public execution is surplusage. *People v. Brown*, 59 Cal. 345, 357.

#### PLACE OF MANUFACTURE.

Under a statute providing that liquors may be sold by wholesale at the "place of manufacture" it is held that a place two hundred yards distant from the place where the liquor is actually manufactured is not the place of manufacture within the meaning of the law. *State v. Whissenhunt*, 4 S. E. 533, 98 N. C. 682.

#### PLACE OF PAYMENT.

The words "place of payment" mean a house, bank, counting room, store, or place of business where the holder of a note can present the same, where the maker can deposit the proper funds to meet it, and where a legal offer to pay it can be made. *Hutchinson v. Crutcher*, 98 Tenn. 421, 435, 39 S. W. 725, 729, 37 L. R. A. 89 (citing *Montross v. Doak* [La.] 7 Rob. 170, 41 Am. Dec. 278).

#### PLACE OF PUBLIC ACCOMMODATION.

The words "and other places of public accommodations," as used in *Laws* 1895, c. 1042, providing that all persons in the state shall be entitled to equal accommodation in hotels, etc., and all other places of public accommodations, are an enlargement of the places from which the right of access is not to be prohibited. The words themselves are of more general signification than "places of public resort," and they apply either to a place where refreshment is provided or attention to the person is given. The division between places for the accommodation of the public and those which are of a private character is an exceedingly difficult line to

draw. It must be an arbitrary one, but places for accommodation of the public include a bootblack stand. *Burks v. Bosso*, 81 N. Y. Supp. 384, 385, 81 App. Div. 530.

#### PLACE OF PUBLIC RESORT.

See "Public Resort."

#### PLACE OF PUBLICATION.

The place of publication of a newspaper is where it first issues to be delivered or sent by mail or otherwise to its subscribers. *State v. Bass*, 54 Atl. 1113, 1115, 97 Me. 484.

The "place of publication" of a newspaper is the place where it is first given to the public for circulation, and not the place where it is subsequently distributed, within a statute requiring the publication of notice of sale of land for improvement assessments in the newspaper published in the village where the improvements are made, or, if there be none, in a newspaper published in the county and circulating in the village. *Le Roy v. Jamison* (U. S.) 15 Fed. Cas. 373, 380; *Village of Tonawanda v. Price*, 64 N. E. 191, 192, 171 N. Y. 415.

The "place of publication" of a newspaper is that indicated upon the face of the newspaper, although it is printed, and part of its issue mailed, at another town or city. *Ricketts v. Village of Hyde Park*, 85 Ill. 110, 113.

The entire city, village, or township, all parts of it alike, and disregarding all inferior subdivisions within which a newspaper is published, is a "place of publication" within the meaning of the statutes which require notices to be published in particular localities. *Hinchman v. Barns*, 21 Mich. 556, 559.

#### PLACE OF RELIGIOUS WORSHIP.

See "Actual Place of Religious Worship"; "Religious Worship."

#### PLACE OF RESIDENCE.

See "Usual Place of Residence."

The "place of residence" of a corporation is the place where its principal office is located or where its principal operations are carried on. *Baltimore & Yorktown Turnpike Road v. Crowther*, 63 Md. 558, 572, 1 Atl. 279.

The place of residence of a corporation, within the meaning of Code Civ. Proc. § 984, providing that an action must be tried in the county in which one of the parties resided at the commencement thereof, is where its principal business is to be carried on as designated by its charter, though in fact it may conduct a large part of its business and have an office

in another county. *Rossie Iron Works v. Westbrook*, 13 N. Y. Supp. 141, 59 Hun, 345.

The term "place of residence," as used in a sheriff's return of service reciting that the summons was served on each of the persons named by leaving the same at his house, or usual place of residence, is substantially the same as "place of abode," and one is properly substituted for the other. *State v. Toland*, 15 S. E. 599, 600, 36 S. C. 515.

The phrase "place where the owner resides" in the rule formulated in the Marine Ordinance of Louis XIV, that the master cannot hypothecate his vessel in the place where the owner resides, is "construed in France to comprehend the whole district, but not the whole country. In his treatise on Agencies Mr. Livermore says: 'Upon the construction of these words Emerigon observes that the whole district or bailiwick is to consider the owner's place of residence, but that, if the vessel puts into a neighboring port in another district, this is not the owner's place of residence.'" *Selden v. Hendrickson* (U. S.) 21 Fed. Cas. 1029, 1031.

A "place of residence" is not synonymous with a "legal settlement," even in the absence of statutory definition. *Moody County v. Minnehaha County* (S. D.) 98 N. W. 698.

#### PLACE OF TRUST OR PROFIT.

As used in Const. art. 14, § 7, providing that no person holding any office or "place of trust or profit" under the United States shall hold any office or place of trust or profit under the authority of the state, the phrase "place of trust or profit" intended places which approximated to, but were not, offices, and yet occupied the same general level in dignity and importance. The manifest intent was to prevent double office holding—that offices and places of public trust should not accumulate in a single person—and the superadded words of "places of trust or profit" were put there to avoid evasions in giving due technical meaning to the preceding rule. *Doyle v. Raleigh*, 89 N. C. 133, 136, 45 Am. Rep. 677.

The phrase "place of public trust or emolument" in a statute prohibiting polygamists from holding any place of public trust or emolument, etc., does not include the position of a jurymen. *People v. Hopt*, 4 Pac. 250, 256, 3 Utah, 396.

A poundmaster appointed from time to time by the common council of a city does not hold a place of trust within the meaning of the city charter, providing that every person chosen or appointed to any office or place of trust shall take and subscribe an oath; the words "a place of trust" having the same meaning as the word "office." *An*

office is a place of trust, and a place of trust, as used in the charter, is an office. *Wilcox v. Hemming*, 58 Wis. 144, 145, 15 N. W. 435, 46 Am. Rep. 625.

### PLACE OF WORSHIP.

See "Regular Place of Worship"; "Stat-  
ed Place of Worship."

A "place of worship," within Const. art. 1, § 18, cl. 2, declaring that no man shall be compelled to erect or support any place of worship, is "any place or structure where worship is statedly held." It is not confined to some place or church edifice where the members of a church worship at stated intervals. *State v. District Board of School Dist. No. 8*, 44 N. W. 967, 979, 76 Wis. 177, 7 L. R. A. 330, 20 Am. St. Rep. 41.

"Places of religious worship," within the meaning of Act April 10, 1838, § 29, exempting from taxation all churches, meeting houses, or other regular places of stated religious worship, are all places consecrated to regular stated religious worship without exception of any kind, and includes property rented by a religious congregation for the purpose of stated religious worship. *Howell v. City of Philadelphia (Pa.)* 8 Phila. 280, 281.

The term "place of religious worship," within the meaning of a statute prohibiting the erection of any booth, stall, etc., for the purpose of selling, giving away, or otherwise disposing of any kind of articles of traffic or spirituous liquors within three miles of any place of religious worship during the time of holding any meeting for religious worship at such place, is not restricted to any denomination, or to any place or mode of religious worship. The open fields, the woods, or a house erected for religious worship are alike within its terms, and, so long as it is religious worship, it makes no difference whether the worshipers are Christians or pagan idolaters. *Rogers v. Brown*, 20 N. J. Law (Spencer) 119, 120.

"A place of worship," within the meaning of laws prohibiting the disturbance of a congregation gathered together in a place of worship, is constituted by the congregation of numerous worshipers thereat, and not by the nature of the place at which they assemble. Hence, under such a statute an indictment will lie for disturbing a congregation assembled for divine service, although it be not in a church, chapel, or meetinghouse permanently set aside for divine worship. *State v. Swink*, 20 N. C. 492, 493.

#### Camp meeting.

Act 1809, pp. 49, 50, prohibiting the retailing of spirituous liquors within one mile of "a place set apart for the worship of Al-

mighty God," should be construed to include a camp meeting or temporary encampment of a denomination of Christians for the purpose of religious exercises. *State v. Hall (S. C.)* 2 Bailey, 151.

#### Parsonage.

A parsonage belonging to a church is not a "place of religious worship" which may be exempted from taxation. *St. Mark's Church v. City of Brunswick*, 3 S. E. 561, 78 Ga. 541; *Dauphin County Treasurer v. St. Stephen's Church (Pa.)* 3 Phila. 189, 190; *Church of Our Saviour v. Montgomery County (Pa.)* 10 Wkly. Notes Cas. 170, 171.

"Place of public worship," as used in a statute exempting from taxation "places of public worship," includes houses used by the public for the worship of God, but is restricted to edifices used for that purpose, and cannot be held to include the residence of the bishop, though closely annexed to the church. *State ex rel. Cunningham v. Parish of Orleans*, 26 South. 872, 877, 52 La. Ann. 223.

#### Schoolhouse.

The term "place of worship," within the meaning of Const. art. 1, § 3, providing that the General Assembly shall make no law respecting the establishment of religion, etc., nor shall any person be compelled to pay tithes, taxes, or other rates for building or repairing places of worship, does not apply to a schoolhouse, though it is habitually used for worship on Sundays. *Davis v. Boget*, 50 Iowa, 11, 15.

### PLACE WHERE MADE.

Under Laws 1891, p. 182, § 24, providing that intoxicating liquors may be sold in any quantity not less than one gallon at the "place where made," the place means any place outside the distillery building, provided it is within the distillery grounds; as under the federal law a sale of intoxicating liquors at the distillery is prohibited. *State v. Heard*, 64 Mo. App. 334, 336, 337.

### PLACER.

"Placer" is defined as a superficial deposit which occupies the bed of an ancient river or valley, and is applied to the auriferous gravels of America. *Montana Coal & Coke Co. v. Livingston*, 52 Pac. 780, 781, 21 Mont. 59 (citing *Moxon v. Wilkinson*, 2 Mont. 421).

A placer is a gravel place where gold is found, especially by the side of a river, or in the bed of a mountain torrent. *Gregory v. Pershbaker*, 14 Pac. 401, 402, 73 Cal. 109.

"Placers," as used in Rev. St. U. S. § 2329 [U. S. Comp. St. 1901, p. 1432], providing



that claims usually called "placers," including all forms of deposit excepting veins of quartz or other rock in place, shall be subject to entry and a patent under like circumstances and conditions as vein or lode claims, includes a stone quarry. "This section extends and enlarges the signification commonly given to placer claims, and makes such locations include all forms of deposit excepting quartz, veins, or other rock in place. The officers of the Land Department have construed it as embracing quarries of rock valuable for building purposes, and we do not doubt the correctness of this construction." *Freezer v. Sweeney*, 21 Pac. 20, 21, 8 Mont. 508.

#### PLACER CLAIM.

In Rev. St. § 2333 [U. S. Comp. St. 1901, p. 1433], providing that where the same person is in possession of a "placer claim" and also a vein or lode, included within the boundaries thereof, application shall be made for a patent for the placer claim with the statement that it includes such vein or lode, and a patent shall issue for the placer claim subject to the provisions of the charter, including such vein or lode, the term "placer claim" means ground within the defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place—that is, not fixed in rock, or which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. *United States v. Iron Silver Min. Co.*, 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571; *Wheeler v. Smith*, 32 Pac. 784, 786, 5 Wash. 704.

#### PLACER LOCATION.

A "placer location" *ex vi termini* embraces an appropriation of all waters covered by it, in so far as such waters are necessary for working the claim. This is true especially when the location covers both banks of the stream, because there is a reasonable presumption that the locator intends to work the channel and the banks wherever he may find pay dirt. *Schwab v. Beam* (U. S.) 86 Fed. 41, 42.

#### PLACER MINE.

"Placer mines" are those in which the mineral is generally found in the softer materials which cover the earth's surface, and not among the rocks beneath. The more usual way of mining is to take the soft earthy matter in which the particles of mineral are loosely mingled, and by filtration separate the one from the other. *Reynolds v. Iron Silver Min. Co.*, 6 Sup. Ct. 601, 605, 116 U. S. 687, 29 L. Ed. 774.

#### PLAIN.

Wag. St. c. 73, § 1, requiring innkeepers to post in their rooms a copy of the statute, printed in large, "plain English type," means large or ordinary sized type, and not very small type. *Porter v. Gilkey*, 57 Mo. 235, 237.

#### PLAIN CLOTHES MAN.

A "plain clothes man" is a police officer who does not wear his uniform or anything to call attention to his position while on his rounds. *People v. Glennon*, 67 N. E. 125, 126, 175 N. Y. 45.

#### PLAIN PLASTERING.

After the execution of a plastering contract, a dispute arose as to the meaning to be given its terms—the defendants contending that "ornamental plastering" had a technical trade meaning, and only included such ornamental work as is modeled and cast in the shop, and afterwards applied to the building in a dry state; that "plain plastering" means the plain surface and such plain moldings and cornices as are put on in the form of wet plaster in the building, and is distinguishable from those cornices and moldings which are not put upon the walls until after they are made. Upon this subject there was a conflict in the testimony, and, in so far as the question was one of fact, the court held that the finding of the court below was conclusive. *Woodruff v. Klee*, 62 N. Y. Supp. 850, 851, 47 App. Div. 638.

#### PLAIN STATEMENT.

"Plain statement," as used in Civ. Code, § 93, requiring a complaint to set forth a plain statement of the facts constituting the cause of action, means a statement of all the facts necessary to enable plaintiff to recover. By a plain statement we understand to be meant a direct and positive averment of the fact, which does not leave the existence of the fact to be inferred merely from the existence of some other facts. *Pender County Com'rs v. McPherson*, 79 N. C. 524, 525.

Code, § 481, providing that a complaint shall set out "a plain and concise statement of the facts constituting each cause of action," means that the plaintiff is merely required to state concisely those facts which go to make up the cause of action on which he relies, and which, on a general denial, he must prove in order to show himself entitled to a judgment. *Crane v. Crane*, 19 N. Y. Supp. 691, 693.

A "plain statement," within the requirement that a complaint shall be "a plain and concise statement" of the facts con-

stituting the cause of action, is one that may be readily understood, not merely by lawyers, but by all who are sufficiently acquainted with the language in which it was written. *Mann v. Morewood*, 7 N. Y. Super. Ct. (5 Sandf.) 557, 564.

### PLAIN WOOLEN GOODS.

Plain woolen goods are those woolen goods in which the warp and woof threads cross each other at right angles. *Newman v. Arthur*, 3 Sup. Ct. 88, 89, 109 U. S. 132, 27 L. Ed. 883.

### PLAIN WORDS.

The Code requiring that an indictment shall set forth the offense in "plain and intelligible words" is not satisfied by an indictment from which no offense against the law of the state can be deduced except by a process of inference and elimination. *Jennings v. State*, 7 Tex. App. 350, 358.

### PLAINLY.

A contract between the owner of a copy-right of a book and plates for printing it and one who purchases a set of plates and right to publish the book that "plainly" bound copies should not be sold below a certain price, means that the cheapest edition shall not be sold below such price. *Murphy v. Christian Press Ass'n Pub. Co.*, 56 N. Y. Supp. 597, 599, 38 App. Div. 423.

### PLAINT.

A *plaint* in an inferior court is in the nature of an original writ. The first process in an inferior court is a *plaint*. *Lilly, Abr. tit. "Plaint."* See, also, *Jacob's Law Dict. "Plaint."* *Shaw v. Dutcher* (N. Y.) 19 Wend. 216, 219.

The word "plaint" in Act 1784 (P. L. p. 340), enacting that any person not duly licensed, who shall keep a billiard table, shall forfeit a certain sum for every such offense, to be recovered by "bill, *plaint*, or information," cannot be construed to mean anything but what it imports in English, namely, the first process of an inferior court. *State v. Mathews* (S. C.) 2 Brev. 82, 83.

The word "plaint" was not designed to refer to proceedings in inferior courts, but to the Court of King's Bench. *Sims v. Alderson* (Va.) 8 Leigh, 479, 484 (citing 1 Tidd, Pr. 167).

### PLAINTIFF.

See "Equitable Plaintiff."

The word "plaintiff," in a civil suit has as well a defined legal and technical mean-

ing as the words "party to a suit." Black, in his Law Dictionary, defines the plaintiff as "a person or party who brings an action, who complains or sues any person in an action and is so named on the record." *Gulf, C. & S. F. R. Co. v. Scott* (Tex.) 28 S. W. 457, 458.

The term "plaintiff" is applicable to the actor in suits at law. *Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n v. Robinson*, 35 N. E. 168, 173, 147 Ill. 138.

Whoever brings the suit, bill, or complaint is a party plaintiff, and whoever is bound to appear and answer or defend is in law the party defendant. *Town of Canaan v. Greenwood's Turnpike Co.*, 1 Conn. 1, 9.

Under a Code provision that sureties for the prosecution or defense of any suit in law or equity may be released from such suretyship by giving five days' notice to the plaintiff, etc., it is held that the word "plaintiff" must be taken to mean the actor or principal for whom the applicant surety is bound. *Kincaid v. Sharp*, 40 Tenn. (3 Head) 151, 154.

### As appellant.

"Plaintiff," as used in Rev. Code, § 3531, providing that, when an execution for costs from the Supreme Court against the appellee has been returned "No property found," the clerk may issue execution against the plaintiff for costs actually created by him, means the appellant, though defendant in the court below. *Westcott v. Booth*, 49 Ala. 182, 183.

### Claimant against assignee for creditors.

A claimant against an assignee for benefit of creditors, who has filed a claim and reply to the exception of the assignee thereto, so that an issue is formed, is a plaintiff, so far as concerns the right to the removal of the cause to a federal court. *Hill v. Graham*, 53 Pac. 1060, 1061, 11 Colo. App. 536.

### Defendant demanding set-off.

Under Civ. Code, § 732, subd. 36, the word "plaintiff" embraces the defendant who demands a set-off or counterclaim; the word "defendant," plaintiff against whom such a demand is made. *Paducah Hotel Co. v. Long*, 17 S. W. 853, 854, 92 Ky. 278.

### Intervener.

An intervener is considered as plaintiff under Code Prac. art. 392, in so far as that he must follow the jurisdiction of defendant; but he is nevertheless a "plaintiff in intervention," who fights for his own hand, and, as he does not lose his identity in that of the original plaintiff, neither does he lose such identity in that of the original defendant, and the court cannot, by an or-

der, make him a defendant in the case. *St. Charles St. R. Co. v. Fidelity & Deposit Co.*, 33 South. 574, 576, 109 La. 491.

**As judgment or execution creditor.**

The word "plaintiff," as used in the act in relation to attachments issued out of justices' courts, shall be construed to mean the judgment or execution creditor. *Mills' Ann. St. Colo.* 1891, § 2745.

**As moving party in garnishment.**

Under 8 How. Ann. St. § 8058, providing that in all cases where there remains any sum unpaid on any judgment or decree garnishment may issue on affidavit of the plaintiff, his agent, etc., the word "plaintiff" refers to the party moving in the garnishment proceedings, and the defendant who has recovered judgment against the plaintiff may sue out a writ of garnishment. *Esler v. Adsit*, 66 N. W. 485, 486, 108 Mich. 543.

**As party in interest.**

The word "plaintiff," as used in the act to prevent usury (*Laws* 1838, p. 486), extends to the party in interest as plaintiff, although he may not be the plaintiff on the record. *Henry v. Bank of Salina* (N. Y.) 5 Hill, 523, 528.

Lexicographers define the word "plaintiff" to mean "the complainant," "he who sues or prosecutes," "the prosecutor." When used in legal proceedings, it refers the mind at once to the party in whose name a plaint or suit is instituted, and to no one else. The word "plaintiff" in the act to prevent usury, sections 2, 8, pp. 486, 487, *Laws* 1837, extends to the party in interest as plaintiff, although he may not be the plaintiff on the record. *Stevens v. White* (N. Y.) 5 Hill, 548, 551.

**As party in whose favor judgment is rendered.**

By the term "plaintiff" as used in the title relating to execution, is meant the party in whose favor judgment is rendered. *Rev. St. Tex.* 1895, art. 2334.

**As party of record.**

"We sometimes look beyond the parties to the record—the person complaining of an injury, and the person who defends or answers the complaint—and see who stands behind them. In this way the plaintiff in interest is sometimes required to pay the costs which may have been adjudged against the plaintiff on record; and, on the other hand, he is protected against the fraudulent acts of the nominal party. So, also, there may be a person standing behind the defendant, who for some purposes will be recognized as the real party in interest on that side of the controversy. But in the legal as well as the ordinary use of those terms no

one can strictly and properly be denominated either plaintiff or defendant in an action unless he is named as such on the record. The words 'plaintiff' and 'defendant' in this statute are used as correlative terms. \* \* \* Whenever in an action at law the defendant shall plead or give notice of defense of usury, \* \* \* he may, for the purpose of proving the usury, call and examine the plaintiff as a witness, etc. The Legislature evidently had in mind the parties to the record, and no one else." *Bank of Salina v. Henry* (N. Y.) 1 Hill, 555, 556.

Under a statute (*Rev. St. c. 82, § 107*) providing that if one plaintiff brings different actions at the same term of the court against the same party, which might have been joined in one, or brings more than one suit on a joint and several contract, he shall recover costs in only one of them, etc., the word "plaintiff" means plaintiff on the record, and not the beneficial plaintiff or real party in interest. *Perry v. Inhabitants of Kennebunkport*, 55 Me. 453, 454.

The word "plaintiff" as used in a statute providing that the plaintiff in any civil suit may at any time be ruled to give security for the costs, etc., designates the actor in the suit as shown by the record. He is the party that complains, and the word "party" is synonymous with the word "plaintiff." *Gulf, C. & S. F. R. Co. v. Scott* (Tex.) 28 S. W. 457, 458.

**As relator.**

The sense of the word "plaintiff" is that the person so called is the complaining party, the party who is coming into court asking for rights which he claims; and hence the complaining party in a proceeding for habeas corpus, though called a relator, is a plaintiff within the meaning of the Code authorizing the allowance of costs in special proceedings in the nature of an action in favor of plaintiff on a judgment in his favor. *State v. Newell*, 34 Pac. 28, 29, 13 Mont. 302.

**Construed in plural.**

Where appellants were plaintiffs, and a judgment for damages was entered in favor of defendant against the plaintiffs, though by the entry the term "plaintiff" in the singular number is used, the judgment should be construed as against both of the plaintiffs. *Brents v. Barnett*, 7 Ky. (4 Bibb) 251.

The word "plaintiff" in a declaration in an action by a three parties plaintiff is held to sufficiently include the plural number. The word in the connection in which it is used signifies the plaintiff party, and includes all who are specified by name as plaintiffs. On this subject the court remarks that bad grammar does not vitiate a declara-

tion when the person and case can be rightly understood, and that, if it did, in these heedless days legal process as a remedy in the collection of small debts would be of little worth. *Blanding v. Mansfield*, 72 Me. 427, 429.

### PLAINTIFF'S TITLE.

The term "plaintiff's title," as used in Rev. St. § 5055, providing that when the summons has been served or publication made the action is pending so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof "as against the plaintiff's title," does not mean the title claimed in the pleading, but as finally determined by the adjudication of the court; and hence from the date of the service of the subpoena in a suit in partition the cause is *lis pendens* to such extent that the purchase of any parcel of the entire tract is subject to the rights of all parties to the suit as determined by the decree of the court, without regard to the title claimed by plaintiff in his pleading. *McClaskey v. Barr* (U. S.) 48 Fed. 130, 132.

### PLAITS.

Plaits are longitudinal parallel flat ruffles having angular edges. The distinction between plaits and flutes is that plaits have angular edges and are flat, whereas the flutes have round edges and stand up. *Kursheedt Mfg. Co. v. Naday*, 107 Fed. 488, 490, 46 C. C. A. 422.

### PLAN.

See "Assessment Plan."

A plan is a design, a delineation, or projection on a plane surface of the ground lines of a structure, which are reduced in size, the relative positions of which, and their proportions, are preserved. *Jenney v. City of Des Moines*, 72 N. W. 350, 551, 103 Iowa, 347.

A plan is a draft or form of representation of a horizontal section of anything, as of a building or machinery. Its synonyms are "draft," "delineation," "sketch," and "design." *Aumt v. Cincinnati*, 8 Ohio S. & C. P. Dec. 624, 628.

"A plan, when applied to a building, is an architectural drawing representing the horizontal sections of the various floors or stories of the building, the disposition of apartments and walls, with the situation of the doors and windows; in fact, it represents the different stories as they are to be built, and the whole as it will appear when completed." Dissenting opinion by Maxwell,

J., in *State v. Kendall*, 18 N. W. 85, 90, 15 Neb. 262.

### As a plot or survey.

"Plan," as used in an ordinance of Philadelphia authorizing the department of public works to revise parts of the city plans in such manner as to strike therefrom a certain street, means a plot or survey indicating number, names, and location of streets, their lines and courses, widths, grades, etc., as they are or are to be laid out and opened on the land, including all particulars germane to the general subject. *Wetherill v. Pennsylvania R. Co.*, 45 Atl. 658, 659, 195 Pa. 156.

### PLANING MILL.

As building, see "Building (In Criminal Law)."

A planing mill is, as a rule, stationary, and includes structures with walls and roofs to protect the machinery, the materials used, and the completed products, so that the use of the term "planing mill," without modification, would usually be understood to include a building and machinery therein used in doing the work of planing mills; and an indictment charging the breaking and entering of planing mills sufficiently charges the breaking and entering of a building. *State v. Haney*, 81 N. W. 151, 152, 110 Iowa, 28.

A policy insuring a "planing mill, building, and additions," includes all buildings necessarily connected with the mill proper, by whatever means, if such buildings are indispensable to the operation of a planing mill, so that a complete planing mill could not exist without them. As so construed, the phrase includes an engine house, situated at some distance from the mill proper, connected with it by a box or spout, carrying shavings from the mill to the engine house, since such engine house was an indispensable attribute of the planing mill. *Home Mut. Ins. Co. v. Roe*, 36 N. W. 594, 596, 71 Wis. 33.

### PLANK ROAD.

Plank roads, which are open to use by the whole public, with their own teams and vehicles, are highways in the strictest sense. *Flint & P. M. Ry. Co. v. Gordon*, 2 N. W. 648, 653, 41 Mich. 420.

Plank roads, adopted by law and used as public highways for the three purposes of permitting all persons to pass and repass on foot, on horseback, and in carriages, are public highways, within Rev. Code, c. 34, § 2, punishing with death robbery in or near a public highway; the fact that the agency

of individuals or of corporations is used for the purpose of constructing and keeping in repair these kind of public highways being immaterial. *State v. Johnson*, 61 N. C. 140, 143.

A plank road is unquestionably a public highway. By the act of constructing it and opening it for use, and being used on payment of tolls, it was as emphatically dedicated to the public as it could have been by a deed or dedication acknowledged and recorded. The elements of a complete dedication are found in the permitted use of the road by the public, and building it for such purpose, and the subsequent use of it by the public without denial or interruption. The very purpose of constructing the road carries with it, when constructed, a dedication. This being so, it would be unjust, in view of the privileges granted, that the parties finding it not remunerative should, on the strength of the claim that the road is private property, suddenly close it up and deprive the public of its use. *Craig v. People*, 47 Ill. 487, 495.

## PLANKING.

"Planking," as used in a notice of injury describing the location at which the injury occurred as at the end of the planking, should be taken in its common and ordinary meaning of planks collectively; a series of planks in place. *Kaherl v. Inhabitants of Rockport*, 33 Atl. 20, 21, 87 Me. 527.

## PLANT.

See "Electrical Plant"; "Electric Light Plant"; "Furnace Plant"; "Sawmill Plant"; "Sewerage Plant."

"Plant" means the fixtures, machinery, tools, apparatus, appliances, etc., necessary to carry on any trade or mechanical business, or any mechanical operation or process. *Southern Bell Telephone & Telegraph Co. v. D'Alemberte*, 21 South. 570, 571, 39 Fla. 25 (citing Cent. Dict.).

Webster defines the word "plant" to be "the fixtures and tools necessary to carry on any trade or mechanical business (local)." The word is defined by Worcester to be "the machinery, apparatus, or fixtures by which a business is carried on." The word is not equivalent to the word "undertaking," which is defined by Webster as "any business, work, or project which a person engages in or attempts to perform; enterprise," and by Worcester as "an attempt, enterprise, or engagement," and such words do not assimilate. *Maxwell v. Wilmington Dental Mfg. Co.* (U. S.) 77 Fed. 938, 941.

"Plant," as used in a receipt of the property of a land and lumber company, consist-

ing of the sawmill property, enumerating it and all other appurtenances, embracing the inventory of the company's property, and also all of the betterments and additions to the plant made to the property by a certain person during his lease, cannot be construed to include the stock of goods contained in a store connected with the business of the company when the lease was given, and that with which it was replenished from time to time. "Plant," as used in this sense, is, according to Webster, the fixtures and tools necessary to carry on any trade or mechanical business. The goods in a promiscuous country store cannot with propriety be denominated either "fixtures" or "tools" essential to the conduct of the business of a mill to saw and plane lumber. They are, so far as they have any connection with the milling business, to be taken rather as supplies for the hands and others engaged in the prosecution of the work carried on in the forest in felling trees and conveying logs to the mill to be sawed into lumber. *Liberty County Land Co. v. Barnes*, 77 Ga. 748, 752, 1 S. E. 378, 380.

In a written contract plaintiff represented himself to be the sole proprietor of certain discoveries and appliances. He sold to defendant the sole right to use the same in Europe for a specified sum and a certain per cent. of the stock of any corporation defendant might form in London or elsewhere, or the same per cent. of the profits of the business defendant might do by the use of the discoveries and appliances. He also agreed to put up four complete plants free of cost to defendant in London. Held, that the word "plant" meant the discoveries and appliances sold to defendant, and therefore there was no ambiguity rendering parol evidence admissible to explain its meaning. *Rooney v. Thomson*, 84 N. Y. Supp. 263, 264.

### As settle or establish.

The word "plant," as used a century and a half ago, had a peculiar meaning, which has since become obsolete. By the word "plant," applied to a tract of land, was meant "settle" or "establish." *Inhabitants of Town of East Haven v. Hemingway*, 7 Conn. 186, 202.

### Of railroad.

The term "plant," as used in a contract referring to all works, material, and plant in use in or about the construction or operation of a railroad, etc., does not necessarily include rolling stock; in fact, rolling stock is usually not referred to as "plant." *Central Trust Co. v. Condon* (U. S.) 67 Fed. 84, 92, 14 C. C. A. 314.

The shanties and temporary stables furnished by a railroad contractor for the shelter of his men and animals on the line, and

at the scene of the work, is in no sense a "plant," within the principle that the machinery used as the "plant" of the contractor, removed from the work, can be said to be furnished in the construction of the road, and a lien granted therefor. *Stewart-Chute Lumber Co. v. Missouri Pac. Ry. Co.*, 44 N. W. 47, 50, 28 Neb. 89.

#### **Undertaking distinguished.**

See "Undertaking."

#### **PLANT CANE.**

The plants that spring up from the seed sugar cane are called "plant cane." *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 976, 120 U. S. 707, 30 L. Ed. 776.

#### **PLANTED.**

"Planted," as used in Rev. St. c. 18, § 65, authorizing a surveyor to dig for materials suited for the making or repair of ways in land not inclosed or planted, includes any land that is seeded or in any way prepared and used for tillage, or for the production of crops or trees, useful or ornamental. *Wellman v. Dickey*, 2 Atl. 133, 134, 78 Me. 29.

#### **PLANTATION.**

See "Home Plantation."

The ordinary signification of the term "plantation" is a farm. These terms are nearly synonymous. A plantation is a place planted; land brought under cultivation; ground occupied by trees or vegetables, which have been planted; especially in United States and West Indies, a large estate cultivated chiefly by negroes, either slaves or free, who live in a distinct community on the estate under the control of the proprietor or master. *Webst. Dict.* Bouvier, after saying that it is applicable to the English colonies in America, defines it as a farm. The cotton or sugar plantation is an estate or farm devoted to the cultivation of cotton or sugar. *Attorney General v. State Board of Judges*, 38 Cal. 291, 295.

#### **As estate in fee.**

"Plantation," as used in a devise of testator's plantation, was construed to mean an estate in fee therein. *French v. McIlhenry* (Pa.) 2 Bin. 13, 18.

#### **As farm.**

"Plantation" is defined as a place planted; land brought under cultivation; ground occupied by trees and vegetables, which have been planted. It was otherwise defined as a farm where staples are cultivated on a large scale. In its ordinary use the term "plantation" is nearly synonymous with "farm,"

and includes all the land forming the parcel or parcels under cultivation as one farm, or even what is worked by one set of hands. In re Private Road in Lower Towamensing Tp., 25 Pa. Co. Ct. R. 305.

#### **As ground adjoining house in town.**

The word "plantation," as used in the act of 1779, making it a misdemeanor to sell liquors in certain quantities, provided the same be not intended to be drank on the "plantation" whereon the same are sold, is of very extensive signification, and when applied to a town must be taken to mean the lot or ground adjoining the room or other house attached to or belonging to the premises where the liquors are sold. *Sanderlin v. State*, 21 Tenn. (2 Humph.) 815, 818.

#### **As town.**

"The terms 'plantation,' 'town,' and 'township' seem to have been used in the early colonies of Massachusetts almost indiscriminately to indicate a cluster or body of persons inhabiting near each other, and when they became designated by name certain powers were conferred upon them by general orders and laws, such as to manage their own prudential concerns, to elect deputies, and the like, which in effect made them municipal corporations, and no formal acts of incorporation were granted until long afterwards." *Commonwealth v. City of Roxbury*, 75 Mass. (9 Gray) 451, 485.

"Plantation," the derivative of "planting," formerly denoted, sometimes a colony, and sometimes a farm or cultivated estate. Thus, in the charter of 1662 the colony of Connecticut was called a "plantation," and its northern boundary line was the line of the "Massachusetts plantation," and in the act of 1685 the township of New Haven was empowered to manage its "plantation affairs," meaning that it might act in all the concerns of the town. *Inhabitants of Town of East Haven v. Hemingway*, 7 Conn. 186, 202.

#### **As tract under one control.**

As used in Code, § 829, providing that a plantation lying on the line between two counties shall be taxed in the one where the most of the improvements are, "plantation" means a tract, the whole of which is under the control of the proprietor; and hence, where, on the death of the owner, his executors divided his plantation up into smaller tracts, it no longer retained its identity as a single plantation, within the meaning of the statute. *Robson v. Du Bose*, 4 S. E. 329, 330, 79 Ga. 721.

#### **Different tracts.**

"The term 'plantation,' as well as 'tract,' is used as merely descriptive of a body of land. In common parlance they are used

as convertible terms, and we speak of our plantation, or our tract of land, intending to be understood as speaking of the same body of land. A plantation may consist of several tracts or portions of land; indeed, it is most commonly the case that it does." Thus the term in a will, in which testator devised certain property to his wife for life, with the benefit of his plantation and utensils belonging to the same, was construed not only to include the tract of land on which testator resided, but also an adjoining tract on which his mills were situated; such an intention of testator being apparent from another clause binding the ultimate division of his property, which directed his house, mills, and all of his land to be equally divided between his sons. *Wash v. Savage* (S. C.) 2 Hill, Eq. 50.

"Plantation," as used in a will, providing that all the property not devised should "remain on my plantation in the care of my wife," should be construed to include two different tracts of land, a half mile apart, which were cultivated by the testator together as one farm. *Bradshaw v. Ellis*, 22 N. C. 20, 22, 32 Am. Dec. 686.

The word "plantation" in common parlance means any body of land, consisting of one or several adjoining tracts, on which is a planting establishment. *State v. Blythe* (S. C.) 3 McCord, 363.

#### **Stock farm.**

"Plantation," as used in Ann. Code 1892, § 3561, requiring railroad companies to construct crossings for plantation roads, should not be construed in its narrow and mere etymological sense, but is sufficient to cover a stock farm, as well as a cotton farm. *Alabama & V. Ry. Co. v. Odeneal*, 19 South. 202, 204, 73 Miss. 34.

#### **Slaves.**

In construing a devise of "my plantation on the Tallapoosa river, known as my lower plantation on said river, together with all the property thereon, real, personal, or perishable, of every kind and description," the court said: "The term 'plantation,' as it is used in the devise, comprehended not only the lands, but the slaves and other personal property on the land, employed or useful in its cultivation. Such a comprehensive use of the term was very common when the will was executed, and at the death of the testator, in the county in which he lived and died." *Taylor v. Harwell*, 65 Ala. 1, 11.

#### **Uncultivated lands.**

The term does not include uncultivated lands. In re Private Road in Lower Townsensing Tp., 25 Pa. Co. Ct. R. 305.

#### **Woodland.**

The term "plantation" has no precise, fixed, and definite single meaning. It may mean the whole body of land (wood and cultivated) which a man uses together for agricultural purposes, or it may mean only that part which is cultivated. The sense in which it is used depends very much on the context or the subject-matter to which it is applied. *Hext v. Jerrell* (S. C.) 3 Strob. 11, 15.

The term "plantation" has several significations; but a man's plantation at such a place is understood by the bulk of people to be the land he owns at that place, whereof he is cultivating more or less for an annual crop. More properly it designates the place planted, but in wills it is generally used to express more than the inclosed and cultivated fields, and to take in the necessary woodland, and, indeed, commonly all the land forming the parcel or parcels under culture as one farm, or even what is worked by one set of hands. *Bradshaw v. Ellis*, 22 N. C. 20, 32 Am. Dec. 686. The term, as used in a will devising the plantation on which the testator lived, embraced two parcels of land, one of which the testator had bought adjoining that on which he lived. All the land which was actually in culture is embraced by the term "plantation" in its strictest sense, and it also includes the contiguous woodland, or at least as much of it as should be requisite for a supply of timber and wood. *Stowe v. Davis*, 32 N. C. 431, 433.

#### **PLANTATION UTENSILS.**

A will bequeathing to certain persons testator's "stock, plantation utensils, and household furniture," cannot be construed to include two stills and boiler, four tubs full of cider, a set of smith's tools and some old iron, a parcel of brandy hogsheads and casks, some leather, a gun, a few books, and fifty head of fattening hogs. *Kendall's Ex'r v. Kendall* (Va.) 5 Munf. 272, 274.

#### **PLANTATION SUPPLIES.**

"Plantation supplies," as used in Code, § 1780, providing that the husband may make contracts for plantation supplies to be used on a plantation owned by his wife, means such supplies as are "necessary for the prosecution of agricultural operations, and whether an article falls within the class designated by the word 'supplies' must be determined by resorting to the usages and customs of agricultural interests." *Wright v. Walton*, 56 Miss. 1, 7.

#### **PLANTERS.**

"Planters," as used in Code, § 1593, providing that cotton, corn, rice, or other prod-

ucts, sold by planters and commission merchants on cash sale, shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, means those who plant something in the ground or sow something therein which produces fruit or increase from this planting, and growing from the soil, such as cotton, corn, or rice. *Roberts v. Savannah, F. & W. Ry.*, 75 Ga. 225, 226.

## PLAQUE.

Webster says a "plaque" is any flat, thin piece of metal, or clay, or ivory, or similar material, used for ornament, or for painting pictures on, and hung upon the wall; and hence flat, rectangular porcelain panels, decorated by means of mineral colors, are dutiable as plaque, and not as paintings. *Bour v. United States (U. S.)* 91 Fed. 533.

Free-hand paintings on plaques painted with mineral colors and subjected to a process of firing, which sets and changes the colors, are dutiable at 35 per cent. as plaques, and not free as paintings in oil or water. *Altman & Co. v. United States (U. S.)* 71 Fed. 393.

## PLASTERER.

As carpenter, see "Carpenter."

As laborer, see "Laborer."

As mechanic, see "Mechanic."

A plasterer is one that overlays with plaster. A plasterer is not a mason, within the meaning of the statute giving a lien to masons for work done or materials furnished for building or repairing any house. *Fox v. Rucker*, 30 Ga. 525, 527.

## PLASTERING.

See "Ornamental Plastering."

Where the specifications of a building contract contained a general heading or title called "Plastering," under which, in subtitles called "Deafening," "Lathing," and "Plastering," the whole title was described, and a contractor undertook to "do the plastering and stucco work" according to the specifications, there was no ambiguity raised by the double use of the word "Plastering," and it will be construed to mean all included under the general title, and not alone that described under the subtitle "Plastering"; and this, although the specifications called for wire lathing, and not the ordinary wooden slip. *Mellen v. Ford (U. S.)* 28 Fed. 639, 640.

## PLAT.

A plat is a subdivision of land into lots, streets, and alleys, marked upon the  
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earth, and represented on paper; and hence the making and platting of it implies that the land had been surveyed, and that such survey was marked on the ground, so that the streets, blocks, and lots could be identified. *McDaniel v. Mace*, 47 Iowa, 509, 510, *Burke v. McCowen*, 47 Pac. 367, 368, 115 Cal. 481.

## PLATTED PORTION.

Gen. St. 1878, c. 68, § 1, limits the homestead exemption to a quantity of land, not exceeding 80 acres, not included in the "laid out or platted portion of any incorporated town, city, or village," or a quantity of land not exceeding in amount one lot, if within the "laid out or platted portion of any incorporated town, city, or village" of not over 5,000 inhabitants, or one-half acre if in a town, city, or village of less than 5,000 inhabitants. Held, that the "laid out or platted portion of an incorporated town, city, or village," as used in the statute, refers only to that part which is already laid out and platted for city or urban purposes, and not to land divided into large out or farm lots for rural or agricultural purposes. In re *Smith's Estate*, 53 N. W. 711, 51 Minn. 316.

## PLATTING.

The word "platting," as applied to towns, is descriptive of the means of perpetuating the evidence of the creation of a town. *Mattheisen & Hegeler Zinc Co. v. City of La Salle*, 8 N. E. 81, 83, 117 Ill. 411.

## PLATE.

The term "plate" is not commonly understood to embrace articles of ordinary use, whatever may be the material, but only the more portentous articles, which are displayed on the tables of the wealthy or ostentatious, and are to be construed rather as articles of luxury than as household furniture. Silver forks and tea and table spoons are not included in the term "plate." *Hanover Fire Ins. Co. v. Mannasson*, 29 Mich. 316, 317.

The term "plate," in a devise of testator's plate, does not include jewels. *Conner v. Ogle*, 4 Md. Ch. 425, 454.

## PLATE MATTER.

"Plate matter" is reading news matter suited to the general needs of newspapers, supplemental to local items necessary for the several localities. This plate matter is edited and set up in New York in the ordinary way. It is then turned into stereotyped plates, which are delivered like ordinary merchandise to the publishers of newspapers for use in their daily or weekly edi-



tions. *Barr v. Essex Trades Council*, 30 Atl. 881, 882, 53 N. J. Eq. (8 Dick.) 101.

## PLATFORM.

Railway platform as a public highway, see "Highway."

## PLAY.

In holding that the words "to play or roll billiards," in an indictment charging the defendant with permitting a minor to play or roll billiards without the consent of his parents, did not describe two distinct offenses, it was said that "the words 'play or roll' are evidently used as synonymous in the act creating the offense, and do not describe different offenses. In the case of tenpins, 'play' and 'roll' are commonly used to describe the game, and though not so frequently used to describe the game of billiards, yet sometimes this is the case, and it is not to be supposed that grave members of the Legislature are so familiar with the language used in the games they prohibit as to use them with technical accuracy." *Cobb v. State*, 45 Ga. 11, 13.

The words "playing at a game of cards" do not describe an indictable offense under a statute prohibiting gaming. There must be something more than simply playing at a game of cards to subject the party to a criminal prosecution. *Belt v. Spaulding*, 20 Pac. 827, 829, 17 Or. 130.

Code, § 4213, prohibiting saloon keepers who have billiard tables in their saloons from permitting minors to "play thereon," does not necessarily mean the technical game of billiards, but it must be a kindred game, or one played with balls and cues or mace, or some substitute therefor; and mere sport or pastime on the table, or even playing with the balls, would not fall within the statute, but there must be a game played or begun to be played in order to constitute the offense. *Sikes v. State*, 67 Ala. 77, 81.

The words "played" and "dealt," as used in the chapter punishing gaming, have the meaning attached to them in common language. The word "exhibited" is intended to signify the act of displaying the bank or game for the purpose of obtaining bettors. *Pen. Code Tex.* 1895, art. 387.

### Bet synonymous.

The word "plays," as used in *Pen. Code*, § 330, providing that every person who plays or carries on, either as owner or employed, any game of faro, etc., shall be punishable, etc., does not include a person who bets at a banking game. *Ex parte Ah Yam*, 53 Cal. 246, 247.

Hill's Code, § 3526, provides that each and every person who shall deal, play, or

carry on, etc., any game of faro, etc., shall be punished. Held, that a person who bets money at a game of faro dealt by another plays faro within the meaning of the section above referred to. *State v. McDaniel*, 26 Pac. 837, 20 Or. 523.

Where two or more persons engage in throwing dice for money, and other persons standing by bet money upon the result of the throws, the latter, as well as the former, are guilty of "playing and betting," under Code, § 4541. *Parmer v. State*, 16 S. E. 937, 938, 91 Ga. 152.

The words "wagering," "playing," "gaming," and "betting," though each having a meaning more or less different from the other, are often used one for the other. *Thrower v. State*, 45 S. E. 126, 127, 117 Ga. 753.

## PLAY (Noun).

A "play" is a dramatic composition, drama, tragedy, comedy, or farce; "a composition in which characters are represented by dialogue and action." *Society for the Reformation of Juvenile Delinquents v. Diers* (N. Y.) 10 Abb. Prac. (N. S.) 216, 220.

## PLAYING POLIOY.

See "Policy Playing—Policy."

## PLAZA.

The word "plaza" is of Spanish derivation, and in Spain, Cuba, Mexico, and parts of the United States settled by the early Spaniards is used to designate a plat of ground in a city or village, dedicated to the use of the general public for a market place, a common, or a park. In some places the plaza is an uninclosed market place and common, over which the public may drive and ride and vend the products of the farm; in other places it consists of an inclosed park, filled with trees, flowers, walks, etc., around which is a driveway, and into which the public have free access; while in other places it consists of an open square, in the center of which is a small inclosed park, with a fountain, flowers, seats, and walks. Where the owner of a square or plat of ground situated in a city or village dedicates it to the use of the public and calls it a "plaza," but does not in any manner designate how it shall be enjoyed, the city or village authorities may assume control of it, and maintain it either as an open market place and common, an inclosed park for the pleasure and recreation of the public, or partly inclosed and partly uninclosed. In such a case, they would be allowed a discretion in determining the manner of its enjoyment by the public. *Sachs v. Trustees of Village of Towanda*, 79 Ill. App. 439, 441.

**PLEA.**

See "Affirmative Plea"; "Anomalous Plea"; "Common Pleas"; "Dilatory Plea"; "Double Plea"; "False Plea"; "Foreign Plea"; "Interplea"; "Negative Plea"; "Pure Plea"; "Special Plea."

Issuable plea, see "Issuable."

"Plea," as the term was used in courts of common law, meant a defense of matters of fact. *Brower v. Wellis*, 33 N. E. 672, 673, 6 Ind. App. 323.

The word "plea," in a recognizance providing that defendant should "prosecute his said appeal to effect" and "make his plea good," was obviously commensurate with the term "defense"; in other words, that at the final determination of the controversy between the parties he should be successful in his defense. *Lockwood v. Jones*, 7 Conn. 431, 435, 438.

A plea is a special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred. *Grand Lodge A. O. U. W. v. Gaddis* (N. J.) 55 Atl. 465, 468.

A plea is a special answer setting forth and relying on some one fact, or several facts tending to one point, sufficient to bar the suit. Its office is to reduce so much of the cause as it professes to answer to a single point. *Davidson v. Schermerhorn* (N. Y.) 1 Barb. 480, 481.

A plea is a special answer to a bill, different from an answer in common form, as it demands the judgment of the court in the first instance whether the special matter urged by it does not debar the plaintiff from his title to that answer which the bill required. *Neale v. Hagthorp* (Md.) 3 Bland, 551, 570.

The proper office of a plea is not, like an answer, to meet all the allegations of the bill, nor, like a demurrer, admitting those allegations to deny the quality of the bill, but it is to prevent some distinct fact which of itself creates a bar to the suit, or to the part to which the plea applies, and thus avoid the necessity of making the discovery asked for and the expense of going into the evidence at large. *United States v. California & O. Land Co.*, 13 Sup. Ct. 458, 461, 148 U. S. 31, 37 L. Ed. 354; *Miller & Lux v. Rickey* (U. S.) 123 Fed. 604, 607; *Giberson v. Cook* (U. S.) 124 Fed. 986, 987.

Whatever is offered by the defendant as sufficient to defeat the cause of action stated in plaintiff's declaration, either by way of denial, justification, or confession, is a plea. *Jewett Car Co. v. Kirkpatrick Const. Co.* (U. S.) 107 Fed. 622, 624.

The term "to plead," as it was used in the courts of common law, meant the interposition of matters of fact as a defense to a suit in the law courts. *Brower v. Wellis*, 33 N. E. 672, 673, 6 Ind. App. 323.

**As any pleading.**

The word "plea," in the statute providing that when a declaration or other pleading alleges that any person made, indorsed, assigned, or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it in issue, obviously is used in its comprehensive sense, and means any pleading, as a replication in law or in chancery. *Robinson v. Dix*, 18 W. Va. 528, 542.

**Affidavit of illegality.**

The word "plea," as used in a judgment that (after stating the case as "illegality to foreclosure"), "there being no evidence produced before the court by the defendant in the above-stated case sustaining said plea, it is the judgment of the court that the above-stated plea be dismissed," etc., evidently meant the affidavit of illegality. The defendant had no other plea or pleading in the case, and the obvious purpose of the judgment was the dismissal of the illegality. *Howell v. Allen*, 31 S. E. 759, 106 Ga. 16.

**Caveat to will.**

The word "pleas" is not, in its usual and ordinary signification, applicable to the grounds of a caveat to the probate of a paper propounded as a will; and there is nothing in Civ. Code, § 5330, providing: "If there are several pleas filed by the defendant, a verdict for the defendant must show upon which of the pleas the verdict is rendered. The jury may render such verdict upon all the pleas, if they see proper to do so"—which remotely suggests that this pregnant word should be understood in any other sense than that generally ascribed to it. This being so, the courts should treat this word, as used in this section, as meaning pleas proper. A plea is "a formal answer made by a defendant to a demand or charge." *And. Law Dict.* Obviously, this definition was not applied to a caveat filed in probate proceedings. *Underwood v. Thurman*, 36 S. E. 788, 789, 111 Ga. 325.

**Demurrer.**

Where a statute provides that, when any writ of mandamus shall be issued, the person suing or prosecuting the writ shall plead to all facts contained in the return, the word "plea" does not include a demurrer, which is a mere refusal to plead. *State ex rel. Alexander v. Ryan*, 2 Mo. App. 303, 308.

The office of a plea in equity practice is to present a single issue of fact as a de-

fense which operates as a bar to complainant's right of recovery, while a demurrer raises a question of law and is directed to the sufficiency of the complaint. It is manifest, therefore, that these two defenses cannot be combined in one pleading. *Hostetter Co. v. E. G. Lyons Co.* (U. S.) 99 Fed. 734, 735.

A plea is the defendant's answer by matter of fact to the plaintiff's declaration. It is distinguished from a demurrer, which opposes matter of law to the declaration; and therefore a demurrer could not be filed under a statute providing that, after the certification of a case to a common pleas division, either party might file "such further pleas, legal or equitable, as he may see fit." *Bates v. Colvin*, 41 Atl. 1004, 21 R. I. 57.

The term "to plead," when used in a limited and appropriate sense, excludes the idea of a demurrer. *Welsh v. Blackwell*, 14 N. J. Law (2 J. S. Green) 344, 346.

The distinction between a demurrer and a plea dates as far back as the time of Lord Bacon, by whose ordinances for the administration of justice in chancery it is said "a demurrer is properly upon matters defective contained in the bill itself and not foreign matter, but a plea is of foreign matter, to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or that there is another bill depending for the same cause, or the like." In other words, a plea which avers that a certain fact is not as the bill affirms it to be sets up matter not contained in the bill. That an objection to the equity of the plaintiff's claim as stated in the bill must be taken by demurrer, and not by plea, is so well established that it has been constantly assumed, and therefore seldom stated in judicial opinions. *Farley v. Kittson*, 7 Sup. Ct. 534, 540, 120 U. S. 303, 30 L. Ed. 684.

A demurrer is not a plea, but, on the contrary, is an excuse for not pleading; and therefore a demurrer could not be filed under a statute providing that, after a certification of a case to the common pleas division, either party may file "such further pleas, legal or equitable, as he may see fit." *Bates v. Colvin*, 41 Atl. 1004, 21 R. I. 57.

#### Disclaimer.

In real actions in trespass, by force of the statute, and in a quare impedit, disclaimer is a plea, and, like pleas in error or in abatement, concludes with a verification, and calls for a replication and issue. But in ejectment, notwithstanding the defendant disclaims title to the land, it is still necessary to try the fact whether defendant was in possession when the writ was served; and consequently, where ejectment was

brought against two, and one entered a disclaimer, the court should have compelled him to give judgment which would secure the costs and damages, or to plead instant the general issue. *Bratton v. Mitchell* (Pa.) 5 Watts, 69, 71.

#### In equity.

A plea in equity is a special answer, to avoid a general answer, under a rule that, if one answers at all, he must answer fully; and the plea is one allowed when it puts the matter upon some one point which is decisive of the controversy, as a purchase for a valuable consideration without notice. *Carter v. Hoke*, 64 N. C. 348, 351.

The object of a plea is to bring the matter presented by the bill to an issue on a single point, which may save the defendant from answering in whole or in part, and save the expense of going into the evidence at large. The general rule permits a single plea only, and several pleas will not be allowed unless they present well-defined issues not interwoven with the alleged equities of the bill, which can be determined separately, without regard to such equity, and without injustice to the complainant. *Gilbert v. Murphy* (U. S.) 100 Fed. 161.

The proper office of a plea in equity is to interpose some ground of conclusive defense, like the pendency of a prior suit between the same parties, want of title in the complainant, statute of limitations, former adjudication, or that the defendant is an innocent purchaser for value, which may determine the suit without the necessity of an exhaustive hearing on the merits of the case under the several different defenses which may be appropriately made by answer. A defendant by such a plea rests his entire defense on it, and may not resort, after an adverse decision on his plea, to an answer on the merits. *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.* (U. S.) 83 Fed. 26, 29.

#### PLEA IN ABATEMENT.

Abate distinguished, see "Abate."

As an appearance, see "Appearance."

A plea in abatement is a defense to a pending action, and is properly so termed. *Bliss*, Code Pl. § 345; *Prac. Act*, § 1; *Pub. Acts* 1879, c. 83; *Bergkofski v. Ruzofski*, 50 Atl. 565, 566, 74 Conn. 204.

A plea in abatement seeks to defeat the proceedings, and does not show that the plaintiff is forever concluded, but it sets out a better form of action for the redress sought. *Hurst v. Everett* (U. S.) 21 Fed. 218, 221.

A plea in abatement is generally defined as one which shows cause to the court why

the defendant should not be impleaded, or, if impleaded, not in the manner and form in which he is. *Middlebrook v. Ames* (Ala.) 5 Stew. & P. 158, 166; *Mantz v. Hendley* (Va.) 2 Hen. & M. 308, 313.

The phrase "plea in abatement," as used in circuit court rule No. 6, providing that, "whenever the defendant interposes a plea in abatement, he may also at the same time plead the general issue," etc., includes a plea to the jurisdiction; for the result of a plea to the jurisdiction, if sustained, is to abate the action. It is a dilatory plea, and the purpose of the rule is to provide for a speedy determination of these pleas, and an immediate trial of the cause, if the plea is bad. *National Fraternity v. Wayne Circuit Judge*, 86 N. W. 540, 541, 127 Mich. 186.

Pleas in abatement are always pleas to the writ, except where the declaration, which is presumed to correspond with the writ, be incorrect in respect to some extrinsic matter; otherwise there is no plea to the declaration alone, but in bar. A plea in abatement is one which shows some ground for quashing the original writ or declaration, or both. A plea in abatement is a dilatory plea, and does not go to the merits of the action to defeat it. *Wilson v. Winchester & P. R. Co.* (U. S.) 82 Fed. 15, 18.

A plea in abatement is entered to save expense by preventing a trial when an action in its present form is not legally supportable. *McNeill v. West*, 3 N. C. 51, 52.

Pleas in abatement are allowed stricti juris, and no latitude in practice is extended to them. They must be always on file in a right time, in right form, and properly verified. *Grove v. Campbell*, 17 Tenn. (9 Yerg.) 7, 9.

The plea to be sued in the county of one's residence is not a plea in abatement, but a meritorious one to secure substantial rights, and, if defective in form, is amendable. *Weekes v. Sunset Brick & Tile Co.*, 56 S. W. 243, 247, 22 Tex. Civ. App. 556 (citing 1 Enc. Pl. & Prac. 519).

A plea by which defendant sets up matter of fact showing that the writ or declaration is defective and incorrect, if valid, defeats the action for the time being; but the plaintiff may proceed with it after the defect is removed, or may recommence by a better plea. The plea in itself must be precise, and plead the fact with strict exactness, and a defendant so pleading ought generally to give the plaintiff a better writ, or, in other words, he ought so to show the mistake or defect that on the face of the plea plaintiff may discover what will make a good writ; but, if the plea goes to the matter and substance of the writ, defendant need not give a better one. *Wadsworth v. Woodford* (Conn.) 1 Day, 28, 29.

"Plea of abatement" is an expression of a very different meaning than "abate" in Rev. St. p. 35, providing that if any writ shall be directed to an indifferent person, except in the cases and under the regulations mentioned, it shall abate. "Abate" is a generic term, derived from the French word "abattre," and signifies to quash, beat down, or destroy. The modes of abatement are various, but the thing is simple and uniform. The plea of abatement is one mode of quashing the writ, but it is not the only one. *Case v. Humphrey*, 6 Conn. 130, 140.

A plea in abatement for misnomer must not only state the true name of the accused, but it must further allege that he was not commonly known and called by the name under which he stands indicted. *Waldron v. State*, 26 South. 701, 41 Fla. 265.

### PLEA IN BAR.

The word "bar" has a peculiar and appropriate meaning in law. In a legal sense it is a special plea constituting a sufficient answer to an action at law, and so called because it barred—i. e., prevented—the plaintiff from further prosecuting it with effect, and, if established by proof, defeated and destroyed the action altogether. *Wilson v. Knox County*, 34 S. W. 45, 46, 132 Mo. 387 (quoting Burrill, Law Dict.).

A plea in bar, in a legal sense, is a plea of peremptory exception of a defendant sufficient to destroy the plaintiff's action. *Norton v. Winter*, 1 Or. 47, 48, 62 Am. Dec. 297 (citing 1 Jac. Law Dict. 289; 1 Abb. Law Dict. 125); *Wilson v. Knox County*, 34 S. W. 45, 46, 132 Mo. 387.

A bar is a peremptory legal exception to a demand. *Huston v. Barstow*, 19 Pa. (7 Harris) 169, 170.

A plea in bar is one which attacks the right of action altogether, instead of merely intending to divert the proceedings to another jurisdiction, or to sustain them, or abate the particular writ or declaration. It is a conclusive answer to the action. *Rawson v. Knight*, 71 Me. 99, 102.

"A plea in bar is one that virtually admits that a cause of action once existed, but insists that the plaintiff cannot and never can maintain his action for the cause alleged." *Hurst v. Everett* (U. S.) 21 Fed. 218, 221.

At the common law pleas in bar were not susceptible of any other division than (1) pleas of traverse or denial and (2) pleas by way of confession and avoidance. An important rule of pleading, deducible from the principle that a plea in bar must traverse or confess and avoid the matter to which it applied, was that a plea in confession and avoidance must give color; that is, that it

must give the plaintiff credit for having an apparent or prima facie right of action, independently of the matter disclosed in the plea to destroy it. *Merten v. San Angelo Nat. Bank*, 49 Pac. 913, 914, 5 Okl. 585 (citing *Tidd*, Prac. 552).

Under Prac. Act Aug. 30, 1784, defining a plea in bar to mean a plea that the action is illegal, the phrase "plea in bar," under Act March 9, 1797, declaring that no action shall be removed to the Supreme Court by habeas corpus after plea pleaded, except a plea in bar, means a plea that the action is illegal. *Austin v. Nelson*, 6 N. J. Law (1 Halst.) 381, 383.

#### PLEA IN DISCHARGE.

A plea in discharge is one which admits that the plaintiff had a cause of action, but that tends to show that it was discharged by some subsequent or collateral matter, as that before action the defendant had satisfied and discharged plaintiff's claim by payment. *Nichols v. Cecil*, 61 S. W. 768, 770, 106 Tenn. (22 Pickle) 455.

#### PLEA IN RECONVENTION.

See "Reconvention."

#### PLEA OF ANOTHER SUIT PENDING.

A plea of another suit pending is a plea in abatement, and is waived or overruled by a plea of not guilty filed at the same time. *Southern Ry. Co. v. Brigman*, 32 S. W. 762, 763, 95 Tenn. (11 Pickle) 624.

#### PLEA OF CONFESSION AND AVOIDANCE.

A plea of confession and avoidance is necessary only when defendant proposes to admit the truth of a material allegation made by the plaintiff, and to avoid liability thereon by affirmative proof of matters which destroy the effect of the allegations admitted. In other words, such a plea concedes to plaintiff an apparent or prima facie right of action, and would entitle plaintiff to judgment, but for the matters affirmatively alleged in the answer. *Staten v. Hammer*, 96 N. W. 964, 965, 121 Iowa, 499.

A plea of confession and avoidance admits the breach and asserts affirmative facts to avoid the consequences, and a plea of waiver is clearly a plea of confession and avoidance, since a waiver involves matter first which is consistent with the pleading by confessing it, and then new and independent matter in avoidance. *Evans v. Queen Ins. Co.*, 31 N. E. 843, 844, 5 Ind. App. 198.

A plea of confession and avoidance is one which admits that the plaintiff had a

cause of action, but which avers that it has been discharged by some subsequent or collateral matter. *De Lissa v. Fuller Coal & Mining Co.*, 52 Pac. 886, 888, 59 Kan. 319.

#### PLEA OF CONTRIBUTORY NEGLIGENCE.

See "Contributory Negligence."

#### PLEA OF FORMER ACQUITTAL.

See "Former Acquittal."

#### PLEA OF FORMER CONVICTION.

See "Former Conviction."

#### PLEA OF GUILTY.

As conviction, see "Convicted—Conviction."

Plea of nolo contendere distinguished, see "Nolo Contendere."

See, also, "Guilty."

A plea of guilty to an indictment amounts to nothing more than an acknowledgment of the facts charged, and whether such facts constitute an offense is left open to be decided by the court. *Crow v. State*, 6 Tex. 334.

A plea of guilty, entered by one accused of crime, is a confession of the charge, and judgment is rendered thereon without a trial on any issue of law or of fact. Where defendant pleads guilty to the charge of grand larceny, and judgment was rendered against him, a motion for a new trial made at the same term of court was therefore ineffectual. The proper practice in such a case is to make a motion to vacate the judgment and for leave to withdraw the plea. *Meyers v. State*, 59 N. E. 1052, 156 Ind. 388.

#### PLEA OF JUSTIFICATION.

"A plea of justification under legal process must set forth matter which, if proved, would constitute a full defense to the action. If the plaintiff in the action is a stranger to the writ, the plea should aver facts to show that the property taken was the property of the defendant in the process and was subject to seizure thereunder." *West v. Hayes*, 23 South. 727, 728, 120 Ala. 92, 74 Am. St. Rep. 24.

A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge. It is unnecessary to repeat and justify every word of the alleged defamatory matter, if the substance of the charge be justified. *Hearne v. De Young*, 52 Pac. 150, 151, 119 Cal. 670.

A plea in justification or excuse admits facts alleged by the plaintiff, but in effect

denies that the plaintiff had at any time a good cause of action, either because the conduct of the defendant is justified under some legal right or cause, or because he is excused from liability in the particular case through some act or conduct of the plaintiff. This is also called an avoidance in law. *Nichols v. Cecil*, 61 S. W. 768, 770, 106 Tenn. (22 Pickle) 455.

A plea of justification is one of confession and avoidance. It must meet and justify the cause of action stated in the declaration. It is not enough to justify only in part. Where a complaint alleged an assault by kicking and striking the plaintiff, and then throwing him on the ground from a moving car, a plea in justification, alleging that plaintiff was a trespasser trying to steal a ride, and ejected only by necessary force, is demurrable, unless it sets forth circumstances showing that the acts were reasonably necessary. *Wright v. Union R. Co.*, 45 Atl. 548, 21 R. I. 554.

#### PLEA OF NOLO CONTENDERE.

See "Nolo Contendere."

#### PLEA OF NON CEPIT.

A plea of non cepit, in the former action of replevin, in substance disallowed all connection with the property, and made no claim to it; and, if the defendant succeeded upon it, he was entitled to a judgment of costs only. *Lewis v. Buck*, 7 Minn. 104, 116 (Gil. 71, 78) 82 Am. Dec. 73.

#### PLEA OF NOT GUILTY.

See "Not Guilty."

#### PLEA OF PLENE ADMINISTRAVIT.

See "Plene Administravit."

#### PLEA OF RELEASE.

A plea of release admits the cause of action, but sets forth a release subsequently executed by the party authorized to release the cause of action. *Landis v. Morrissey*, 10 Pac. 258, 259, 69 Cal. 83.

#### PLEA OF SELF-DEFENSE.

See "Self-Defense."

#### PLEA OF USURY.

The plea of usury is a privilege personal to the debtor, or his privies in blood, contract, or representation; and an attaching creditor of the mortgagor is a privy in representation of the mortgagor, and hence can interpose the defense. *Coleman v. Cole*, 59 S. W. 106, 108, 158 Mo. 253.

#### PLEA PUIS DARREIN CONTINUANCE.

See "Puis Darrein Continuance."

#### PLEA SON ASSAULT.

See "Son Assault."

#### PLEA TO THE ACTION.

Pleas to the action are such as dispute the cause of action. *Parks v. McClellan*, 44 N. J. Law (15 Vroom) 552, 558.

#### PLEA TO THE JURISDICTION.

A demurrer to the jurisdiction of the court is a "plea to the jurisdiction," within the meaning of an action precluding appellate courts for proceeding to a reversal for want of jurisdiction unless a plea to the jurisdiction is filed in the court below. *Pryor v. Adams (Va.)* 1 Call, 882, 891, 1 Am. Dec. 533; *Tate's Dig.* 358.

#### PLEAD TO THE DECLARATION.

The phrase "to plead to the declaration or complaint," as used in Act Cong. March 3, 1887, providing that the party desiring to remove a cause from a state court to the Circuit Court of the United States on the ground of diverse citizenship must file his petition at the time or at any time before the time when defendant is required by the law of the state to answer or plead to the declaration or complaint of the plaintiff, refers to the time when defendant is required to plead to the merits of the action, and does not limit the filing of the petition for removal to the time when pleas in abatement must be filed under the state practice. *Wilson v. Winchester & P. R. Co. (U. S.)* 82 Fed. 15, 18.

#### PLEADING.

See "Sham Pleading."

As proceeding, see "Proceedings."

Irrelevant pleading, see "Irrelevancy—Irrelevant."

Other pleading, see "Other."

Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense. It is the formal mode of alleging that in the record which would be the support of the action or the defense of the party in evidence. *Chattanooga Cotton Oil Co. v. Shamblin*, 47 S. W. 496, 101 Tenn. (17 Pickle) 263; *Burnham v. Ross*, 47 Me. 456, 459; *Kilpatrick-Koch Dry Goods Co. v. Box*, 45 Pac. 629, 631, 13 Utah, 494; *Smith v. Cottrell (Tenn.)* 8 Baxt. 62, 63.

Pleadings are "the statements of the parties, in a legal and proper manner, of the causes of action and grounds of defense.

\* \* \* They were formerly made by the parties or their counsel orally in open court under the control of the court." In other words, pleadings are but the statements of the issues to be tried. *Bowman v. McLaughlin*, 45 Miss. 461, 489 (citing *Bouvier*).

Pleadings at common law are composed of the written allegations of the parties, terminating in a single proposition distinctly affirmed on one side and denied on the other, called the "issue." If it is a proposition of fact, it is to be tried by the jury upon the evidence adduced; and it must correspond with the allegations and be confined to the point in issue. Pleadings are for the purpose of advising the parties to an action what the opposite party relies on, that he may be ready to meet it in evidence on trial. *Parlman v. Young*, 4 N. W. 139, 143, 2 Dak. 175; *Marshall v. Haney* (Md.) 9 Gill, 251, 258; *Hong Sling v. Scottish Union & National Ins. Co.*, 27 Pac. 170, 171, 7 Utah, 441; *Blum v. Bruggemann*, 68 N. Y. Supp. 1065, 1068, 58 App. Div. 377.

Pleading is the formal mode of alleging on the record that which would be the support or defense of the party on evidence; and in pleading the legal effect of the facts is stated, and not the facts themselves. *Dyett v. Pendleton* (N. Y.) 8 Cow. 727, 728.

Pleadings are presumed to be statements in legal form of those facts constituting the charge or defense of the party, by means of which issues between the parties to be tried are defined, and are necessary to inform the court what issues are raised and which are proper. *Cook v. Merritt*, 25 Pac. 176, 177, 15 Colo. 212.

Pleadings are the allegations made by the parties to a civil or criminal case, for the purpose of definitely presenting the issues to be tried, and to determine between them. *Tucker v. United States*, 14 Sup. Ct. 299, 301, 151 U. S. 164, 38 L. Ed. 112.

The word "pleading," in law, signifies the science and course of allegation, whereby a party presents his demand or defense against the demand of the other party to be made a matter of record. *City of Kansas v. O'Connor*, 36 Mo. App. 594, 599.

A pleading is a statement of fact, and not of evidence of facts. *Elliott v. First Nat. Bank*, 70 Pac. 421, 422, 30 Colo. 279.

The term "pleading" includes all the pleadings of both parties, as used in Code, § 101, providing that the court may allow any pleading to be amended, etc. *Talbot v. Garretson*, 49 Pac. 978, 979, 31 Or. 256.

The pleadings, in the reformed system of procedure, "are the written statements by the parties of the facts constituting their respective claims and defenses." Code Civ.

Proc. § 89. They are not, as formerly, the mere flourishes of the draftsman, and the practice, therefore, is to receive them in evidence in other suits, when offered as admissions or declarations against interest. *Paxton v. State*, 81 N. W. 383, 388, 59 Neb. 460, 80 Am. St. Rep. 689.

The term "pleadings" has a technical and well-defined meaning, and when it occurs in our laws the profession is at no loss to comprehend its purport. They are the written allegations of what is affirmed on the one side or denied on the other, disclosing to the court or jury who have to try the cause the real matter in dispute between the parties; and when parties are required to plead on return of process before a justice, or when it is required by the plaintiff or defendant as allowed by statute, it would be strange indeed if the issue thus made up in writing could be departed from or abandoned at pleasure. Such a liberal practice before a justice would admit of evidence of a trespass or assault under an issue in writing showing a claim of debt or covenant. *Desnoyer v. Hereux*, 1 Minn. 17, 19 (Gil. 1, 3).

The term "pleadings," in Rev. St. § 7356, as amended in 1883, providing that in criminal cases in the Supreme Court only errors of law occurring on the trial or appearing in the pleadings or judgment can be reviewed, includes the indictment and pleadings in abatement, as well as in bar, and extends to the orders or judgments with respect to the pleadings; but, where matter not the proper subject of a plea is incorporated in a paper denominated a "plea," a decision with respect to it will not ordinarily be reviewed upon the ground that it is part of the pleadings. *Wagner v. State*, 42 Ohio St. 537, 541.

The word "pleading," as used in the Constitution, authorizing the granting of a pardon of an offense after verdict of guilty and before sentence, and declaring that no pardon granted before conviction shall avail the party pleading the same, includes any suitable form of bringing the pardon to the notice of the court by plea, motion, or otherwise. *Commonwealth v. Lockwood*, 103 Mass. 323, 331, 12 Am. Rep. 699.

The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses. Ind. T. Ann. St. 1899, § 3225; Gen. St. Kan. 1901, § 4518; Rev. St. Okl. 1903, § 4288; Rev. St. Wyo. 1899, § 3531.

The pleadings are the formal allegations by the parties of their respective claims and defenses for the judgment of the court. Code Civ. Proc. Cal. 1903, § 420; Code Civ. Proc. Idaho 1901, § 3200; Rev. St. Utah 1898, § 2956.

**Amended complaint.**

The term "pleading," within the meaning of Code Civ. Proc. § 670, subd. 2, making the pleadings part of the judgment roll, includes an original complaint which has been amended. *Redington v. Cornwell*, 27 Pac. 40, 43, 90 Cal. 49.

**Bill of exceptions.**

See "Bill of Exceptions."

**Bill of particulars.**

See "Bill of Particulars."

**Demurrer.**

A demurrer is a pleading. *Rosenbach v. Dreyfuss* (U. S.) 1 Fed. 391, 393.

"The word 'pleading,' when used in a large or general sense, comprehends not only the declaration and special or other pleas, but demurrers." *Welsh v. Blackwell*, 14 N. J. Law (2 J. S. Green) 344, 346.

The word "pleading" in its broadest sense includes all proceedings from the complaint until issue is joined, and in its most limited sense it means the defendant's answer to the complaint. As used in Rev. St. 1894, § 379, providing for liberality in the construction of pleadings, it does not include a demurrer. *Merrill v. Pepperdine*, 36 N. E. 921, 922, 9 Ind. App. 416.

Gen. St. 1878, c. 66, § 131, provides that an intervention shall be by complaint, which must set forth the facts on which the intervention rests, and all the pleadings therein shall be governed by the same principles and rules as in other pleadings. Held, that the words "complaint" and "all the pleadings therein" evidently referred to the course of pleadings analogous to ordinary pleading in civil actions, including the demurrer to the complaint for its failure to state a cause of action or ground of intervention, as the case may be. *Shepard v. Murray County*, 24 N. W. 291, 292, 33 Minn. 519. See, also, *Mulvey v. Staab*, 12 Pac. 699, 701, 4 N. M. (Johns.) 50.

**Garnishment, writ of.**

See "Garnishment."

**As mandate.**

See "Mandate."

**Motion for new trial.**

Pleadings are defined by section 84 of the Code as "the written statements by the parties of the facts constituting their respective claims and defenses." Section 86 limits and defines the only pleadings permissible by the Code as follows: "The only pleadings allowed are: First, the petition by the plaintiff; second, the answer or de-

murrer by the defendant; third, the demurrer or reply by the plaintiff; fourth, the demurrer by the defendant to the reply of plaintiff." So that a motion for a new trial is not a pleading within such definition. *McDermott v. Halleck*, 69 Pac. 335, 337, 65 Kan. 403.

**Notice of special matter in infringement suit.**

Notice of special matter in an action for the infringement of a patent is not a "pleading," and, instead of being put in the answer, should be served on the adverse party. *Cottler v. Stimson* (U. S.) 20 Fed. 906, 907.

**Petition.**

See "Petition."

**Petition for rehearing.**

A petition for rehearing, under the rules of appellate procedure, is a pleading, and not a mere argument or brief. *Baltimore & O. S. W. Ry. Co. v. Conoyer* 49 N. E. 452, 149 Ind. 524.

**Petition to foreclose mortgage.**

A petition, under section 3962 of the Code of Georgia, to foreclose a mortgage on realty, is a pleading, within the statute of amendment, embraced in section 3479 of the Code. *Ledbetter v. McWilliams*, 15 S. E. 634, 90 Ga. 43.

**Specification of objections in bankruptcy proceeding.**

Specifications of objection to the discharge of a bankrupt are pleadings, and should be verified as required by Bankr. Act July 1, 1898, c. 541, § 18c, 30 Stat. 551 [U. S. Comp. St. 1901, p. 3429]. In *re Baerncopf* (U. S.) 117 Fed. 975. There is a very narrow and technical sense in which the word "pleading" is confined, both in law and equity practice, to such formal documents as the declaration or bill, the demurrer, the plea or answer, a disclaimer, or the like; but that is hardly the sense of this statute. It has seemingly the broader meaning, given in *Bouvier's Dictionary*, of stating in logical and legal form the facts which constitute the plaintiff's cause of action or the defendant's ground of defense. It is the formal mode of alleging that on the record which constitutes the support or the defense of the party in evidence. In *re Glass* (U. S.) 119 Fed. 509, 512. But see, contra, in *re Jamieson* (U. S.) 120 Fed. 697, 698.

**PLEADING OVER.**

Pleading over is a waiver of mere defects in pleading; but, where the plaintiffs' proceeding is contrary to the statute which alone gives them the right to maintain the suit, the objection goes to the foundation of



the action and may be taken at the trial. *Johnson v. Algor*, 47 Atl. 511, 573, 65 N. J. Law, 363.

### PLEADING A STATUTE.

Pleading the statute is stating the facts which bring the case within it, and counting on it, in the strict language of pleading, is making express reference to it by apt terms to show the source of right relied on. *McCullough v. Colfax County* (Neb.) 95 N. W. 29, 31 (citing *Howser v. Melcher*, 40 Mich. 185; *King v. Felton*, 63 Cal. 66).

### PLEADING TO THE MERITS.

"Pleading to the merits" is a phrase of long standing, and distinguishes those pleas which answer the cause of action and on which a trial may be had from those which are of a different character. *Rahn v. Gunnison*, 12 Wis. 523, 529.

### PLEASURE.

See "During Pleasure."

The term "pleasure of the lodge," in a by-law providing for the election of a physician, to remain in office during the pleasure of the lodge, authorizes a dismissal of such physician at a regular meeting of the lodge, in the absence of provisions in the constitution or by-laws requiring such dismissal to be made at a special meeting. *Brendon v. Worley*, 28 N. Y. Supp. 557, 558, 8 Misc. Rep. 253.

### PLEASURE CARRIAGE.

"A pleasure carriage is one for the more easy, convenient, and comfortable transportation of persons." *Middlesex Turnpike Co. v. Wentworth*, 9 Conn. 371, 373.

A "pleasure carriage," as used in the act establishing a turnpike, includes a one-horse wagon with a spring seat and paneled sides, which was not used for farming purposes or for carrying goods. *Moss v. Moore* (N. Y.) 18 Johns. 128, 129.

### PLEDGE.

A pledge is defined to be a bailment of personal property as security for some debt or engagement. *Evans v. Darlington* (Ind.) 5 Blackf. 320, 322. "At common law a pledge is defined to be a bailment of personal property as a security for some debt or engagement." *Stearns v. Marsh* (N. Y.) 4 Denio, 227, 229, 47 Am. Dec. 248; *Campbell v. Parker*, 22 N. Y. Super. Ct. (9 Bosw.) 322, 333; *Brewster v. Harlley*, 37 Cal. 15, 25, 99 Am. Dec. 237. A pledge is a bailment of goods by a debtor to his creditor, to be kept until the debt is discharged. It is a conversion for the

pledgee to change the settings and make an absolute gift of pledged jewels, and therefore the pledgor is entitled to possession without being required to tender the amount of the debt. A gift by a pledgee of the pledged articles does not carry with it an assignment of the debt. *Sheridan v. Presas*, 41 N. Y. Supp. 451, 453, 18 Misc. Rep. 180. A pledge is a bailment of personal property as security for some debt or engagement. *Story, Bailm.* § 286. Coupon bonds, payable to bearer, being negotiable securities usually sold in the stock market, and understood by the parties to be designed for that use, are the subject of pledge. *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. (1 Stockt.) 667, 686, 64 Am. Dec. 423.

A pledge consists of a delivery of goods by a debtor to his creditor, to be held until the debtor's obligation is discharged, and then to be delivered to the pledgor; the title not being changed during the continuance of the pledge. *People v. E. Remington & Sons*, 14 N. Y. Supp. 98, 99, 59 Hun, 282 (affirmed in 27 N. E. 853, 126 N. Y. 654); *Parshall v. Eggart* (N. Y.) 52 Barb. 367, 874; *Bank of Rochester v. Jones*, 4 N. Y. (4 Comst.) 497, 507, 55 Am. Dec. 290; *Eastman v. Avery*, 23 Me. (10 Shep.) 248, 250. See, also, *Haskins v. Patterson* (N. Y.) 1 Edm. Sel. Cas. 120, 123.

A pledge is a delivery of goods by a debtor to his creditor, to be kept till the debt is discharged. *Commonwealth v. Cart* (Pa.) 2 Pittsb. R. 495, 497; *Belden v. Perkins*, 78 Ill. 449, 452; *Gifford v. Ford*, 5 Vt. 532, 537.

A pledge is a bailment of personal property of a debtor to his creditor as security for the debt, with power in the latter (if not expressed, then implied) upon default of the pledgor to convert the security into money, applying the proceeds in payment of the debt, and rendering the surplus, if any, to the debtor. *Moffat v. Williams*, 36 Pac. 914, 915, 5 Colo. App. 184.

A pledge is a deposit of personal effects, to be retained until redeemed; and although the time for redemption is specified by the agreement of the parties, and the obligors suffer it to pass and are thus in default, while the property remains in the obligee only, the right to redemption continues until it is foreclosed by acts sanctioned by law. *Chamberlain v. Martin* (N. Y.) 43 Barb. 607, 610.

A pledge is a deposit of personal effects to be retained until redeemed. *Chamberlain v. Martin* (N. Y.) 43 Barb. 607, 610.

A pledge is the delivery of property as security for a debt, conditioned that, if the demand is not paid in a certain time, the property may be disposed of to pay the debt. *Brownell v. Hawkins* (N. Y.) 4 Barb. 491, 492.

A pledge is a lien created by the owner of personal property by the mere delivery of it to another on an express or implied understanding that it shall be retained as security for an existing or future debt. The pledge is subject to redemption, and the lien is immediately divested by a tender of the amount secured; and, if the pledgee refuse to restore the property, an action for possession may be maintained. The title to the property remains in the pledgor, while the possession, actual and constructive, according to the nature of the property or circumstances of the case, is with the pledgee, who can only sell on default of the pledgor. *Wilcox v. Jackson*, 4 Pac. 966, 973, 7 Colo. 521; *Corbett v. Underwood*, 83 Ill. 324, 326, 25 Am. Rep. 392.

A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation to be a lien on it. *Doak v. Bank of State*, 28 N. C. 309, 319; *Gilliat v. Lynch* (Va.) 2 Leigh, 493, 500.

A pledge is a privilege, with the right of retention of the property pledged. *Villere v. Shaw*, 32 South. 196, 197, 108 La. 71.

The word "pledge" has a legal and well-defined interpretation. It may be derived, says Cowell, from "the French 'pleige, fidejussor; pleiger aucum, i. e., fidejubere pro aliquo.' In the same signification is 'plegius' used by Glanville (liber 10, c. 5), and 'plegiatio,' for the act of suretyship. In Interpreter of the Grand Customary of Normandy, c. 60, 'plegi dicuntur personæ, quæ se obligant ad hoc, ad quod qui eos mittit, tenebatur.'" "Pledgery" Cowell defines to be "suretyship; an undertaking or answering for." And the remedy of a surety which is found in Fitzh. N. B. fol. 137, and Reg. 158, is a writ called "de plegiis acquietandis." It lies for a surety against him for whom he is surety, if he pay not the money at the day. And where a person undertook by his indorsement to be answerable for the maker of the note, it was a pledge of his name and responsibility, within an assignment for the benefit of creditors, providing that a release of the assignor should not be construed to impair or affect "any lien or pledge theretofore created or obtained as security for a debt or claim due from the assignor." *Gloucester Bank v. Worcester*, 27 Mass. (10 Pick.) 528, 531.

A pledge is defined by Sir William Jones to be a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged; and by Lord Holt thus: "When goods or chattels are delivered to another as a pawn, to be security for money borrowed of him by the bailor, this is called in Latin 'vadium' and in English 'pawn' or 'pledge.'" *Haskins v. Patterson* (N. Y.) 1 Edm. Sel. Cas. 120, 123. "In the Roman law," says

Story, "it is called 'pignus.'" *Whitney v. Peay*, 24 Ark. 22, 27.

Pothier defines a pawn or pledge to be a contract by which a debtor gives to his creditor a thing to be detained as security for his debt, which the creditor is bound to return when the debt is paid. Judge Story says the definitions of pawns and pledges, as given by some of the writers, are limited in terms to cases where a pawn is given as a mere security for debt, but a pawn may be given as security for any other engagement. *Surber's Adm'r v. McClintic*, 10 W. Va. 236, 242. See, also, *Haskins v. Patterson* (N. Y.) 1 Edm. Sel. Cas. 120, 123.

A pledge is a bailment of goods by the debtor to his creditor, to be kept until the debt is discharged; and a special property in them passes to the creditor, and he may hold them against the pledgor, and, of course, his creditors, who can have no better right, until redeemed by the payment of the debt. *Peet v. Burr*, 31 Ark. 34, 35.

The term "pledged," in its common meaning, signifies a solemn promise made, which under no possible circumstances shall be violated. This is held to be the meaning of the word in a constitutional provision directing that every city shall create a sinking fund, which shall be inviolably pledged for the payment of the public debt. *Brooke v. City of Philadelphia*, 29 Atl. 887, 390, 162 Pa. 123, 24 L. R. A. 781.

A pledge is a deposit of personal property as security (Civ. Code, § 2986), and is dependent on possession, and is not valid until the property is delivered to the pledgee (section 2988). A transfer of personal property to trustees as security for a debt, under an agreement that such trustees are to conduct the business of the grantors through one of the latter, as their agent, for six months, when, if found unprofitable, they are to sell the goods, and providing that, when certain creditors shall have received 50 per cent. of their claims and all costs and expenses, then the trust shall be terminated, and the assets remaining shall be transferred to such grantors, is a pledge. *Lillenthal v. Ballou*, 57 Pac. 897, 898, 125 Cal. 183.

Where a commission merchant contracts for the purchase of grain for another to be delivered at a future time, the principal making an advance on the purchase, which is in the merchant's name, and agrees to keep the margin caught up to the time of delivery, the relation of pledgor and pledgee will not be created, so as to require a notice of the time and place of sale on failure to keep up the margins. *Corbett v. Underwood*, 83 Ill. 324, 326, 25 Am. Rep. 392.

A pledge, though, like a mortgage, a security for a debt, is a mere bailment, a delivery of articles to be kept till the debt is

paid, and it passes to the pledgee a special property only, while the general property remains in the pledgor. *Leach v. Kimball*, 34 N. H. 568, 571.

A pledge does not vest the title in the pledgee. He has only a special property in or lien on the chattel pledged, and, if the pledge is not redeemed by the time limited, it retains the character of a pledge still. *Heyland v. Badger*, 35 Cal. 404, 410.

A pledge is a deposit of personal property by way of security for the performance of another act. Civ. Code Mont. 1895, § 3890; Civ. Code S. D. 1903, § 2104; Rev. Codes N. D. 1899, § 4744; Civ. Code Cal. 1903, § 2986.

Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge. Civ. Code Cal. 1903, § 2987; Civ. Code Idaho 1901, § 2833.

A pledge or pawn is property deposited with another as security for the payment of a debt. Civ. Code Ga. 1895, § 2956.

The pledge is a contract by which one debtor gives something to his creditor as a security for his debt. Civ. Code La. 1900, art. 3133.

#### Assignment distinguished.

"The essential difference between a general assignment to an assignee in trust and a pledge is that in one case the absolute title passes to the assignee, while in the case of a pledge the title remains in the pledgor, and it is the right of possession to hold or apply the pledge to secure the debt that is vested in the pledgee." *Maas v. Falk*, 24 N. Y. Supp. 448, 450, 72 Hun, 637.

#### Chattel mortgage distinguished.

The distinction between a mere pledge and a mortgage of personal chattels is one frequently stated in the books and seems to be perfectly well settled. A pledge is a thing deposited as a security, to be returned to the pledgor when he has redeemed it. In a mortgage title is conveyed, subject to be divested if the condition of the mortgage is performed. *Sims v. Canfield*, 2 Ala. 555, 560.

A pledge differs from a chattel mortgage in three essential characteristics: (1) It may be constituted without any contract in writing, merely by delivery of the thing pledged. (2) It is constituted by a delivery of the thing pledged, and is continued only so long as the possession remains with the creditor. (3) It does not generally pass the title to the thing pledged, but gives only a lien to the creditor while the debtor retains the general property. *People v. Remington*, 2 N. Y. Supp. 824, 826, 50 Hun, 602; *Thurber v.*

*Oliver* (U. S.) 26 Fed. 224, 226. See, also, *Mitchell v. Roberts* (U. S.) 17 Fed. 776, 778; *McFarland v. Wheeler* (N. Y.) 26 Wend. 475 (citing *Cortelyou v. Lansing* [N. Y.] 2 Caines, Cas. 202); *Wright v. Ross*, 36 Cal. 414, 428; *Lewis v. Graham* (N. Y.) 4 Abb. Prac. 106, 109; *Raper v. Harrison*, 15 Pac. 219, 220, 37 Kan. 243.

A mortgage differs from a pledge in that it is a conveyance of the title on condition, and may be valid without actual delivery. A mortgage is a pledge, and more; for it is an absolute pledge, to become an absolute interest if not redeemed at a certain time; while a pledge is a deposit of personal effects, not to be taken back except on payment of a certain sum, by express stipulation or the course of trade made to be a lien on them. "In the case of a mortgage, the legal property passes with a condition of defeasance; in that of a pledge, the general property does not pass, but remains with the pawnor." *Lockett v. Townsend*, 3 Tex. 119, 129, 49 Am. Dec. 723 (citing 2 Story, Eq. § 1030; 4 Kent, Comm. 138; 2 Ves. Jr. 378; *Cortelyou v. Lansing* [N. Y.] 2 Caines, Cas. 200, 206); *Brown v. Bement* (N. Y.) 8 Johns. 96, 97.

A pledge differs from a mortgage, in that the pledgee must have possession and the pledgor the legal title of the property, while a mortgage passes the title to the mortgagee and may allow the possession to remain in the mortgagor. *American Pig Iron Storage Warrant Co. v. German*, 126 Ala. 194, 223, 28 South. 603, 85 Am. St. Rep. 21.

The radical distinction between a pledge and a mortgage is that by a mortgage the general title is transferred to the mortgagee, subject to be reverted by performance of the condition; but in case of a pledge the pledgor retains the general title in himself, and parts with the possession for a special purpose. To constitute a pledge the pledgee must take possession, and to preserve it he must retain possession. *Walker v. Staples*, 87 Mass. (5 Allen) 34, 35.

Formerly no distinction was taken between a pledge and a mortgage of chattels. They were both regarded as security for a debt, and the title of the pledgee was considered as substantially the same in both cases. There is, however, an important distinction, which has not always been observed, to wit, that in a pledge the general property remains with the pledgor and only a special property passes to the pledgee, and hence, on a failure to redeem, the pledgee has no right to sell or appropriate the pledge, while a mortgage of a chattel passes the absolute title, subject to a defeasance, and upon a failure to redeem the title of the mortgagee becomes perfect. *Appeal of Collins*, 107 Pa. 590, 605, 52 Am. Rep. 479.

A mortgage of personal property is not a pledge, within the meaning of 2 Rev. St. (2d Ed.) p. 1890, § 20, authorizing the sale of the interest of the pledgor. A pledge, as applied to chattels, is a bailment—that is, an actual delivery of the thing for security of some engagement; but after the title of the mortgagee has become absolute the statute cannot divest it, and the property is not subject to execution. *White v. Cole* (N. Y.) 24 Wend. 116, 142.

It is not invariably true that in all cases where the legal title is transferred to the creditor the transaction is a mortgage, and not a pledge, but it is true that the possession of the property must uniformly accompany a pledge, for the right of the pledgee cannot otherwise be consummated. Where the property is not capable of manual delivery in possession—for example, shares of stock—a pledge may be created by a written transfer thereof, and the transaction may be a pledge, instead of a mortgage, although the legal title passes to the creditor, where it is shown that a transfer was made as collateral security for the debt. *Wilson v. Little*, 2 N. Y. (2 Comst.) 443, 446, 51 Am. Dec. 307.

One test whether a transfer of property is a pledge or a mortgage is whether it exists independent of it for the payment of which it is security, in which case it is the former. A pledge of property capable of physical delivery requires that it should be so delivered. Property not capable of such delivery may be pledged in writing. The transfer of choses in action as mere security for a debt is always a pledge. When so received, without special authority, the pledgee cannot sell them or compromise them. He can only wait until they mature and collect them. So an assignment of a mortgage by the mortgagee to secure a debt due from him to the assignee is clearly a pledge of the mortgage, and not a mortgage or conditional sale. *Haskins v. Kelly*, 24 N. Y. Super. Ct. (1 Rob.) 160, 172.

A chattel mortgage is a pledge, within the meaning of the statute or laws of Hawaii requiring the registration of pledges of chattel property. *Hardy v. Ruggles*, 1 Hawaii, 255, 257 (quoting Burrill, Law Dict.).

#### Continued possession required.

To constitute a pledge there must be, not only a delivery over, but a continued possession by the pledgee of the thing pledged, and as soon as the thing is restored the pledge ceases to exist. *Bonsey v. Amee*, 25 Mass. (8 Pick.) 236, 238; *Heilbron v. Guarantee Loan & Trust Co.*, 43 Pac. 932, 933, 13 Wash. 645.

#### Delivery required.

An actual delivery is necessary in order to constitute a pledge. *Thompson v. An-*

*draws*, 53 N. C. 453, 455; *Heilbron v. Guarantee Loan & Trust Co.*, 43 Pac. 932, 933, 13 Wash. 645; *Hays v. Riddle*, 3 N. Y. Super. Ct. (1 Sandf.) 248, 252 (citing *Jones, Bailm.* 107; *Story, Bailm.* § 297); *Jordan v. Turner* (Ind.) 3 Blackf. 309, 311; *Campbell v. Parker*, 22 N. Y. Super. Ct. (9 Bosw.) 322, 333; *First Nat. Bank v. Nelson*, 38 Ga. 391, 402, 95 Am. Dec. 400; *First Nat. Bank v. Harkness*, 24 S. E. 548, 552, 42 W. Va. 156, 32 L. R. A. 408; *Wilson v. Little*, 2 N. Y. (2 Comst.) 443, 446, 51 Am. Dec. 307; *Hurst v. Jones*, 78 Tenn. (10 Lea) 8, 14.

To constitute a pledge, a present possession must pass to the pledgee. An agreement to deliver property at a future day or upon some future contingency does not create a pledge. *Fielding v. Middlebaugh's Adm'rs*, 2 Ohio Dec. 55, 56, 1 West. Law Month. 218.

Two things are essential to constitute a pledge: (1) Possession by the pledgee; (2) that the property pledged be under the power and control of the creditor. Possession may be considered as 'of the very essence of a pledge, and if possession be once given up the pledge as such is extinguished. *Fidelity Ins., Trust & Safe Deposit Co. v. Roanoke Iron Co.* (U. S.) 81 Fed. 439, 445.

In order to constitute a valid pledge of property to secure a debt, there must be a delivery, either actual or constructive, of the property to the intended pledgee. *Commercial Bank of Jacksonville v. Flowers*, 42 S. E. 474, 475, 116 Ga. 219.

A delivery of the thing pledged is essential to the contract, and until such delivery the special property that the bailee is entitled to hold does not vest in him. So where a corporation, which is indebted for money advanced, issued as security to a third person, as trustee for the creditors, shares of its capital stock, to be retransferred to the corporation on payment of the indebtedness, the transaction constitutes a pledge of stock. *Brewster v. Hartley*, 37 Cal. 15, 25, 99 Am. Dec. 237.

A pledge is a delivery of goods by a debtor to his creditor, to be kept until the debt is discharged. While the terms of a pledge require there should be a delivery of the article, it is not necessary that there should be an actual manual delivery. It is sufficient if there be any of those circumstances which in construction of law are deemed sufficient to pass the possession of the property. Where the defendants, stock-brokers, at the request of the plaintiff, and for him, but in their own name and with their own funds, purchased certain stock, he depositing with them a margin of 10 per cent., which was to be kept good, and they "carrying" the stock for him, the legal relation created between the parties by this transaction was that of pledgor and pledgee:

the stock purchased being the property of the plaintiff, and in fact pledged to the defendants as security for the repayment of advances made by them in the purchase. *Markham v. Jaudon*, 41 N. Y. 235, 241.

A book account is not pledged by the delivery of a copy of the account as security without an assignment, since such a copy does not represent the debt. *Cornwell v. Baldwin's Bank*, 43 N. Y. Supp. 771, 772, 12 App. Div. 227.

A bill of sale of goods to secure the payment of rent as it became due, providing that, if the rent should be paid as it became due, the said bill of sale should be void, is a mortgage of the goods, and not a technical pledge. A pledge is a deposit of goods, to be redeemed on certain terms. Delivery always accompanies a pledge, but a mortgage of goods is often valid without delivery. Possession continuing in the vendor only prima facie evidence of fraud, and may be explained. *Barrow v. Paxton* (N. Y.) 5 Johns. 258, 261, 4 Am. Dec. 354.

A delivery of personal property by a debtor in security of a debt, accompanied by an agreement whereby the debtor agrees, if he does not pay the debt by a certain time, that the creditor may dispose of the property to pay the debt, is a pledge, and not a mortgage; but, if there is no delivery of the property, there is no pledge. The word "pledge," implied in an instrument, does not conclusively determine the character of the transaction. *Vanstone v. Goodwin*, 42 Mo. App. 39, 46.

#### **Hypothecation distinguished.**

A pledge, in the Roman law, answered exactly to a pledge of movables in our law, where possession is indispensable. It differed from a hypothecation, which answered to a mortgage of real estate in our law, where title to the thing may be required without possession. *The Nestor* (U. S.) 18 Fed. Cas. 9, 12.

#### **Privilege distinguished.**

"Privilege" and "pledge" are totally different things; privilege being a right which the nature of a debt gives to a creditor which enables him to be preferred before other creditors, even those who have mortgages. But a pledge is a contract by which a debtor gives something to his creditor as a security for his debts. *Carroll v. Bancker*, 10 South. 187, 194, 43 La. Ann. 1078, 1194.

#### **Sale distinguished.**

See "Sale."

#### **Transfer of chattel mortgage as collateral.**

A transfer of a chattel mortgage merely by way of collateral security for the pay-

ment of a debt is a pledge, not a mortgage thereof, and need not be recorded. *Haskins v. Kelly* (N. Y.) 1 Abb. Prac. (N. S.) 63, 75.

#### **Transfer of note as collateral.**

A note delivered to a party, with a power of redemption and as a security for a debt, is a pledge. Such act does not constitute a sale. The property in the note was not intended to pass until after the default. It was merely deposited with the party, and the legal property did not pass, as it does in the case of a mortgage. *McLean v. Walker* (N. Y.) 10 Johns. 471, 474.

A note delivered as collateral security, with a right to redeem, is to be considered and treated as a pledge; but the legal property does not pass. The general ownership remains with the pledgor, and the pledgee only acquires a special property therein; and if he settles with the maker of the note, and surrenders it to him, though for less than the face value, he is responsible to the pledgor for the difference between the value of the note and the amount of the debt to secure which it was pledged. *Garlick v. James* (N. Y.) 12 Johns. 146, 149, 7 Am. Dec. 204.

A note, delivered with a right to detain as a security of the debt, but in which the legal property did not pass, as it does in the case of a mortgage with a condition of defeasance, is a pledge; the general ownership to remain with the debtor, and only a special property passing to the creditor. It is therefore distinguished from a mortgage of goods. Besides, delivery is essential to a pledge; but a mortgage of goods is in certain cases valid without delivery. *Cortel-you v. Lansing* (N. Y.) 2 Caines, Cas. 200, 202.

Where defendant loaned \$2,000 to plaintiff for the space of 44 days, and received in return a check for the same amount, and as collateral security for the repayment of the money plaintiff deposited with him notes taken in the course of business as margins, amounting to the sum of \$2,614, the contract was a pledge of the notes, and not a mortgage. *Wheeler v. Newbould*, 16 N. Y. 392, 396.

A note executed to a bank by a borrower contained a printed recital that the maker had deposited collateral security for the payment thereof, "and also of all other present or future demands of any kind of the said bank" against the maker, due or not due. It further provided that the bank should have power to sell the collateral and apply the proceeds to the payment of the note, and should "return the overplus, if any," to the maker. The maker deposited as collateral certain shares of stock in a corporation, and subsequently increased the amount from time to time, in compliance

with the demands of the bank, on the ground that the market value of the stock had declined, leaving the margin below its requirements. Held, that the agreement was one of pledge to secure the payment of the note only. *First Nat. Bank v. Illinois Trust & Savings Bank* (U. S.) 84 Fed. 34, 38.

### PLEDGEHOLDER.

A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a "pledgeholder." Civ. Code S. D. 1903, § 2111.

### PLEDGERY.

"Pledgery" is a suretyship; an undertaking or answering for. *Gloucester Bank v. Worcester*, 27 Mass. (10 Pick.) 528, 531.

### PLEDGOR.

The word "pledgor," as used in Pub. St. c. 105, § 25, providing that a certificate of stock issued as a pledge should so state, and also give the name of the pledgor, means the general owner of the stock at the date when the certificate is issued. *J. H. Wentworth Co. v. French*, 57 N. E. 789, 790, 176 Mass. 442.

### PLENARY CAUSE.

Greenleaf defines "plenary causes" as those in which the order and solemnity of the law are strictly observed in the regular contestation of the suit, while summary proceedings are those in which its order and solemnity are dispensed with. *Arellano v. Chacon*, 1 N. M. 269, 276.

### PLENE ADMINISTRAVIT.

It is well settled that a plea of "plene administravit" is not necessarily a false plea, and in an action of debt against an executor on a judgment against his deceased testator, where nothing was alleged in the declaration to show that the defendant had become personally liable for the judgment debt, the judgment in such a case, even if the plea is not sustained, should be a judgment de bonis testatoris. Plene administravit is doubtless a good plea and good defense; but the rule is that the jury, under such a plea, if no devastavit is averred, must find the amount of the assets, if any, before any judgment can be rendered. *Smith v. Chapman*, 93 U. S. 41, 42, 23 L. Ed. 795.

### PLIGHT.

Though possibly from its derivation properly meaning a bad condition, "plight"

does not universally convey that meaning, but in common parlance has departed greatly from the signification indicated by its derivation; and the use of the word in an instruction relative to the safety of the surroundings in an employe's personal injury action does not erroneously indicate the court's opinion that such surroundings were in a dangerous condition. *Texas & N. O. R. Co. v. Echols*, 41 S. W. 488, 492, 17 Tex. Civ. App. 677.

### PLOTTAGE.

The term "plottage" is used to designate the additional value given to city lots by the fact that they are contiguous, which enables them to be utilized as large blocks of land. "It is an added percentage to the aggregate value of two or more lots held in one ownership, and arises from the fact that such lots thus held in ownership may be utilized for large buildings and to a much greater advantage than if each lot were separately built upon. What the characteristics of plottage are, and whether adjoining lots can thus be advantageously used, must depend on facts and conditions pertaining to each parcel, and, as said before, the general nature of the plottage right is also a matter of which the court can only be informed by the testimony of those acquainted with it." Where property is condemned for public purposes, and the owner is entitled to its value, he is not then entitled to the full value of each building on each lot which will have to be destroyed to give the land plottage value, and also plotting value; but he may have the value of each lot and each building, in which case he is not entitled to an allowance for plottage. *In re Armory Board*, 76 N. Y. Supp. 766, 767, 73 App. Div. 152; *Id.*, 72 N. Y. Supp. 87, 88, 85 Misc. Rep. 548.

### PLUMBING.

Plumbing is recognized by Pennsylvania legislation in relation to mechanics' liens as a part of the work or erection and construction of buildings. It is not a luxury or convenience only, but an essential part of modern city dwellings. The supply of water is indispensable, and underground drainage by which waste can be carried off is enjoined by city ordinance. The prohibition of surface drainage and the use of wells, either for the supply of water or as receptacles for waste, make a part of the plumbing absolutely necessary. *Owen v. Johnson*, 34 Atl. 549, 550, 174 Pa. 99.

### PLUMBER.

The business of a plumber is not ranked with the learned professions; his work being mostly mechanical, calling for the ex-

ercise of deftness of the hands, rather than the possession of scientific knowledge. A plumber is one who fits dwellings and public buildings with tanks, pipes, traps, fittings, and fixtures for the conveyance of gas, water, and sewage; but his work is so concerned with public health that a statute has a right to regulate it by requiring a license. *State v. Gardner*, 51 N. E. 136, 137, 55 Ohio St. 599, 41 L. R. A. 689, 85 Am. St. Rep. 785.

## PLUNDER.

"The most common meaning of this term 'to plunder' is to take property from persons or places by open force, and this may be in the course of a lawful war, or by unlawful hostility, as in the case of pirates or banditti. But in another and very common meaning, though perhaps in some degrees figurative, according to the general tendency of man to exaggerate and apply stronger language than the case will warrant, it is used to express the idea of taking property from a person or place without just right, but not expressing the nature or quality of the wrong done." *Carter v. Andrews*, 33 Mass. (16 Pick.) 1, 9.

"Plunder," as used in a statute punishing a person who plunders any money or merchandise belonging to any vessel in distress or wrecked, has no special legal signification. In *Abbott's Law Dictionary* "plunder" is said to be often used to express the idea of taking property without right to do so; but not as expressing the nature of the wrong involved, or necessarily imputing a felonious intent. 2 *Abb. Law Dict.* 284, word "Plunder." In *Bouvier's Law Dictionary* it is limited to the idea of capturing property from a public enemy on land; but "plunderage" is defined as a maritime term for the "embezzlement" of goods on board a ship. The word is used in *Rev. St.* § 5361 [U. S. Comp. St. 1901, p. 3640], in describing an intent as a synonym of "despoil"; this being also a section of the act of 1825, from which the one we are considering was taken. The first English statute of 7 & 8 Geo. IV, c. 29, § 18, used the words "plunder or steal," but contained a proviso that where things of small value were cast on shore and were stolen, without circumstances of violence, the offender might be prosecuted for simple larceny; which shows that the statute was not regarded as declaring the crime of larceny simply, but something more. Indeed, anciently the common law would take no jurisdiction of theft upon the high seas, but committed the offender to answer in the admiralty. The second English statute of 1 Vict. c. 87, § 8, uses the words "plunder or steal," as does the latest, 24 & 25 Vict. c. 96, § 64, without the proviso, and, with the exception of the word "destroy," the act is the same as our act of 1825, which was enacted

before any of the English statutes. 2 *Russ. Crimes*, 150; 3 *Fish. Dig.* (Jacob's Ed.) 3322; 1 *Bish. Cr. Law*, § 141. *United States v. Stone* (U. S.) 8 Fed. 232, 246.

The word "plunder" in the crimes act of 1825, c. 65, § 9, making it criminal for any person to plunder any goods, merchandise, or other effects from or belonging to any ship, vessel, boat, or raft which shall be in distress, or which shall be wrecked, lost, stranded, etc., is used in its popular sense; in such a sense as would be understood by seamen, for instance, and as it would be used and understood in ordinary conversation. It is not limited to a taking by force, for, although this is undoubtedly one sense of the word, it by no means expresses its full meaning. The various lexicographers inform us that it means as well taking by fraud. And so in the quotation made from the Scriptures where the words "to spoil" ("to spoil the Egyptians," *Exodus* xli, 35, 36), which the lexicographers give as one of the original synonyms of plunder, were applied to a taking of property in which the possession was actually obtained by consent. But it does not rest here. So long ago as the time of Judge Peters it was practically adjudged by him that "plundering" was equivalent to "embezzlement." *Mariners v. The Kensington* (U. S.) 16 Fed. Cas. 749. And, further, it will be found by reference to the shipping articles used in England and this country that the word "plunderage" is used in them in a manner to imply not a forcible taking, but a fraudulent taking; in fact, an embezzlement. And these words "to plunder" are of very general meaning. They embrace robbery and fraudulent taking. A vessel may properly be said to be plundered not only if openly attacked and robbed, but if property be taken from her furtively in the nighttime, or after she has been abandoned by the crew. *United States v. Pitman* (U. S.) 27 Fed. Cas. 540, 541.

## PLURAL

"Plural," as defined by *Bouvier*, is a word used in grammar to signify more than one. "Sometimes it may be so expressed that it means only one, for, if a man were to devise to another all he was worth if he (the testator) die without children, and he dies leaving one child, the devise would not take effect," according to the civil law, etc. So of the word "singular" he says: frequently includes the "plural," as a bequest to "my nearest relation" is to all in the same degree; so a bequest to "my heir" by one having three heirs is extended to all. The word "heirs" is never construed as requiring more than one. A gift or devise to one "and his children" would not be held to call for plurality. *Pierson v. Armstrong*, 1 *Iowa* (1 *Clarke*) 282, 295, 63 Am. Dec. 440.

**PLURAL WIFE.**

This court knows, and is bound to take notice, that the practice of polygamy is taught in Utah, and that in public and in private a polygamous woman is called a "plural wife," and that a plural wife is never the first wife. *Freil v. Wood*, 1 Utah, 160, 165.

**PLY.**

The word "ply" imports the performance of repeated acts of the same kind. A reference to plying a business at a certain place ordinarily imports that such place is a seat of the business, and such in law is its meaning as used in a railroad company's grant of the exclusive privilege of plying on the depot grounds at a station of the business of a carrier of passengers or luggage. *New York, N. H. & H. R. Co. v. Scovill*, 41 Atl. 246, 249, 71 Conn. 136, 42 L. R. A. 157, 71 Am. St. Rep. 159.

"Plying," as used in Pol. Code, § 3645, providing that vessels registered out of and "plying" in whole or in part in the waters of the state, the owners of which reside in the state, must be assessed in the state, is a nautical phrase, which is defined by Webster as follows: "To make regular trips, as a vessel plies between the two places." Plying implies regularity, and is not a term used to express the character of the irregular and transient visitations of a ship to a port in the course of her voyage to various ports. In that case a vessel is said to "touch" at each of the ports which she visits. A vessel plies between two places; she may touch at many. A vessel which sails out of a port outside of a state to various ports and countries in the regular course of commerce transporting lumber and other freight and touching at the port of San Francisco transiently in the course of her voyages, and long enough to take in and discharge cargo, is not plying in the waters of California. *City and County of San Francisco v. Talbot*, 63 Cal. 485, 487.

The meaning of the word "ply" in a contract for the sale of brackets "3 ply" may be explained by evidence tending to explain the sense in which the parties were in the habit of using the word, or to show the construction given by them to similar contracts; but a party cannot testify as to his intention in using the word. *Jaqua v. Witham & A. Co.*, 7 N. E. 314, 315, 106 Ind. 545.

**PNEUMATIC TUBES.**

"Pneumatic tubes," as used in Laws 1868, c. 842, entitled "An act to provide for the transmission of letters, packages and merchandise in the cities of New York and Brooklyn by means of pneumatic tubes to be constructed beneath the surface of the

streets and public places in such cities," conveys to our minds no other meaning than that of tubes for the transmission of parcels operated by atmospheric pressure applied within the tubes. The parcels may be transmitted outside the tubes on vehicles attached to a piston operated within the tubes by atmospheric pressure, or they may be transmitted within the tubes by atmospheric pressure applied behind them; but they are in no sense railways. Such a tube may contain vehicles placed on wheels, and the wheels may run on rails or in grooves, and yet the structure could not, according to the popular sense, or in legal sense, be what is generally known as a railway. The tubes may be so constructed that in a technical or scientific sense the structure might be called a railway, and so, too, any structure on which vehicles may be moved on rails, however peculiar or small, may in some limited sense be called a railway, and yet it may not be a railway within the meaning of the Constitution and general laws of the state. *Astor v. New York Arcade Railway Co.*, 20 N. E. 594, 596, 113 N. Y. 93, 2 L. R. A. 789.

**POCKET.**

See "Flue Pocket."

An indictment charging defendant with an attempt to steal from the person of J. S. by thrusting his hand into the "pocket" of the said J. S., means a pocket in the clothing worn by him. *Commonwealth v. Sherman*, 105 Mass. 169, 171.

**POCKET PISTOL.**

A "pocket pistol," within the meaning of Act 1871, c. 90, which prohibits publicly or privately carrying a belt or pocket pistol or revolver, other than an army pistol, or such as are commonly carried and used in the United States army, is such a pistol as a man ordinarily carries, or may conveniently carry, or actually carries on his person, in his pocket. The name of the pistol is unimportant, and the number of times the pistol shoots is immaterial. *Porter v. State*, 66 Tenn. (7 Baxt.) 106, 108.

**POINT.**

As used in Act Cong. April 29, 1802, § 6, providing that "whenever any question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen shall be certified to the Supreme Court, and shall by the said court be finally decided," the term "point" means a point of law upon a part of the case settled and stated. A record stating certain facts and including the testimony of numerous witness-



es, which was directed to the establishment of other facts, the whole case being in fact brought up with a purpose apparently that the Supreme Court should decide both fact and law, and the question certified being whether in point of law upon the facts as stated and proved the action could be maintained, does not present a point for the determination of the Supreme Court within the meaning of such act. *Daniels v. Chicago & R. I. R. Co.*, 70 U. S. (3 Wall.) 250, 256, 18 L. Ed. 224.

The terms "points" and "authorities," as used in a rule of the Supreme Court requiring a separate statement in an appellant's assignments of error of his "points" and "authorities," are synonymous with the term "brief," which is a condensed statement of the propositions of law which the counsel desires to establish, and indicating the reasons and authorities which sustain them. *Duncan v. Kohler*, 34 N. W. 594, 596, 37 Minn. 379.

Points or requests for charge are statements of the rule or particular portions of the law which counsel deem applicable to the special facts of the case. Their use is, first, to direct the judge to the view of the law which the parties desire him to take; and, secondly, thereby to have the jury instructed on the principles they ought to apply in making up their verdict after they have ascertained the facts. *Myers v. Kingston Coal Co.*, 17 Atl. 891, 892, 126 Pa. 582.

"Point or question," as used in *Sess. Laws* 1861, p. 136, c. 25, providing that a judge is required to give his decisions in writing upon each "point or question" submitted to him, means, in case of demurrer, no more than one of the grounds of a demurrer specified in the statutes. *Commonwealth Ins. Co. v. Pierro*, 6 Minn. 569, 570 (Gil. 404, 405).

#### **Fact synonyms.**

On a trial for larceny it appeared that the money was stolen at night from under the pillow of a sleeping man in a room also occupied by defendant and three others, and an accomplice testified that he took the money at the request of defendant, who was present, aiding and abetting. The money was stolen by some one familiar with the habits of the owner and with the room, and the evidence did not connect any of the inmates except defendant with the crime. The court instructed the jury that, in order to convict, it was necessary that the testimony of the accomplice should be corroborated by other testimony tending to connect defendant with the commission of the crime; not necessarily on every point on which he had testified, but if the jury believed that he was corroborated as to the commission of the crime charged, and on any point tending to connect the defendant with the commission of the offense, and if the evidence with this cor-

roboration was sufficient to satisfy them of defendant's guilt, they would be authorized to so find. In commenting on this instruction the court said: "While the word 'point' is generally used in connection with a legal proceeding to denote some question of law arising or propounded therein, yet when this expression in the instruction is considered in connection with the previous instructions it is clear that the court used the word 'point' as synonymous with the word 'fact.'" *Kent v. State*, 41 S. W. 849, 851, 64 Ark. 247.

#### **POINT OF EVIDENCE.**

A "point of evidence," it is said in *Low-er Augusta v. Selinsgrove*, 64 Pa. (14 P. F. Smith) 166, "cannot, by any latitude of construction, be considered to mean whether the entire testimony makes out the case or proves the facts. It means evidently whether a witness offered is competent or relevant as tending to prove any fact material to the issue." *Poor Dist. of Borough of Edenburg v. Poor Dist. of Borough of Strat-tanville*, 41 Atl. 589, 188 Pa. 373.

#### **POINT OF JUNCTION.**

See "Junction."

#### **POINT OF LAW.**

A "point of law" is a question of law applicable to the facts as they may be found by the court, which the party may propose in the shape of a written point and require an answer. *Poor Dist. of Borough of Edenburg v. Poor Dist. of Borough of Strat-tanville*, 41 Atl. 589, 188 Pa. 373.

#### **POINT OF NAVIGABILITY.**

The rule that a riparian owner may construct landings, etc., to the "point of navigability" of a navigable stream "is not to be understood in the narrow sense of being limited to that point where the waters of the stream may be navigable for some purposes at certain stages of water. It must be understood as giving the right to do so to the extent necessary to make abutting property reasonably available at any stage of water for any kind of navigation for which the stream is used and for which it is adapted, provided it does not obstruct paramount rights of the public. It must have reference not only to an ordinary low stage of water, but also the size and kind of vessels which navigate the stream and the kind of business done on it." *Union Depot St. Ry. & Transfer Co. v. Brunswick*, 17 N. W. 626, 628, 31 Minn. 297, 47 Am. Rep. 789.

#### **PONTER.**

In a prosecution for hunting game on Sunday with guns and dogs, it was said that

a "pointer" dog is a bird dog, and is used for hunting birds. *Gunn v. State*, 15 S. E. 458, 459, 89 Ga. 341.

### POINTING.

The term "pointing," as used in speaking of a dog "pointing" a bird, has the same meaning as the word "setting" used in a similar connection. The term has a somewhat technical meaning, and means that the dog is standing and intently looking in one direction. *Citizens' Rapid Transit Co. v. Dew*, 45 S. W. 790, 100 Tenn. 317, 40 L. R. A. 518, 66 Am. St. Rep. 754.

### POISON.

Poison is defined in Webster's Dictionary (1) as any substance which, when introduced into the animal organism, is capable of producing a morbid, noxious, or deadly effect upon it; (2) anything infectious or malignant, as the poison of pestilent diseases. *Preferred Mut. Acc. Ass'n v. Beidelman (Pa.)* 1 Monag. 481, 482; *State v. Baldwin*, 36 Kan. 1, 20, 12 Pac. 318, 328.

A poison is an agent which, when introduced into the animal organism, is capable of producing a morbid, noxious, or deadly effect upon it; any substance that, when taken into the system, acts in a noxious manner by means not mechanical, tending to cause death or serious detriment to the health; a substance of definite chemical composition, which, when taken into the living organism, is capable of causing impairment or cessation of function; any substance which, when taken into the body, and either by being absorbed, or by its direct chemical action upon the parts with which it comes in contact, or when applied externally and entering the circulation, is capable of producing deleterious effects. *Boswell v. State*, 39 S. E. 897, 898, 114 Ga. 40.

Poison is any substance which, when introduced into the animal organism, is capable of producing morbid, noxious, or deadly effect upon it. *Webst. Dict.* And it is defined in the *American Encyclopedia* as any substance which, when introduced in small quantities into the animal organism, seriously disturbs or destroys the vital functions. *State v. Baldwin*, 12 Pac. 318, 328, 36 Kan. 1.

Poison "means a substance taken internally, which is injurious to health, and often fatal to life." *Bacon v. United States Mut. Acc. Ass'n (N. Y.)* 44 Hun, 599, 802.

"Poison," as used in *Pen. Code*, § 216, providing for the punishment of every person who, with intent to kill, administers or causes or procures to be administered to another any poison or other noxious or destructive substance or liquid, but by which death is not caused, means, as defined by Wharton

& S. Med. Jur. § 493, "a substance having an inherent deleterious property, which renders it, when taken into the system, capable of destroying life." A definition stated in 2 Beck, Med. Jur., is as follows: "A poison is any substance which, when applied to the body externally or in any way introduced into the system, without acting mechanically, but by its own inherent qualities, is capable of destroying life." It is too broad a definition to say that a poison or poisonous substance is one which has an inherent and deleterious property capable of destroying life, for it would include substances which act on the system mechanically so as to destroy life. *People v. Van Deleer*, 53 Cal. 147, 148.

"A poison is commonly defined to be a substance which, when administered in small quantities, is capable of acting deleteriously on the body, and in popular language it is confined to substances which in small doses destroy life. It is obvious, says a learned writer, that the above definition is too restricted for the purposes of medical jurisprudence. It would, if admitted, exclude a large class of substances, the poisonous properties of which cannot be disputed; as, for example, the salts of copper, tin, zinc, lead, and antimony, which, generally speaking, act only as poisons when administered in large doses." *Dougherty v. People*, 1 Colo. 514-519.

In holding that an exception in a life policy that the insurer should not be liable for injuries, fatal or otherwise, resulting wholly or in part from poison or anything accidentally or otherwise taken, administered, or absorbed, or inhaled, included death caused by blood poisoning from the effect of the absorption into the system of septic poison evolved by the propagation of germs in cotton inserted by a dentist in wounds caused by the removal of teeth, it was said that, while the word "poison," as used in the policy, may be construed to mean liquids commonly known as poison, it is followed by the words "or anything," which clearly indicates that the intent was to include under the entire term anything of a poisonous nature. *Kasten v. Interstate Casualty Co.*, 74 N. W. 534, 99 Wis. 73, 40 L. R. A. 651.

"The common understanding of the term 'poison' is that it distinguishes substances which are often fatal from other minerals and drugs. But, while often fatal in one quantity, a smaller amount often produces injuries, the effects varying with the proportion given." *People v. Carmichael*, 5 Mich. 10, 18, 71 Am. Dec. 769.

"Poison" is a word which *ex vi termini* imports fatal properties when introduced into the human system, and therefore it is not necessary, in an indictment for murder by poison, to aver that the prisoner knew the

noxious properties of the poison administered. *State v. Slagle*, 83 N. C. 630, 633.

A poison, in the meaning of an act prohibiting the sale of any poison without a label attached, is defined in the act to be any drug, chemical, or preparation which, according to standard works on medicine or materia medica, is liable to be destructive to adult human life in quantities of 60 grains or less. *Kentucky Board of Pharmacy v. Cassidy (Ky.)* 74 S. W. 730, 731.

"Poison," as used in an insurance policy excluding from its provision "death by poison," includes any and every manner of poison, whether intentionally or unintentionally, consciously or unconsciously, taken. *Lowenstein v. Fidelity & Casualty Co. (U. S.)* 88 Fed. 474, 476.

In the language of the learned and in the common parlance of the street a death from poison unconsciously taken in the belief that it was a harmless drink is a death from poison. A statement made in the ordinary affairs of life that such a death was not from poison would be universally recognized as false. In its plain, ordinary, and popular sense, "death from poison" describes and includes a death from poison unconsciously and unintentionally taken under the mistaken belief that it is a harmless medicine. The phrase is unambiguous, and raises no doubt or question of its meaning. *McGlother v. Provident Mut. Acc. Co. (U. S.)* 89 Fed. 685, 689, 32 C. C. A. 318.

#### **Ammonia.**

Within the meaning of a policy of life insurance excepting liability on account of a death resulting from poison, death results from poison when it is caused by the effect of a shock caused by the insured swallowing aqua ammonia given him through mistake for medicine. *Early v. Standard Life & Accident Ins. Co.*, 113 Mich. 53, 71 N. W. 500, 67 Am. St. Rep. 445.

#### **Coal gas.**

"Poison," as used in a life insurance policy excepting the company from liability when death was caused by taking poison or contact with poisonous substances, cannot be construed to include coal gas. Poison is a substance which, when taken into the body, is capable of destroying some part or parts of the body so as to leave them permanently incapable of performing their functions. Carbonic acid is always in the blood, and as such is not a poison under the above definition. Carbonic oxide is not a poison under such definition, because it is given off from the blood in the same manner as carbonic acid, only more slowly. In case of death by coal gas there are two causes active in producing death: One, carbonic oxide acts directly; the other gases act simply by ex-

cluding the air. Ultimately it is asphyxia in both cases. Carbonic acid is a poison, using the word "poison" in a loose sense, and in the same loose sense you would call water a poison. Carbonic oxide produces death in the same way as does carbonic acid, but it can be called more poisonous than carbonic acid if volume is to be considered; it not requiring so much carbonic oxide as carbonic acid to cause death. In death by suffocation or asphyxia, lack of oxygen to supply the system stimulates the nerve center at the base of the brain to exhaustion. When it reaches the point of exhaustion, it fails to control the respiratory muscles, and they cease to act. Death is caused in this way—I, e., by suffocation—by carbonic acid, by carbonic oxide, choking, drowning, etc. Death by suffocation or asphyxiation results from the cutting off of the supply of oxygen for the blood and the prevention of the discharge of carbonic acid in the blood. Coal gas kills both by the shutting off the supply of oxygen and preventing the discharge of carbonic acid in the blood. If there were no carbonic oxide in the coal gas, it would still certainly produce death. Using the word "poison" in a loose and general sense, both carbonic oxide and carbonic acid are poisons; used in a strict sense, neither are poisons. Both cause death by suffocation. Using the word "poison" in a loose sense, a great many things are called poisons in the sense of poisoning—that is to say, they produce death—while strictly speaking they are not poisons. Using the word "poison" in a loose sense, one would say a person drowned was poisoned. *United States Mut. Acc. Ass'n v. Newman*, 3 S. E. 805, 808, 84 Va. 52.

#### **Compounded medicines.**

"Poison," as used in Shannon's Code, § 6745, requiring any person selling any poison to have it so labeled, does not include any substance, in whatever form sold, containing any quantity of poisonous matter, since this would require the labeling of numberless prescriptions and ready compounded preparations, such as Dover's Powders, paregoric, and syrup of ipecac, which are in common use, and contain some small proportion of poisonous elements. The term, as used in a statute, does not include medicine compounded by druggists upon the prescription of physicians. *Wise v. Morgan*, 48 S. W. 971, 973, 101 Tenn. 273, 44 L. R. A. 548.

#### **Sting of insect.**

The question whether the term "poison in any form and manner," in a policy exempting the insurer from liability for injuries resulting therefrom, includes the sting of a venomous insect, is for the jury. *Preferred Mut. Acc. Ass'n v. Beidelman (Pa.)* 1 Monag. 481, 482.

**POISONING.**

"Poisoning a horse," as used in an indictment charging a person with poisoning a horse, does not imply a willful and malicious poisoning with an intent to injure its owner or any other person, as required by Comp. St. c. 229, § 111, providing for the punishment of any person who shall willfully and maliciously poison any horse with intent to injure its owner or any other person, for a horse might be poisoned and not die or be injured. The poison may be administered for the purpose of improving his appearance, or as a medicine to remedy some disease, and where the effect may be beneficial instead of injurious. A man might poison his own horse, and cause death thereby, and commit no crime, or even any wrong in any sense, if the horse was so injured that he could not recover, and this course was taken to relieve him from protracted suffering. *Glines v. Smith*, 48 N. H. 259, 266.

**POISONOUS SUBSTANCE.**

"Poisonous substance," as used in an indictment charging the offense of exposing a poisonous substance with intent that a certain animal belonging to another person should take and eat the same, should be construed to include paris green. *State v. Labounty*, 21 Atl. 730, 731, 63 Vt. 374.

**POKER.**

See "Senate Poker."

"Poker" is played with cards, and is a game of chance within the meaning of a statute providing that any person who shall keep any house, saloon, or room where any banking game or any other game of chance is dealt or played for money, or anything representing money is used, he shall pay a license, etc.; for such is its popular and general meaning. *Kennon v. King*, 2 Mont. 437, 438.

**POKER TABLE.**

A poker table is a table on which poker is played. *Lyle v. State*, 16 S. W. 765, 80 Tex. App. 118, 28 Am. St. Rep. 893.

**POLICE.**

The word "police" is defined as that species of superintendence by magistrates which has principally for its object the maintenance of public tranquillity among the citizens. The officers who are appointed for this purpose are also called "police." Police has been divided into administrative police, which has for its object to maintain constantly public order in every part of the general administration; and judiciary police,

which is intended principally to prevent crimes by punishing criminals. *State v. Hine*, 21 Atl. 1024, 1025, 59 Conn. 50, 10 L. R. A. 83.

"The word 'police' in law is not a term of indefinite meaning, though it has several significations. It is administrative, under which its object is to maintain order, comfort, and convenience among the inhabitants of its administration; and it is judicial, under which it seeks to prevent crimes by punishing criminals. The judicial police punishes those offenses which the administrative police has not been able to prevent by fit regulations. Strictly speaking, therefore, the term 'police' has relation to a power of organization or a system of regulations tending to the health, order, and comfort of the inhabitants, and to the prevention of punishments of injuries and offenses to the public." *Monet v. Jones*, 18 Miss. (10 Smedes & M.) 237, 247.

The police of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others. *People v. Squire*, 14 N. E. 820, 824, 107 N. Y. 593, 1 Am. St. Rep. 893.

Police is a general system of precaution either for the prevention of crimes or calamities. *Logan v. State*, 5 Tex. App. 306, 314; *City of Louisville v. Wehmhoff* (Ky.) 78 S. W. 876-881.

"Police" means the government of a city or town, the administration of the law and regulations of a city, the internal regulations and government of a kingdom or state. *People v. Central R. Co. of New Jersey*, 42 N. Y. 283, 314.

**POLICE COURT.**

As an inferior court, see "Inferior Courts."

The term "police courts," as used in the chapters relating to justices' and police courts and appeals therefrom, includes police judges' courts, police courts, and all courts held by mayors or recorders in incorporated cities or towns. *Pen. Code Cal.* 1903, § 1461.

**POLICE FORCE.**

A "police force" is an organization having a controlling mind by which its members

may be made to act in concert. *White v. Manistee County Sup'rs*, 105 Mich. 608, 612, 63 N. W. 653.

The term "police force," when used in a statute or other writing, refers to the body of men appointed to preserve the peace and good order of a city or town, and does not refer to the extensive and undefined, if not indefinable, power usually spoken of as the "police power" or "police regulations." It is true that the word "police" is sometimes loosely, but inaccurately, used to designate the policemen of a town or city; the body of men appointed to preserve the peace and good order of a town or city; but never have the words "police force" been used to designate the "police power." *City of Florence v. Brown*, 26 S. E. 880, 882, 49 S. C. 832.

#### POLICE JUDGE.

As judicial officer, see "Judicial Officer."

A "police justice" is a magistrate charged exclusively with the duties incident to the common-law office of a conservator or justice of the peace, and the prefix "police" serves merely to distinguish them from justices having also civil jurisdiction. *Wenzler v. People* (N. Y.) 2 Cow. Cr. 72, 83.

#### POLICE JURISDICTION.

A "police jurisdiction" means the right to regulate and govern a city or state. *People v. Central R. Co. of New Jersey*, 42 N. Y. 283, 314.

#### POLICE JUSTICE.

As justice of the peace, see "Justice of the Peace."

#### POLICE MAGISTRATE.

As magistrate, see "Magistrate."

A "police magistrate," without other legal definition, supposes some officer of the state or some municipal division thereof, invested with authority, executive or judicial, relating to the administration of police or municipal laws. *People v. Curley*, 5 Colo. 412, 416.

A "police magistrate" is a magistrate charged exclusively with the duties incident to the common-law office of conservator or justice of the peace, and the prefix "police" serves merely to distinguish them from justices having also civil jurisdiction. A police magistrate is an inferior judicial magistrate, whose jurisdiction, in the absence of constitutional or statutory extensions, is confined to criminal cases arising under the ordinances and regulations of a municipality, and in such sense the word is used in Const.

§ 113, declaring that the legislative assembly shall provide by law for the election of police magistrates in cities. *McDermont v. Dinnie*, 69 N. W. 294, 295, 6 N. D. 278.

#### POLICE OFFICER.

As city officers, see "City Officer."

As civil officers, see "Civil Officer."

Special police officer as servant, see "Servant."

The powers of a "police officer," except his appointment, are derived not from the municipal ordinances, but from the common law and acts of assembly, and they can in no sense be regarded as servants or agents of the city. Their duties are of a public nature, and hence, where one was injured by the firing of a cannon on a public street, the city was not liable for the injury, although the firing had been carried on for several hours by the citizens, and a police officer, who was present, had not interfered. *Morristown v. Fitzpatrick* (Pa.) 1 Chest. Co. Rep. (Pa.) 10, 11.

An assessor is not a police officer, as his duties are confined wholly to the assessment of taxes, while the duties of a police officer pertain to the government of the town, or to the administration of the laws and regulations therein. *Dibble v. Merriman*, 52 Conn. 214, 216.

A chance man on the police force of the city of Camden is a "police officer" within Act March 25, 1885, providing that members of the police force cannot be removed except for cause and after hearing. *Bakely v. Nowrey*, 52 Atl. 289, 290, 68 N. J. Law, 95.

The term "police officer," as used in Gen. St. c. 18, § 38, providing that the city marshal or other police officer may prosecute for fines and forfeitures which may inure to the city, does not include a constable. *Commonwealth v. Smith*, 111 Mass. 407, 408.

#### POLICE OFFICIAL.

The mayor of the city, though *ex officio* head of the police of that city, is not a "police official" within Laws 1890, c. 163, § 1, making it unlawful for "police officials" to be interested in the manufacture and sale of spirituous liquors. *People v. Gregg*, 13 N. Y. Supp. 114, 115, 59 Hun, 107.

#### POLICE ORDINANCE.

See "Necessary Police Ordinances."

#### POLICE POWER.

See "Internal Police."

The police power is incapable of exact definition, but the existence of it is essential

to every well-ordered government. *People v. King*, 110 N. Y. 418, 423, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389.

The "police power" is incapable of exact definition and of a precise limitation. It seems to be a power to which are referred all governmental acts which are incapable of arrangement under any other distinct head, and which are justifiable as internal regulations, having in view facility of intercourse between citizen and citizen, the preservation of good order, good manners, and morals, and the health of the public. *Town of Macon v. Patty*, 57 Miss. 378, 386, 407, 34 Am. Rep. 451.

In *Slaughter-House Cases*, 83 U. S. (16 Wall.) 62, 21 L. Ed. 394, it was said that the "police power" is, from its nature, incapable of any exact definition or limitation; and in *Stone v. Mississippi*, 101 U. S. 814, 818, 25 L. Ed. 1079, that it is "easier to determine whether particular cases come within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate." *New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 6 Sup. Ct. 252, 258, 115 U. S. 650, 29 L. Ed. 516.

"It is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of the police power than to mark its boundaries or prescribe limits to its exercise." "This power is and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of and existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." *Slaughter-House Cases*, 83 U. S. (16 Wall.) 36, 62, 21 L. Ed. 394.

It would be presumptuous for any court to attempt to formulate an exact definition of the term the "police power of the state." Legal definitions do not sum themselves up in single sentences. They are, and of necessity must be, more or less general and elastic, in order that the courts may apply them to the infinite variety of circumstances which may arise in the relations and affairs of mankind in civilized society. *State v. Dalton*, 46 Atl. 234, 235, 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818.

What is termed the "police power" has been the subject of a good deal of consideration by both the federal and state courts, and all agree that it is a difficult matter to define the limits within which it is to be exercised. Every well-organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public; and, as no one

can foresee the emergency or necessity which may call for its exercise, it is not an easy matter to prescribe the precise limits within which it may be exercised. It may be said to rest upon the maxim, "*Salus populi suprema lex.*" *Deems v. City of Baltimore*, 30 Atl. 648, 650, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339.

The term "police power" is often used as a term of convenience, and not of clearly ascertained legal principle. It was found to be the most convenient phrase for designating the extent of state legislation when such legitimate legislation covered the same ground included in the exclusive power of legislation given to Congress; notably in the wide field covered by the power to regulate interstate and foreign commerce. As used in this connection, the term has acquired a more definite meaning through the many decisions of the United States Supreme Court, but such meaning relates rather to what it has been decided to cover than to what it may in fact cover. As Justice Grier says in the *License Cases*, 46 U. S. (5 How.) 504, 12 L. Ed. 257: "Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restriction or punishment of crime, for the preservation of the public peace, health, morals, must come within this category." But the term is much more indefinite when used to designate that exercise of executive power which involves and justifies, as a necessary incident, the performance of acts by administrative officers that may partake of a judicial nature; and the necessity for its use in this connection, except as a term of convenience, is much less obvious. In *re Clark*, 31 Atl. 522, 527, 65 Conn. 17, 28 L. R. A. 242.

Of the police power it may be said that it is known when and where it begins, but not when and where it terminates. *Champer v. City of Greencastle*, 35 N. E. 14, 18, 138 Ind. 339, 24 L. R. A. 768, 46 Am. St. Rep. 390; *New Orleans Gaslight Co. v. Hart*, 4 South. 215, 216, 40 La. Ann. 474, 8 Am. St. Rep. 544.

"Police power" is defined by Blackstone to be the due regulation and domestic order of the kingdom whereby the inhabitants of a state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. It is said that by the general police power of the state persons and property are subjected to all kinds of restraint and burdens in order to secure the general comfort, health, and prosperity of the state. In *re Marriage License Docket*, 4 Pa. Dist. Ct. 102, 163.

It is said that there is no better definition of "police power" than that given by

Kent, to wit, the power to regulate unwholesome trades, slaughterhouses, operations offensive to the senses, etc. *Butchers' Union Slaughterhouse Co. v. Crescent City Live Stock Landing Co.*, 4 Sup. Ct. 652, 654, 111 U. S. 746, 28 L. Ed. 585.

#### **Attribute of sovereignty.**

The police power of the state is a power which pertains to sovereignty. *People v. Rosenberg*, 22 N. Y. Supp. 56, 58, 67 Hun, 52.

It is an attribute of sovereign power to enact laws for the exercise of such restraint and control over a citizen and his occupation as may be necessary to promote the health, safety, and welfare of society. This power is known as the "police power." *Price v. People*, 61 N. E. 844, 846, 193 Ill. 114, 53 L. R. A. 588, 86 Am. St. Rep. 306.

Police powers are nothing more or less than the powers of government inherent in every sovereignty; that is to say, the power to govern men and things. *Munn v. Illinois*, 94 U. S. 113, 125, 24 L. Ed. 77; *Licenses Case*, 46 U. S. (5 How.) 504, 583, 12 L. Ed. 256. And whether a state enacts a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominions. *License Cases*, 46 U. S. (5 How.) 504, 583, 12 L. Ed. 256.

Police power is that inherent and plenary power in the state which enables it to prohibit things hurtful to the comfort, safety, and welfare of society, *Mathews v. Kalamazoo Board of Education*, 86 N. W. 1036, 1039, 127 Mich. 530, 54 L. R. A. 736; *Meadowcroft v. People*, 45 N. E. 303, 304, 163 Ill. 56, 35 L. R. A. 176, 54 Am. St. Rep. 447; *Town of Lakeview v. Rose Hill Cemetery Co.*, 70 Ill. 191, 194, 22 Am. Rep. 71; *Booth v. People*, 57 N. E. 798, 799, 186 Ill. 43, 50 L. R. A. 762, 78 Am. St. Rep. 229; even though the prohibition invade the right of liberty or property of the individual, *Booth v. People*, 57 N. E. 798, 799, 186 Ill. 43, 50 L. R. A. 762, 78 Am. St. Rep. 229.

The "police power" is a general term used to express the particular right of a government which is inherent in every sovereignty. If in the assumed exercise of its police power the Legislature violates the federal Constitution, the legislation is void. *Lake Shore & M. S. R. Co. v. Smith*, 19 Sup. Ct. 565, 567, 173 U. S. 684, 43 L. Ed. 858.

The phrase "police power" has been sometimes used by writers upon legal subjects as if it denoted some peculiar and transcendent form of legislative authority. The word "police" does not naturally carry any

such meaning. Its use in this connection came into our law early in the nineteenth century. As applied to the state, police laws are laws of general administration and government. Its power to enact such laws extends over all subjects within its territorial limits. *Prigg v. Pennsylvania*, 41 U. S. (16 Pet.) 539, 625, 10 L. Ed. 1060. The police powers of a state, in the apt words of Chief Justice Taney, "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." *McKeon v. New York, N. H. & H. R. Co.*, 53 Atl. 656, 657, 5 Conn. 343, 61 L. R. A. 730 (citing *The License Cases*, 46 U. S. [5 How.] 504, 583, 12 L. Ed. 257).

#### **Belongs to the states.**

The police power belongs to the several states, and not to the federal government, save in exceptional cases. *State v. Schenker*, 84 N. W. 698, 699, 112 Iowa, 642, 51 L. R. A. 347, 84 Am. St. Rep. 360.

Police power is a power not delegated to the general government, but remaining in the states, to enable them to regulate for their own welfare, as they understand their welfare, their internal or domestic concerns. *State v. Fitzpatrick*, 11 Atl. 767, 769, 16 R. I. 54.

Police power may be characterized as a power which inheres in the state and the political divisions thereof to protect by such restrictions as are necessary and proper the lives, health, comfort, and property of its citizens. *City of Rochester v. West*, 51 N. Y. Supp. 482, 484, 29 App. Div. 125.

The Legislature cannot by any contract divest itself of the power to provide the objects over which the police power extends. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 33, 24 L. Ed. 989; *City of Westport v. Mulholland*, 60 S. W. 77, 78, 159 Mo. 86, 53 L. R. A. 442.

The police power originally and inherently belongs to the states, and it will remain with them unless impliedly taken away by a fair construction of the Constitution or the laws enacted in pursuance thereof. *Reeves v. Corning* (U. S.) 51 Fed. 774, 785.

#### **Eminent domain distinguished.**

The term "police power" includes the right of regulating the use of property devoted to a use in which the public has an interest. There is a very clear distinction between this regulation and the appropriation of property for the use of the public, the latter falling within the power of eminent domain, instead of the police power. *State v. Jacksonville Terminal Co.*, 27 South. 221, 237, 41 Fla. 363.

Compensation has never been a condition of the exercise of the police power, even

when attended with inconvenience or pecuniary loss, as each member of a community is supposed to be benefited by that which promotes the general welfare. *Village of Carthage v. Frederick*, 25 N. E. 480, 481, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490.

#### Extent of power.

It has often been said that it is difficult, if not impossible, to give an exact and satisfactory definition of police power, but it is said by an eminent text writer that this power, "like that of taxation, pervades every department of business, and reaches to every interest and every subject of profit or enjoyment." *Karasek v. Peier*, 61 Pac. 33, 35, 36, 22 Wash. 419, 50 L. R. A. 345 (citing *Cooley*, Const. Lim. [5th Ed.] p. 706).

The police power comprehends legislation for the public health, the public safety, the public morals, and the public welfare. In short, the "police power" is an equivalent term for the "legislative power." *Health Dept. v. Rector of Trinity Church*, 17 N. Y. Supp. 510, 513; *New Orleans Gas Light Co. v. Louisiana Light & Heat Co.*, 6 Sup. Ct. 252, 258, 115 U. S. 650, 29 L. Ed. 516; *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 923; *City of Louisville v. Wehmhoff* (Ky.) 76 S. W. 876, 881.

In *People v. King*, 110 N. Y. 418, 423, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389, Judge Andrews said: "By means of this power the Legislature exercises a supervision over matters involving the common weal, and enforces the observance by each individual member of society of the duties which he owes to others and the community at large." *City of Geneva v. Geneva Telephone Co.*, 62 N. Y. Supp. 172, 175, 80 Misc. Rep. 236.

The police power extends to legislation having for its object the promotion of the health, comfort, safety, and the welfare of society. Under it the conduct of an individual in the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other. *Matter of Jacobs*, 98 N. Y. 98, 108, 50 Am. Rep. 638. But under the exercise of the police power the act must have reference to the comfort, safety, or welfare of society, and it must not conflict with the Constitution. The law will not allow the rights of property to be invaded under the guise of protection, when it is manifest such is not the object and purpose of the regulation. *Whiteley v. Terry*, 82 N. Y. Supp. 89, 91, 83 App. Div. 197 (citing *People v. Gillson*, 109 N. Y. 389, 403, 17 N. E. 343, 4 Am. St. Rep. 465).

The police power extends over a large range of subjects—public health, the public

morals, the public safety, the public welfare—under any one of which the regulation and restriction of the sale of intoxicating liquors would readily fall. The courts have wisely refrained from prescribing limits to the exercise of the police power by this government, and it has been held to embrace all such legislation as will preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and the establishment of such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest. *Webster v. State*, 75 S. W. 1020, 1022.

The police power is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement by summary proceedings of whatever may be regarded as a public nuisance. To justify the state in thus interposing its authority in behalf of the public it must appear (1) that the interest of the public generally, as distinguished from those of a particular case, requires such improvement; and (2) that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive on individuals. *Lawton v. Steele*, 14 Sup. Ct. 499, 500, 152 U. S. 133, 38 L. Ed. 385.

The police power of the state is the authority vested in the Legislature by the Constitution to enact all such wholesome and reasonable laws not in conflict with the fundamental law, the Constitution of the state, and of the United States, together with laws made in pursuance of it, as they may deem conducive to public good. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84; *State v. Moore*, 10 S. E. 143, 144, 104 N. C. 714, 17 Am. St. Rep. 696.

Police power is the power vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. *State v. Griffin*, 39 Atl. 260, 69 N. H. 1, 41 L. R. A. 177, 76 Am. St. Rep. 139; *Harrington v. Board of Aldermen of City of Providence*, 38 Atl. 1, 2, 20 R. I. 233, 38 L. R. A. 305.

The police power is a broad and comprehensive power, by which the rights of an individual, both as to his liberty and his enjoyment of property, may be curtailed in the interest of the public welfare. Where laws supposed to be enacted in the exercise of police power interfere with the citizen's liberty or rights of property, they can only be justified on the ground that they in some



manner secure the comfort, safety, or welfare of society. *Huber v. Merkel*, 94 N. W. 354, 358, 117 Wis. 355, 62 L. R. A. 589.

The police power of a state is a power incapable of exact definition, but the existence of which is essential to every well-ordered government. By means of this power the Legislature exercises a supervision over matters involving the common weal, and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals, and general welfare of the community, and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion, with which the courts cannot interfere. *Meffert v. State Board of Medical Registration & Examination*, 72 Pac. 247, 250, 66 Kan. 710 (citing *People v. King*, 110 N. Y. 418, 423, 18 N. E. 245, 246, 1 L. R. A. 293, 6 Am. St. Rep. 389).

Under the police power the government regulates the conduct of one towards another, and the manner in which each shall use his own property, when such regulations become necessary for the public good. *Waters-Pierce Oil Co. v. State*, 44 S. W. 936, 940, 19 Tex. Civ. App. 1.

Police power may be described, though not defined, as the power of a government to regulate the conduct and property of some for the safety and property of all. *State v. Kreutzberg*, 90 N. W. 1098, 1101, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934.

"Police power," in its broadest acceptance, means the general power of the government to preserve and promote the public welfare, even at the expense of private rights. *City of Geneva v. Geneva Telephone Co.*, 62 N. Y. Supp. 172, 175, 30 Misc. Rep. 236; *Karasek v. Peler*, 61 Pac. 33, 35, 22 Wash. 419, 50 L. R. A. 345.

"Police power," in the language of Judge Cooley, "in a comprehensive sense embraces the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offenses against the state, but to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are inculcated to prevent a conflict of rights and insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with the like enjoyment of rights by others." *State ex rel. Star Pub. Co. v. Associated Press*, 60 S. W. 91, 98, 159 Mo. 410, 51 L. R. A. 151, 81 Am. St. Rep. 368; *Territory v. O'Connor*, 41 N. W. 746, 750, 5 Dak. 397, 3 L. R. A. 355; *Commonwealth v. Bearer*, 132 Mass. 542, 546, 42 Am. Rep. 450. See, also, *Bancroft v. Thayer* (U. S.) 2 Fed. Cas. 580, 581.

"Police power" is defined by Blackstone as the due regulation and domestic order of the kingdom, whereby individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. *Village of Carthage v. Frederick*, 25 N. E. 480, 481, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490; *Territory v. O'Connor*, 41 N. W. 746, 750, 5 Dak. 397, 3 L. R. A. 355. Jeremy Bentham has this definition: "Police power is in general a system of precaution, either for the prevention of crimes or of calamities. Its business may be distributed into eight different branches: First, police for prevention of offense; second, police for the prevention of calamities; third, police for the prevention of endemic diseases; fourth, police of charity; fifth, police of interior communication; sixth, police of public amusement; seventh, police for recent intelligence; eighth, police for registration." *Territory v. O'Connor*, 41 N. W. 746, 750, 5 Dak. 397, 3 L. R. A. 355.

Police power is that power which extends to making regulations promotive of domestic order, morals, health, and safety. *Arkansas v. Kansas & T. Coal Co.* (U. S.) 96 Fed. 353, 361; *Territory v. Guyot*, 22 Pac. 134, 135, 9 Mont. 46; *State v. Hodgson*, 28 Atl. 1089, 1091, 66 Vt. 134; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 471, 24 L. Ed. 527; *Rouse v. Youard* (Kan.) 41 Pac. 426, 430; *State v. Dalton*, 46 Atl. 234, 235, 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818; *People v. Havnor*, 43 N. E. 541, 542, 149 N. Y. 195, 31 L. R. A. 680, 52 Am. St. Rep. 707.

Police power is the power of the state to prescribe regulations to promote the health, peace, morality, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and to add to its wealth and prosperity. *Bell's Gap R. Co. v. Commonwealth of Pennsylvania*, 10 Sup. Ct. 533, 535, 134 U. S. 232, 33 L. Ed. 892; *Mugler v. Kansas*, 8 Sup. Ct. 273, 298, 123 U. S. 623, 31 L. Ed. 205; *Leisy v. Hardin*, 10 Sup. Ct. 681, 692, 135 U. S. 100, 34 L. Ed. 128; *Barbier v. Connolly*, 5 Sup. Ct. 357, 359, 113 U. S. 31, 28 L. Ed. 923; *Cantini v. Tillman* (U. S.) 54 Fed. 969, 974; *Railway Co. v. Beckwith*, 129 U. S. 29, 9 Sup. Ct. 207; *Waters-Pierce Oil Co. v. State*, 44 S. W. 936, 940, 19 Tex. Civ. App. 1; *Bagg v. Wilmington, C. & A. R. Co.*, 14 S. E. 79, 82, 109 N. C. 279, 14 L. R. A. 596, 26 Am. St. Rep. 569; *Oury v. Goodwin* (Ariz.) 26 Pac. 376, 381.

Police power of the state "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state, and by which persons and property are subjected to

all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state." *Thorpe v. Rutland & B. R. Co.*, 27 Vt. (1 Williams) 140, 149, 82 Am. Dec. 625; *Village of St. Johnsbury v. Thompson*, 9 Atl. 571, 575, 59 Vt. 300, 59 Am. Rep. 731; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Arkansas v. Kansas & T. Coal Co.* (U. S.) 96 Fed. 353, 361; *Logan v. State*, 5 Tex. App. 306, 314; *Marmet v. State*, 12 N. E. 463, 468, 45 Ohio St. 63; *Morris v. City of Columbus*, 30 S. E. 850, 852, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243; *People v. Phippin*, 37 N. W. 888, 894, 70 Mich. 6; *River Rendering Co. v. Behr*, 7 Mo. App. 345, 353.

"The police power has been held to embrace the protection of the lives, health, and property of the citizens, the maintenance of good order and quiet in the community, and the preservation of the public morals." *Van Hook v. City of Selma*, 70 Ala. 361, 363, 45 Am. Rep. 85 (citing *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989); *City of Westport v. Mulholland*, 60 S. W. 77, 78, 159 Mo. 86, 53 L. R. A. 442; *People v. Phippin*, 37 N. W. 888, 894, 70 Mich. 6; *Sweet v. Balentine* (Nev.) 69 Pac. 995, 996.

"Police power" is defined as "the function of that branch of the administrative machinery of government which is charged with the preservation of public order and tranquility, the promotion of the public health, safety, and morals, and the prevention, detection, and punishment of crime." *City of Seattle v. Clark*, 69 Pac. 407, 410, 28 Wash. 717.

The term "police power of the state" is used in different senses. In its broadest and most unlimited sense it embraces all those laws or regulations which are for the well-being or government of the people, while in its more limited sense it is used to embrace the power of preservation of the health or safety of the people by depriving persons of liberty, or to destroy private property in the face of constitutional limitations, in great and pressing emergencies, to prevent the spread of contagious diseases or other great calamities to the people or their property. *Braun v. City of Chicago*, 110 Ill. 186, 194.

Police power is the power given to a city or municipal corporation to control and regulate such things as affect the health, safety, and happiness of the inhabitants thereof, and for the peace, good order, regulation, and cleanliness thereof. *Salt Lake City v. Wagner*, 2 Utah, 400, 403.

The police power of the state is the power which enables it to promote the health, comfort, safety, and welfare of society. *People v. Lochner*, 76 N. Y. Supp. 396, 399, 73 App. Div. 120; *People v. Rosenberg*, 22 N. Y. Supp. 56, 58, 67 Hun. 52; *Ritchie v. People*, 40 N. E. 454, 457, 155 Ill. 98, 29 L. R. A. 79,

46 Am. St. Rep. 315; *Booth v. People*, 57 N. E. 798, 799, 186 Ill. 43, 50 L. R. A. 762, 78 Am. St. Rep. 229; *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 194, 22 Am. Rep. 71; *Rushtrat v. People*, 57 N. E. 41, 45, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30.

The police power may be defined in general terms as comprehending the making and enforcement of all such laws, ordinances, and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public. *Wice v. Chicago & N. W. Ry. Co.*, 61 N. E. 1084, 1085, 193 Ill. 351, 56 L. R. A. 268; *Electric Imp. Co. v. City and County of San Francisco* (U. S.) 45 Fed. 593, 594, 13 L. R. A. 131, 133; *Culver v. City of Streator*, 22 N. E. 810, 130 Ill. 238, 6 L. R. A. 270. This definition is broad enough to cover the power of a city to pass necessary police ordinances. *Wice v. Chicago & N. W. Ry. Co.*, 61 N. E. 1084, 1085, 193 Ill. 351, 56 L. R. A. 268.

Chief Justice Shaw, in defining the police power of the state, said: "All property in this commonwealth is . . . held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations, established by law, as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." *Parker v. Otis*, 62 Pac. 571, 573, 130 Cal. 322, 92 Am. St. Rep. 56 (quoting *Commonwealth v. Tewksbury*, 52 Mass. [11 Metc.] 55).

It is generally admitted that matters and subjects which affect the general welfare and public interests are within the supervision of the police power of the state. *Waters-Pierce Oil Co. v. State*, 44 S. W. 936, 940, 19 Tex. Civ. App. 1.

Everything hurtful to the public interest is subject to the police power of the state, and may be brought within its restraining or prohibitory influence. *Cole v. Hall*, 103 Ill. 31.

In the exercise of its police power the state is not confined to matters relating strictly to the public health, morals, and peace, but there may be interference whenever the business interests demand it. *State v. Wagner*, 80 N. W. 633, 635, 77 Minn. 483, 46 L. R. A. 442, 77 Am. St. Rep. 681.

"The police power is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this pow-

er it has been held that the state may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by, the demolition of such as are in the path of a conflagration, the slaughter of diseased cattle, the destruction of decaying or unwholesome food, the prohibition of wooden buildings in cities, the regulation of railways and burial grounds, the restriction of objectionable trades to certain localities, the compulsory vaccination of children, the confinement of the insane, the restraint of beggars and habitual drunkards, the suppression of obscene publications, and the prohibition of gambling houses and places where intoxicating liquors are sold. There is no civilized country that does not enforce such laws. *Osborn v. Charlevoix Circuit Judge*, 72 N. W. 982, 985, 114 Mich. 655; *Jew Ho v. Williamson* (U. S.) 103 Fed. 10, 20; *In re Race Horse* (U. S.) 70 Fed. 598, 609; *Grossman v. Caminez*, 79 N. Y. Supp. 900, 903, 79 App. Div. 15. Such, also, are laws to prohibit the use of warehouses for the storage of gunpowder near a habitation or highway, to restrain the height to which wooden buildings may be erected in populous neighborhoods, and require them to be covered with slate or other incombustible material, to prohibit buildings from being used for hospitals for contagious diseases, or for the carrying on of noxious or offensive trades. It includes the right to establish lines in a harbor beyond which no wharf shall be extended or maintained, and to declare that any wharf extended or built beyond such lines is a public nuisance. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85.

To the police power may be referred the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike roads, canals, wharfs, ferries, and telegraph lines, and the draining of swamps. *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 6 Sup. Ct. 252, 258, 115 U. S. 650, 29 L. Ed. 516.

The authorities generally affirm that the power to tax, in a strict and proper sense, for the purpose of creating revenue, is not included within the police power of the state, though in the exercise of the latter power a municipality may incidentally create a revenue, and thereby benefit the public treasury. *City of Terre Haute v. Kersey*, 64 N. E. 469, 471, 159 Ind. 300, 95 Am. St. Rep. 298.

#### Same—Regulation of business.

Municipal authorities have exercised this power, *eo nomine*, for time out of mind, by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. *Village of Carthage*

*v. Frederick*, 25 N. E. 480, 481, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490.

In the exercise of the police powers it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, etc., and in so doing to fix a maximum charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the states on some or all of these subjects, and we think it has never yet been successfully contended that such legislation came within any of the constitutional provisions against interference with private property. *Munn v. Illinois*, 94 U. S. 113, 125, 24 L. Ed. 77.

The state in the exercise of its police power is, as a general proposition, authorized to subject all occupations to a reasonable regulation, when such regulation is required for the protection of public interests or for the public welfare. *Marmet v. State*, 12 N. E. 463, 468, 45 Ohio St. 63.

"The general nature of the police power of the state is nowhere more forcibly stated than in the eloquent words of Mr. Justice Field. He says it is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex, and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed, by the governing authority of the country, essential to the safety, health, peace, good order, and morals of the community." *Lansburg v. District of Columbia*, 11 App. D. C. 512-521 (quoting *Crowley v. Cristensen*, 137 U. S. 89, 11 Sup. Ct. 13, 34 L. Ed. 620).

The rule seems to be well settled that, when one devotes his property to a use or carries on a business in which the public has an interest, he holds the property and carries on the business subject to the police power of the state to regulate or control its use, so as to protect and preserve the public health, the public morals, and the general safety and welfare of the public. *Berthoff v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 323; *State v. Wagener*, 80 N. W. 633, 635, 77 Minn. 483, 46 L. R. A. 442, 77 Am. St. Rep. 681. "The rule is that, where one devotes his property to a use in which the public has an interest, he must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created." *City of Geneva v. Geneva Telephone Co.*, 62 N. Y. Supp. 172, 175, 30 Misc. Rep. 236 (quoting *People v. King*, 110 N. Y. 423, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389).

The police power is one of wide scope, whose limits are susceptible of no precise definition. The protection of the citizen from fraud and imposition evidently falls within the just limits of the police power, and includes regulations as to sales of patent rights. *Reeves v. Corning* (U. S.) 51 Fed. 774, 785.

#### Grounds of power.

The police power in a state is coextensive with self-protection, and is not inaptly termed the "law of overruling necessity." *Town of Lakeview v. Rose Hill Cemetery Co.*, 70 Ill. 191, 194, 22 Am. Rep. 71.

The court, in the case of *Munn v. State* of Illinois, 94 U. S. 113, 124, 24 L. Ed. 77, speaking of the police power, says: "But it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another's." This is the very essence of government, and has found expression in the maxim, "*Sic utere tuo ut alienum non lædas.*" *Waters-Pierce Oil Co. v. State*, 44 S. W. 936, 940, 19 Tex. Civ. App. 1; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Logan v. State*, 5 Tex. App. 306, 314; *Thorpe v. Rutland & B. R. Co.*, 27 Vt. (1 Williams) 140, 149, 62 Am. Dec. 625. In its relations with the enjoyment of property it is based upon the settled principle "growing," as was said by Chief Justice Shaw, "out of the nature of well-ordered civil society, that every holder of property, however absolute may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." *River Rendering Co. v. Behr*, 7 Mo. App. 345, 353.

The police power of the state rests in the common-law maxim, "*Sic utere tuo ut alienum non lædas.*" According to this maxim, every one must so use his own property as not to injure the rights of others, but subject to this qualification, he has the right to exercise complete control over his own land. *Karasek v. Peier*, 61 Pac. 33, 35, 22 Wash. 419, 50 L. R. A. 345.

It may also be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime or pauperism or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in *Re Passenger Cases*, 48 U. S. (7 How.) 283, 12 L. Ed. 702, by Mr. Justice Greer, in the sacred law of self-defense.

Vide 3 Sawy. 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527.

#### Legislative or judicial question.

By the general police power of a state persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right of the Legislature to do which no question ever was, and upon acknowledged principles never can be, made, so far as natural persons are concerned. *Arkansas v. Kansas & T. Coal Co.* (U. S.) 96 Fed. 353, 361 (citing *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470, 24 L. Ed. 527); *Thorpe v. Rutland & B. R. Co.*, 27 Vt. (1 Williams) 149, 62 Am. Dec. 625; *Marmet v. State*, 12 N. E. 463, 468. 45 Ohio St. 63, *Woodward v. Fruitvale Sanitary Dist.*, 34 Pac. 239, 242, 99 Cal. 554.

According to the maxim, "*Sic utere tuo ut alienum non lædas.*" which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. *Thorpe v. Rutland & B. R. Co.*, 27 Vt. (1 Williams) 140, 149, 62 Am. Dec. 625; *Logan v. State*, 5 Tex. App. 306, 314; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527.

It belongs to the legislative branch of the government to exert what is known as the "police power of the state," and to determine primarily what measures are appropriate or needful for the protection of the public morals or safety. *Missouri Pac. R. Co. v. Finley*, 16 Pac. 951, 954, 38 Kan. 550.

Police power can only be exercised by legislative enactment, and it rests solely within legislative discretion to determine when the public welfare or safety requires its exercise. Courts are authorized to interfere and declare a statute unconstitutional only when it conflicts with the Constitution. With the wisdom, policy, or necessity of such an enactment they have nothing to do. But while such are the legislative functions, there must always be a reason for the exercise of the power, and rights granted by federal and state Constitutions cannot be violated by the mere declaration that an occupation or any particular act is injurious to public welfare.

*City of Geneva v. Geneva Telephone Co.*, 62 N. Y. Supp. 172, 175, 30 Misc. Rep. 236. See, also, *State v. Schlenker*, 84 N. W. 698, 699, 112 Iowa, 642, 51 L. R. A. 347, 84 Am. St. Rep. 360.

A large discretion is necessarily vested in the Legislature to determine not only what the public interests require, but what measures are necessary for the protection of such interests. *Barbier v. Connolly*, 5 Sup. Ct. 357, 359, 113 U. S. 27, 28 L. Ed. 923; *Kidd v. Pearson*, 9 Sup. Ct. 6, 10, 128 U. S. 1, 32 L. Ed. 346; *Grossman v. Caminez*, 79 N. Y. Supp. 900, 903, 79 App. Div. 15; *State v. Wagoner*, 80 N. W. 633, 635, 77 Minn. 483, 46 L. R. A. 442, 77 Am. St. Rep. 681; *Jew Ho v. Williamson* (U. S.) 103 Fed. 10, 20. Their determination is not final, but is subject to supervision by the courts. They may not, under the guise of protecting the public, arbitrarily interfere with private business, or impose any unusual and unnecessary restrictions upon lawful occupations, and whether they have done so in a particular case is a judicial question. *Jew Ho v. Williamson* (U. S.) 103 Fed. 10, 20.

It is for the Legislature to determine when an exigency exists for the exercise of the police power, but what are the subjects of its exercise is clearly a judicial question. *Rubstrat v. People*, 57 N. E. 41, 45, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30.

The line between a valid exercise of the police power and the invasion of private rights is clearly drawn by Judge Earl in his opinion in *Re Jacobs*, 98 N. Y. 98, 110, 50 Am. Rep. 636. He says: "Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act, and see whether it really relates to and is convenient and appropriate to promote the public health." *People v. Lochner*, 76 N. Y. Supp. 396, 399, 73 App. Div. 120.

The police power of a state embraces all regulations affecting the health, good order, morals, peace, and safety of society; and, when such regulations are not in conflict with any constitutional prohibition or fundamental principle, they cannot be assailed in a judicial tribunal. *Electric Imp.*

*Co. v. City & County of San Francisco* (U. S.) 45 Fed. 593, 594, 13 L. R. A. 131, 133; *People v. King*, 18 N. E. 245, 246, 110 N. Y. 418, 1 L. R. A. 293, 6 Am. St. Rep. 389; *City of Geneva v. Geneva Tel. Co.*, 62 N. Y. Supp. 172, 175, 30 Misc. Rep. 236.

#### Limitations on power.

The police power is commensurate with the sovereignty of the state, and of necessity is despotic, and individual rights of property beyond express constitutional restraint must yield to its force. *Rouse v. Youard*, 41 Pac. 426, 430, 1 Kan. App. 270.

"It was remarked by Judge Gray in *People v. Ewer*, 36 N. E. 4, 141 N. Y. 129, 132, 25 L. R. A. 794, 38 Am. St. Rep. 783, that it is difficult, if not impossible, to define the 'police power' of a state, or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed." It is very broad and far-reaching, but it is not without its limitations. *People v. Lochner*, 76 N. Y. Supp. 396, 399, 73 App. Div. 120.

The term "police power" means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all. It must be confined to such restrictions and burdens as are necessary to promote the public welfare or to prevent the infliction of public injury. *State v. Wagener*, 80 N. W. 633, 635, 77 Minn. 483, 46 L. R. A. 442, 77 Am. St. Rep. 681. See, also, *Rippe v. Becker*, 57 N. W. 331, 333, 56 Minn. 100, 22 L. R. A. 857.

To justify the state, in interposing its authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, nor impose unusual and unnecessary restrictions upon lawful occupations. *Grossman v. Caminez*, 79 N. Y. Supp. 900, 903, 79 App. Div. 15 (citing *Lawton v. Steele*, 152 U. S. 133, 136, 137, 14 Sup. Ct. 499, 38 L. Ed. 385; *Colon v. Lisk*, 153 N. Y. 188, 197, 47 N. E. 302, 60 Am. St. Rep. 609, and authorities there cited); *In re Race Horse* (U. S.) 70 Fed. 598, 609.

This power to restrain an individual of some measure of his liberty of action and of his property goes no further than to authorize the enactment of laws necessary to reasonable protection of the safety and welfare of the general community, and not depriving the individual of liberty in the constitutional sense. *State v. Kreutzberg*, 90

N. W. 1098, 1101, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934.

A law enacted in the exercise of the police power must in fact be a police law. If it be a law for the protection of health, it must be a health law, having some relation to public health. If it is apparent on the face of the act that its provisions, from their very nature, cannot and will not conduce to any legitimate police purpose, it is the right as well as the duty of the court to pronounce it invalid as in excess of legislative power, and as an arbitrary and unwarranted interference with the rights of the citizen to pursue any lawful occupation. *State v. Donaldson*, 42 N. W. 781, 783, 41 Minn. 74.

When the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the Legislature, nor can the court inquire whether it was intended to guard the citizens of the state from pestilence or disease, or to make regulations of commerce for the interest and convenience of trade. And it is a question of power. In all matters of government, and especially in police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and civilization, new and vicious indulgences spring up which require restraint, which can only be imposed by the legislative power. When this power shall be exerted, how far it shall be carried, and where it shall cease, must mainly depend upon the evil to be remedied. Under the pretense of a police regulation the state cannot counteract the commercial power of Congress, and yet, to guard the health, morals, and safety of the community, the laws of the state may prohibit an importer from landing his goods, and may sometimes authorize their destruction. But this exception to the operation of the general commercial law is limited to the existing exigency. Still it is clear that the law of the state is not rendered unconstitutional by a reduction of transportation, and especially is this not the case when the state regulation has a salutary tendency on society and is founded on the highest moral considerations. The police power of the state and the commercial power of Congress must stand together. Neither of them can be so exercised as to materially affect the other. In *re License Cases*, 46 U. S. (5 How.) 504, 583, 592, 12 L. Ed. 256.

The exercise of the police power is subject to constitutional limitations. It is essential that police regulations have reference to the comfort, safety, and welfare of society, and, when applied to a corporation, the regulation must not be in conflict with

any of the provisions of its charter under the pretense of police regulations, and corporations cannot be divested of any of their essential rights and privileges conferred by its charter. *Town of Lakeview v. Rose Hill Cemetery Co.*, 70 Ill. 191, 194, 22 Am. Rep. 71.

Definitions of the "police power" must, however, be taken subject to the condition that the state cannot, in its exercise for any purpose whatever, encroach on the powers of the general government, or rights granted or secured by the supreme law of the land. *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 6 Sup. Ct. 252, 258, 115 U. S. 650, 29 L. Ed. 516.

"Police power" may be said to be a right of the state to prescribe regulations for the good order, peace, health, protection, comfort, convenience, and morals of the community, which do not encroach on a like power vested in Congress by the federal Constitution, or which do not violate any of the provisions of the organic law. *Champer v. City of Greencastle*, 35 N. E. 14, 18, 138 Ind. 339, 24 L. R. A. 768, 46 Am. St. Rep. 390; *New Orleans Gaslight Co. v. Hart*, 4 South. 215, 216, 40 La. Ann. 474, 8 Am. St. Rep. 544; *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 359, 7 Sup. Ct. 1126, 30 L. Ed. 1187.

#### Same—Constitutional provisions.

Due process of law as applicable to, see "Due Process of Law."

All authorities agree that the Constitution presupposes the existence of police power, and is to be construed with reference to that fact. *Village of Carthage v. Frederick*, 25 N. E. 480, 481, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490.

The police power is necessarily fettered by the express and peremptory prohibition against a deprivation of property without due process of law, and the taking of property for public use without compensation. In *People v. Gellison*, 109 N. Y. 400, 17 N. E. 343, 4 Am. St. Rep. 465, it is said the police power has never yet been fully described, nor its extent limited, further, at least, than this: It is not above the Constitution, but is bounded by its provisions, and, if any franchise or liberty is expressly protected by any constitutional provision, it cannot be destroyed by any valid exercise by the Legislature or the executive of the police power. *Health Dept. of New York City v. Trinity Church*, 17 N. Y. Supp. 510, 513.

The state cannot, by arbitrarily assuming a commodity is injurious to the health or comfort of the people, impair individual rights guaranteed by the Constitution. The police power, like every other power, is subject to the Constitution, and cannot be used as a cloak under which to disregard con-

stitutional rights or restrictions. *State v. Schlenker*, 84 N. W. 698, 699, 112 Iowa, 642, 51 L. R. A. 347, 84 Am. St. Rep. 360.

The constitutional guaranties for the security of private rights have never been understood as interfering with the power of the state to pass such laws as may be necessary to protect the health and provide for the safety and good order of society. *Deems v. City of Baltimore*, 30 Atl. 648, 650, 80 Md. 164, 26 L. R. A. 541, 45 Am. St. Rep. 339.

The fourteenth amendment to the federal Constitution does not limit the subjects in relation to which the police power may be exercised for the protection of its citizens. *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 29, 9 Sup. Ct. 207, 209, 32 L. Ed. 585; *Cantini v. Tillman* (U. S.) 54 Fed. 969, 974.

The police power reaches all persons and things within the state, and it may be rightfully exercised by a state over them, unless the power is denied by constitutional limitation, or an act of Congress, or a treaty made pursuant to the Constitution. *Reeves v. Corning* (U. S.) 51 Fed. 774, 785.

In determining whether an exercise of the police power is warranted by the Constitution, the rule is to look to the restrictions and limitations imposed on the Legislature by the Constitution, and not to express grants of legislative power. *Logan v. State*, 5 Tex. App. 306, 314.

If the act and the Constitution can be construed so as to enable both to stand and each can be given a proper and legitimate work to perform it is the duty of the court to adopt such construction. *People v. Rosenberg*, 34 N. E. 285, 286, 138 N. Y. 415.

#### Public health.

It was held in *People v. Warden of City Prison*, 144 N. Y. 529, 536, 39 N. E. 686, 27 L. R. A. 718, that: "The restraint of personal action is justified when it manifestly tends to the protection of the health and comfort of the community, and no constitutional guaranty is then violated." In *Health Department of the City of New York v. Rector of Trinity Church*, 39 N. E. 833, 145 N. Y. 32, 45 Am. St. Rep. 579, the court laid down the rule that the Legislature, in the exercise of its power to conserve the public health, safety, and welfare, may direct that certain improvements or alterations shall be made in tenement houses at the owners' expense, and that suitable appliances be supplied to receive and distribute a supply of water for domestic use. Judge Peckham, in discussing the constitutionality of the act, says: "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for

such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner." Under the police power, persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort and health of the public. Thus it has been held that the Legislature might prohibit railroads from permitting or requiring workmen who have worked 24 hours from going on duty again until they have had 8 hours' rest; that 10 hours' work out of 12 consecutive hours shall constitute a day's labor; that every locomotive engineer may pass an examination as to his competency, character, and habits; and that no railroad company shall permit any locomotive engineer from running a locomotive more than 10 consecutive hours in any day. It limits the hours of labor, except in emergencies, to 8 hours in each day. In *Tied. Lim. Police Power*, 181, the author says: "If the law did not interfere, the feverish, intense desire to acquire wealth, inciting a relentless rivalry and competition, would ultimately prevent, not only the wage-earner, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instinct of self-preservation by resting periodically from labor." *People v. Lochner*, 76 N. Y. Supp. 396, 399, 73 App. Div. 120.

Danger to public health has always been regarded as a sufficient ground for the exercise of police power in restraint of a person's liberty. The General Assembly may, in the exercise of the police power, confer upon the municipal corporations of the state authority to make and enforce ordinances requiring all persons who may be within the limits of such corporations to submit to vaccination whenever an epidemic of small-pox is existing or may be reasonably apprehended. *Morris v. City of Columbus*, 30 S. E. 850, 852, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243.

The purpose of quarantine regulations, in case of the existence of a contagious or an infectious disease, is to limit the spread of such disease to the fewest possible number of persons, by isolating the persons already affected or exposed from communication with all others, so far as possible. *Jew Ho v. Williamson* (U. S.) 103 Fed. 10, 20.

Under the police power it is competent for the Legislature to regulate the practice of medicine, and to prescribe the qualifications necessary for a person to possess in order to engage in the practice of medicine and surgery. *People v. Phippin*, 37 N. W. 888, 894, 70 Mich. 6; *State v. Currens*, 87 N. W. 561, 562, 111 Wis. 431, 56 L. R. A. 252; *Logan v. State*, 5 Tex. App. 306, 314.

It is within the police power of the state to prohibit the sale of adulterated milk.

though there be no fraud or deceit in the sale, and the adulteration in certain cases be harmless. *State v. Schlenker*, 84 N. W. 698, 699, 112 Iowa, 642, 51 L. R. A. 347, 84 Am. St. Rep. 360.

Act March 31, 1891, St. 1891, p. 223, authorizing the creation of sanitary districts throughout the state, and empowering such districts to issue bonds for the construction of sewers and drains, is within the police power. *Woodward v. Fruitvale Sanitary Dist.*, 34 Pac. 239, 242, 99 Cal. 554.

The municipal authorities have the right to prescribe the terms upon which its streets may be used for the purpose of removal of carcasses of dead animals, and may confine such removal to a single agency subject to their control. *River Rendering Co. v. Behr*, 7 Mo. App. 345, 353.

Laws 1895, c. 823, § 1, prohibiting barbers from carrying on their business on Sunday, is within the police powers of the Legislature, which include the enactment of legislation adapted to the promotion of health by enforcing the observance of a day of rest. *People v. Havnor*, 43 N. E. 541, 542, 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707.

An act empowering the aldermen of a city to abate a privy vault, regardless of the manner in which it is kept, where situate upon premises abutting on a street in which there is a sewer, provides for the proper exercise of police power as to subject-matter. *Harrington v. Board of Aldermen of City of Providence*, 38 Atl. 1, 2, 20 R. I. 233, 38 L. R. A. 305.

It is difficult to define, or with precision to describe, the "police power." We may say that it extends to the protection of the public health, but *Sess. Laws 1899, c. 103*, singling out workmen in underground mines and smelters, and restricting them as to the number of hours they shall work, is not a valid exercise of the police power to protect the public health, since the health of the miner alone, and not the public at large, is its object. *In re Morgan*, 58 Pac. 1071, 1074, 26 Colo. 415, 47 L. R. A. 52, 77 Am. St. Rep. 269.

An act prohibiting the deposit of sawdust in a lake and its tributaries, which is the source of water supply for a city, is valid as an act under the police power of the state. *State v. Griffin*, 39 Atl. 260, 69 N. H. 1, 41 L. R. A. 177, 76 Am. St. Rep. 139.

Rev. St. § 1407, authorizes the State Board of Health to take general supervision over the public health; section 1408 authorizes it to make regulations to preserve the public health; and sections 1409 and 1409b authorizes it to make rules and regulations to guard against contagious diseases. Held, that a rule by the board of health to the

effect that no child shall be allowed to attend a school without a certificate of vaccination, in the absence of a statute making vaccination compulsory, cannot, under the statute cited, be upheld as a valid exercise of the police power. *State v. Burdge*, 70 N. W. 347, 349, 95 Wis. 390, 37 L. R. A. 157, 60 Am. St. Rep. 123.

#### Public morals.

Police power is generally held to extend to all the regulations affecting the health, good order, morals, peace, and safety of society, and includes the right to regulate and control the manufacture and sale of intoxicating liquors. *State v. Hodgson*, 28 Atl. 1089, 1091, 66 Vt. 134; *City of Seattle v. Clark*, 69 Pac. 407, 410, 28 Wash. 717; *Territory v. Guyott*, 22 Pac. 134, 135, 9 Mont. 46; *Territory v. O'Conner*, 41 N. W. 746, 750, 5 Dak. 397, 3 L. R. A. 355; *Commonwealth v. Intoxicating Liquors*, 52 N. E. 389, 172 Mass. 311.

The police power is signally exercised in legislation designed to promote popular education, to protect the public health and morals, to punish and prevent crime, to alleviate and prevent pauperism, and especially to diminish and prevent the demoralization and impoverishment and the numberless vices and miseries which are the sure concomitants of a free traffic in intoxicating liquors. *State v. Fitzpatrick*, 11 Atl. 767, 769, 16 R. I. 54.

A city ordinance making it an offense to indecently expose the person, without reference to the intent which accompanies the act, is a valid exercise of the police power of the city. *City of Grand Rapids v. Bateman*, 53 N. W. 6, 7, 93 Mich. 135.

Laws authorizing ordinances to restrain and punish prostitutes are within the police power. *Dunn v. Commonwealth*, 49 S. W. 813, 105 Ky. 834, 43 L. R. A. 701, 88 Am. St. Rep. 344.

#### Public safety.

"In virtue of the police power the state may prescribe regulations contributing to the comfort, safety, and health of the passengers, the protection of the public at highway crossings, the security of the owners of adjacent property by requiring railroad tracks to be fenced, and such appliances to be annexed to the engine as shall prevent the communication of fire." *Pearsall v. Great Northern Ry. Co.*, 16 Sup. Ct. 705, 710, 161 U. S. 646, 40 L. Ed. 838.

An ordinance regulating the height of billboards is within the police power. *City of Rochester v. West*, 51 N. Y. Supp. 482, 484, 29 App. Div. 125.

An ordinance declaring that a passenger car operated by trolley or electric power in



the streets of a city shall have suitable and proper fenders on such cars to prevent accidents is valid as a reasonable exercise of police power of the city, authorized by its charter to make ordinances to regulate the public streets, and the running of locomotive engines and railroad cars therein. *Cape May, D. B. & S. P. R. Co. v. City of Cape May*, 36 Atl. 678, 679, 59 N. J. Law, 404, 38 L. R. A. 657.

"The provision of the city charter of the city of Omaha, authorizing the city by ordinance to require railroads to construct and keep in repair viaducts over streets therein crossed by their tracks, is a valid exercise of the police power." *Chicago, B. & Q. R. Co. v. State*, 66 N. W. 624, 628, 47 Neb. 549, 41 L. R. A. 481, 53 Am. St. Rep. 557.

A requirement that telephone wires in a city be placed underground is within the police power. *City of Geneva v. Geneva Telephone Co.*, 62 N. Y. Supp. 172, 175, 30 Misc. Rep. 236.

That the police power should be applied to railroad companies is necessary and just, as the tremendous forces brought into action in running a railroad car render it essential that every precaution should be taken against accidents by collision, not with other trains only, but with animals. *Minneapolis & St. L. R. Co. v. Beckwith*, 9 Sup. Ct. 207, 209, 129 U. S. 29, 32 L. Ed. 585.

#### **Public welfare.**

The act authorizing a license fee to be imposed upon and collected of the owners or keepers of dogs is within the police power. *Cole v. Hall*, 103 Ill. 31.

Unless restrained by its Constitution, a state may, in the exercise of its police power, provide by contract that certain persons shall have the exclusive privilege of supplying the common schools of the state with text-books of a specified character and price. *Bancroft v. Thayer* (U. S.) 2 Fed. Cas. 580, 581.

An act prohibiting the use of the national flag for commercial purposes and as an advertising medium, and imposing a penalty for its violation, is not a proper exercise of the police power of the state. *Ruhrstrat v. People*, 57 N. E. 41, 45, 185 Ill. 133, 49 L. R. A. 181, 76 Am. St. Rep. 30.

The same "police power," loosely defined and of uncertain limits, which would permit the Legislature to authorize a city to compel the owner of a lot abutting on a street to defray a portion of the expense of improving the street by assessment on the property, would permit also a street-paving assessment. *Adams v. Fisher*, 63 Tex. 651, 656.

Laws 1896, c. 931, prohibiting the sale of scrub brushes made in another state by

convict labor, is not within the police power of a state. *People v. Hawkins*, 47 N. Y. Supp. 56, 59, 20 App. Div. 494.

The prohibition of the wasteful use of natural gas is within the police power. *Townsend v. State*, 47 N. E. 19, 22, 147 Ind. 624, 37 L. R. A. 204, 62 Am. St. Rep. 477.

A law prohibiting the grazing and herding of sheep within two miles of inhabited dwellings was a valid exercise of the police power of the state. *Sweet v. Ballentine* (Idaho) 69 Pac. 995, 996.

Game laws are within the police power. *In re Race Horse* (U. S.) 70 Fed. 598, 609.

A statute prohibiting the bringing into the state of cattle affected with certain diseases is a legitimate exercise of the police power, and not an intrusion of the interstate commerce clause of the federal Constitution. *Rouse v. Youard*, 41 Pac. 426, 430, 1 Kan. App. 270.

The statute enacted for the protection of cattle, having for its object the protection of the cattle of the state from the disease known as "Texas splenic," or "Spanish fever," is justified as a police regulation, and therefore not in contravention with the federal Constitution. *Missouri Pac. R. Co. v. Finley*, 16 Pac. 951, 954, 38 Kan. 550.

The placing of a fence on private property on which is displayed an advertisement is not subject to the police power of the state, and Greater New York Charter (Laws 1897, p. 212, c. 378, § 610), giving the park board power to establish rules and to enact ordinances for the protection of public places, conferred no power on the board to adopt an ordinance prohibiting the posting of bills or advertising on property adjacent to public parks. *People v. Green*, 83 N. Y. Supp. 460, 463, 85 App. Div. 400.

#### **Regulation of occupations.**

The state may, in the exercise of its police power, legislate concerning many matters which, but for the authority in this respect, would be unauthorized, and Acts March 30, 1889, and April 30, 1895, prohibiting combinations in the restraint of trade, are within and a proper exercise of such power. *Waters-Pierce Oil Co. v. State*, 44 S. W. 936, 940, 19 Tex. Civ. App. 1.

Laws 1899, c. 225, regulating and defining the business of commission merchants or persons selling agricultural products and farm produce on commission, is a valid exercise of the police power of the state. *State v. Wagener*, 80 N. W. 633, 635, 77 Minn. 483, 46 L. R. A. 442, 77 Am. St. Rep. 681.

It is within the police power of a state to prohibit, as detrimental to the general welfare, contracts for the sale of shares of

stock in corporations or associations, on margins, to be delivered at a future day. *Parker v. Otis*, 62 Pac. 571, 573, 130 Cal. 322, 92 Am. St. Rep. 56.

The police power is very broad and far-reaching, but it does not authorize an act declaring that no female shall be employed in any factory or workshop more than 8 hours in any one day or 48 hours in any one week. *Ritchie v. People*, 40 N. E. 454, 457, 155 Ill. 98, 29 L. R. A. 70, 46 Am. St. Rep. 315.

Pub. Acts 1897, No. 151, prescribing the size of fish nets, and authorizing fish wardens to seize the nets found in use in violation of the law, was a proper exercise of the police power. *Osborn v. Charlevoix Circuit Judge*, 72 N. W. 982, 985, 114 Mich. 655.

It is within the police power of the Legislature to prohibit the malicious erection by an owner or lessee of land of any structure upon it intended to annoy or injure an adjoining proprietor in the use of his property. *Karasek v. Peier*, 61 Pac. 33, 35, 22 Wash. 419, 50 L. R. A. 345.

The requirement of cattle guards at farm crossings falls legitimately within the police power. *Thorpe v. Rutland & B. R. Co.*, 27 Vt. (1 Williams) 140, 149, 62 Am. Dec. 625.

An ordinance prohibiting the suspension of electric wires from or upon the roofs of buildings is within the police power of the city, where the suspension of the wires is extremely dangerous, not only as being liable to originate fires, but as obstructing the extinguishment of fires otherwise originated. *Electric Improvement Co. v. City and County of San Francisco (U. S.)* 45 Fed. 593, 594, 13 L. R. A. 131, 132.

An act regulating the occupation of transient and itinerant merchants is held to be a legitimate exercise of the police power. *Levy v. State*, 68 N. E. 172, 176, 161 Ind. 251.

#### Same—Licensing occupations.

A by-law of a village licensing grocery or victualing shops, and providing for the punishment of any one who should keep any such establishment without a license, is a proper exercise of the police power of the state, which by public charter had been delegated to the village so far as the regulation of such establishments was concerned. *Village of St. Johnsbury v. Thompson*, 9 Atl. 571, 575, 59 Vt. 300, 59 Am. Rep. 731.

*Hurd's Rev. St. 1899*, p. 848, requiring persons, firms, and corporations, in cities of a specified population, who shall own property or maintain a private employment agency for hire, to obtain a license and give bond, fixing a penalty for violating the provisions thereof, is a valid exercise of the police power of the state. *Price v. People*,

61 N. E. 844, 846, 193 Ill. 114, 35 L. R. A. 588, 86 Am. St. Rep. 306.

The requirement of licenses from persons, firms, and corporations, in cities of a specified population, who may maintain and operate a private employment agency, is a valid exercise of police power. *Price v. People*, 61 N. E. 844, 846, 193 Ill. 114, 35 L. R. A. 588, 86 Am. St. Rep. 306.

In the exercise of its police power the General Assembly may provide that any occupation which is the proper subject of the power may not be pursued by the citizen except when authorized by license, issued by public authority, so to do. *Price v. People*, 61 N. E. 844, 846, 193 Ill. 114, 35 L. R. A. 588, 86 Am. St. Rep. 306.

A statute or ordinance restricting the business of hawkers and peddlers, and requiring a license therefor, is within the police power. *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12; *Commonwealth v. Gardner*, 19 Atl. 550, 551, 133 Pa. 284, 7 L. R. A. 666, 19 Am. St. Rep. 645, 25 Wkly. Notes Cas. 462; *State v. Wheelock*, 95 Iowa, 577, 64 N. W. 620, 621, 30 L. R. A. 429, 58 Am. St. Rep. 442.

#### Same—Prevention of fraud.

Laws 1887, c. 81, provided that any person who should buy or sell cotton in the seed in quantity less than that usually baled, and fail to reduce the sale to writing and deliver the same to the nearest justice of the peace, should be guilty of a misdemeanor, but that the act should apply only to certain counties. Held, that the act was a proper exercise of police power. *State v. Moore*, 10 S. E. 143, 144, 104 N. C. 714, 17 Am. St. Rep. 696.

The police power includes the power to regulate a banking business; such as a statute making it criminal for any person doing a banking business to receive deposits, knowing that the bank is insolvent, whereby the deposit is lost to the depositor. *Meadowcroft v. People*, 45 N. E. 303, 304, 163 Ill. 56, 35 L. R. A. 176, 54 Am. St. Rep. 447.

Pub. Laws, c. 652, making it a misdemeanor to sell or give a stamp or coupon, in connection with the sale of property, which shall entitle the purchaser to receive from some person other than the seller any article of merchandise other than that actually sold, and for such other person to deliver the extra article of merchandise on presentation of the stamp or coupon, is not a valid exercise of the police power, as the transaction sought to be prohibited is not a lottery, and its prohibition not in furtherance of the public morals, health, or safety. *State v. Dalton*, 46 Atl. 234, 235, 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818.

It is not a constitutional exercise of the legislative power, under the "police power" of the state, to deprive a citizen of the right to carry on the business of banking by discounting negotiable paper, buying and selling exchange, receiving deposits, and loaning money on personal security, and to confer such privilege exclusively on corporations organized under an act of the Legislature; such business of banking not being necessarily injurious to the community. For under the police power it is not competent for the state to prohibit a citizen from carrying on any trade, occupation, or business that is not offensive to the community or injurious to society. The business may be regulated, but not prohibited. *State v. Scougal*, 51 N. W. 858, 862, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756.

#### **Same—Restrictions as to place.**

The police power only extends to the regulation of necessary pursuits of man, so that they shall not become, in their mode of exercise, unhealthy, noisome, dangerous, or otherwise destructive or injurious. It does not extend to the destruction of, or drive to inconvenient and unprofitable localities, necessary or useful occupations. And hence an ordinance making it an offense for any one to carry on a laundry within the habitable portion of a city is not sustainable under the police power. *Stockton Laundry Case* (U. S.) 26 Fed. 611, 613.

The Legislature, under the police power, may certainly regulate, or even prohibit, the carrying on of any business in such manner and in such place as to become dangerous or detrimental to the health, morals, or good order of the community. *People v. Rosenberg*, 34 N. E. 285, 286, 138 N. Y. 415.

Laws 1892, c. 646, providing that no person shall carry on the business of fat rendering or bone boiling, etc., within the limits of any incorporated city, or within three miles of such limits, does not constitute a deprivation of life, liberty, or property without due process of law, but is rather a valid exercise of the police power of the state. *People v. Rosenberg*, 22 N. Y. Supp. 56, 58, 67 Hun, 52.

#### **Taxing power distinguished.**

The police power of the state is a very different one from the taxing power, in its essential principles, though the taxing power, when properly exercised, may indirectly tend to reach the end sought by the other in some cases. *Phillips v. Lewis*, 3 Tenn. Cas. 231, 233.

#### **POLICE PURPOSES.**

The term "police purposes," as used in Const. art. 10, § 7, providing that township trustees should have such power of local taxation for police purposes as might be

prescribed by law, should be construed to include the purpose of constructing ditches, drains, and water courses which are demanded by or are conducive to the public health, convenience, or welfare. Police purposes ordinarily arise on the administration of the affairs of cities and towns, in the exercise of their power and duty to promote the public health, convenience, and welfare. *Sessions v. Crunkilton*, 20 Ohio St. 349, 358.

Under a constitutional provision authorizing the commissioners of counties to levy taxes "for police purposes," it is held that purposes which are demanded by or are conducive to public health, convenience, or welfare are police purposes. *Champaign County Com'rs v. Church*, 57 N. E. 50, 53, 62 Ohio St. 318, 48 L. R. A. 738, 78 Am. St. Rep. 718.

#### **POLICE REGULATIONS.**

See, also, "Police Power."

Police regulations are such provisions of law as are designed to protect the lives, limbs, health, comfort, and quiet of citizens, and secure them in the enjoyment of their property, which can be invoked only for an interference with one's dominion over his own property to prevent such use of it by him, or its continuance in such conditions as would be detrimental to the community. *State ex rel. Haeussler v. Greer*, 78 Mo. 188, 194.

Where a city is given such criminal power as is necessary to insure obedience to police regulations, the words "police regulations" mean such as have reference to health, cleanliness of streets, wharves, lights, watchmen, and the like, or to the commission of acts which, though not criminal under the state law, might properly be made so when committed within the city limits. *Ex parte Bourgeois*, 60 Miss. 663, 671, 45 Am. Rep. 420.

Laws and ordinances relating to the safety, comfort, health, convenience, good order, and general welfare of the inhabitants are styled "police regulations." And such regulations, though they disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury, it is damage without injury, or, in the theory of the law, the owner is compensated for it by sharing in the general benefit which the regulations are intended to secure. *Roanoke Gas Co. v. City of Roanoke*, 14 S. E. 665, 671, 88 Va. 810.

"Police regulations," says Judge Cooley, "must have some reference to the comfort, safety, or welfare of society, and must not, under pretense of regulation, take from a cor-

poration any essential right which its charter confers. In short, they must be police regulations in fact, and not amendments of the charter or curtailment of the corporate franchise." The Legislature may regulate the exercise of a railroad franchise by general laws, but it cannot impair its franchise, and the power granted to a company to adjust its tariff of charges is one of those essentials to the enjoyments of its franchise. *Sloan v. Pacific R. Co.*, 61 Mo. 24, 31, 21 Am. Rep. 397.

A police regulation is a regulation enacted by a city to prevent damage to the public or to third persons. There are certain lines of business and certain occupations which require regulation, because of their peculiar character, in order that harm may not come to the public, or that threatened danger may be averted. Where the profession or business is not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever which does not fall within the power of taxation for revenue. A license tax on attorneys is unauthorized as a regulation of the business or profession of practicing law. *City of Sonora v. Curtin*, 70 Pac. 674, 675, 137 Cal. 583.

The term "police regulations" includes laws providing compensation to the owners of animals killed or injured by the cars of any railroad company, and therefore such laws may be imposed on existing corporations without constituting any impairment of the obligation of contracts, or interfering with vested rights. *Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84.

The term "police regulation" applies to regulations of peddling goods. *State v. Rhyne*, 28 S. E. 126, 127, 119 N. C. 905.

A statute prohibiting the running of freight trains on Sunday is held to be a legitimate police regulation. *Hennington v. State*, 17 S. E. 1009, 1010, 90 Ga. 396.

The term "police regulation" includes the twenty-ninth section of the revenue act of March 2, 1867, which makes it a misdemeanor to mix certain oils for sale, or to sell or offer to sell such mixtures. Such statute does not fall within the power of Congress over the states, and only applies where the Legislative power of Congress extends to domestic police regulations, as in the territories. *United States v. De Witt*, 76 U. S. (9 Wall.) 41, 19 L. Ed. 593.

A license fee does not lose its character as such, and cease to be sustainable as a police regulation, because called a tax in the legislation which permits it. *Levy v. State*, 68 N. E. 172, 176, 161 Ind. 251.

#### POLICE STATION.

The words "police station" or "station," as used in the statutory provisions relating

to police matrons, shall mean any place in which persons are temporarily confined under arrest. *Rev. Laws Mass. 1902*, p. 944, c. 108, § 35.

In the act relating to police matrons, the expression "police station" shall include any place where persons are temporarily confined under arrest. *Comp. Laws Mich. 1897*, § 3497.

#### POLICE SURGEON.

A police surgeon is not a clerk or employé, within the meaning of New York City Charter 1873, c. 755, § 2, giving the police board the power to fix the salaries and compensation of all clerks appointed by such board, and of all employés whom they may be authorized to appoint, but he is an officer, within the meaning of the charter. *People v. Board of Police*, 75 N. Y. 38, 41.

#### POLICEMAN.

See "Special Policeman."

The word "policemen" may be used as a generic term, and when so used may equally apply to any member of the police force, whatever his rank or station; but this can only be true when the word is used alone as a generic term, and as descriptive of the whole police force—officers as well as men—and not when officers and men are carefully segregated from each other in meaning by apt terms of distinctive designation. Under sections of a city charter relating to the employment and discharge of policemen, the provision that policemen may be appointed for a probationary term does not apply to the office of chief of police. *State ex rel. Crow v. Vallins*, 140 Mo. 523, 532, 41 S. W. 887, 888.

The term "policemen" is the legal equivalent of "watchman" at common law. *State v. Evans*, 61 S. W. 590, 593, 161 Mo. 95, 84 Am. St. Rep. 669.

"A policeman, to speak plainly, is only a citizen dressed in blue clothes and brass buttons, with no right or power to arrest without a warrant which all his fellow citizens do not possess; and he should be taught by those in authority over him not to forget this. The citizens have not made him their master, but only their honorable servant, with no power to arrest any one except as provided by law. The only exception to the foregoing is that where a felony has in fact been committed, although not in his view, a policeman may, without a warrant, arrest any person he has reasonable ground for believing to be the one who committed it, whereas a private citizen may arrest in such a case only on an absolute certainty, at the hazard of being sued for damages for false imprisonment if he arrests the wrong person." *People v. Glennon*, 74 N. Y. Supp. 794, 797, 37 Misc. Rep. 1.

"Policemen," as used in a borough charter authorizing the warden and burgesses to appoint such number of policemen, not exceeding 25, as they see fit, one of whom shall be designated as chief of police, is intended to apply not so much to naming an office, as to defining the appointment, tenure of office, specific powers, and removal of all members of the police establishment, including the person appointed to the office of chief of police. All members of the force are called "policemen." This is a name adopted as common to all in defining powers common to all. Each member of the force holds an office, because the powers conferred can only be exercised by a public officer. *State v. Kennedy*, 37 Atl. 503, 505, 69 Conn. 220.

Pen. Code, art. 6, regulating the keeping and bearing of deadly weapons, makes it the duty of all sheriffs, constables, marshals, their deputies, and all policemen and other peace officers, to enforce the act. Held, that a policeman is an officer, within the meaning of that word as used in article 448 of the Penal Code, which defines aggravated assaults. *Sanner v. State*, 2 Tex. App. 458, 459.

## POLICY.

See "Permanent Policy"; "Public Policy."

**As a game.**

See "Policy Playing."

**As insurance policy.**

See "Policy of Insurance."

## POLICY HOLDER.

See "Persistent Policy Holder."

The policy holder is the person on whose life a policy of insurance is effected. *Rev. St. Tex.* 1895, art. 3096a.

## POLICY OF INSURANCE.

See "Blanket Policy"; "Cash Policy"; "Endowment Insurance"; "Interest Policy"; "Life Policy"; "Mixed Policy"; "Nonforfeiting Policy"; "Open Policy"; "Participating Policy"; "Running Policy"; "Specific Policy"; "Stock Policy"; "Time Policy"; "Valued Policy"; "Voyage Policy"; "Wager Policy."

See "All Policies Concurrent."

In the parlance of the business of insurance, ordinarily the contract is called a "policy." *State v. Pittsburgh, C., C. & St. L. Ry. Co.*, 67 N. E. 93, 96, 68 Ohio St. 9, 64 L. R. A. 405, 96 Am. St. Rep. 625.

"Policy," or, more fully, "policy of insurance," is the name by which the formal written instrument in which a contract of insurance is generally embodied is known."

*Corporation of London Assurance v. Pater-son*, 32 S. E. 650, 655, 106 Ga. 538.

A contract of insurance is usually in writing, and is termed a "policy." *Hicks v. British-American Assur. Co.*, 43 N. Y. Supp. 623, 624, 13 App. Div. 444.

A policy is the written instrument containing the consideration, terms, and stipulations of the contract of indemnity between the underwriter and the insured. *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148, 163.

The term "policies," as used in a contract between insurance companies wherein one agreed "to pay all losses on policies issued by A. (the other company) upon risks in the state of New York only," means the instruments in which the contract of insurance are embodied. *London & L. Fire Ins. Co. v. Lycoming Ins. Co.*, 105 Pa. 424, 430.

The written instrument in which a contract of insurance is set forth is called a "policy of insurance." *Civ. Code Cal.* 1903, § 2586; *Civ. Code S. D.* 1903, § 1837; *Civ. Code Mont.* 1895, § 3450.

An insurance policy is the written evidence of an agreement by the terms of which the insurer, in consideration of a stipulated premium, undertakes to indemnify the insured against such damage as he may sustain by reason of the injury to, or destruction of, the subject-matter by means of the risk insured against. *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Insurance Co.*, 55 Pac. 435, 438, 34 Or. 228.

A policy of insurance is a contract in writing by which the insurer, for a reasonable compensation, engages that certain property of the insured, specified in the policy, shall sustain no losses or damages from any of the perils enumerated in the contract between the parties. *Insurance Co. of North America v. Jones (Pa.)* 2 Bin. 547, 561.

A policy of insurance is a voluntary contract, and the insurers have the right to impose conditions therein. If the insured objects to any condition, he is under no obligations to make the contract; but, if he voluntarily enters into it, he will be bound thereby. *Brown v. United States Casualty Co.* (U. S.) 95 Fed. 935, 936.

A policy of insurance is a mere incident of commercial intercourse. In *Paul v. Virginia*, 75 U. S. (8 Wall.) 163, 19 L. Ed. 357, Mr. Justice Field said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between corporations and the assured for consideration paid by the latter. These contracts are not articles of commerce, in the proper meaning of the word." *Hooper v. People of California*, 15 Sup. Ct. 207, 210, 155 U. S. 648, 39 L. Ed. 297.

A policy of insurance is a contract in writing of such nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. *Liverpool & L. & G. Ins. Co. v. T. M. Richardson Lumber Co.*, 69 Pac. 938, 949, 11 Okl. 585.

A policy of life insurance is in the nature of a testament, and, although not a testament, it is, like the provisions of a will, to be liberally construed in favor of the ones who may naturally be presumed to have been special objects of bounty. It is to be interpreted as the insured understood it if all points of the contract, taken together, will admit of such an instruction. *McNally v. Metropolitan Life Ins. Co.*, 49 Atl. 299, 301, 199 Pa. 481.

"Policies of fire insurance" are defined to be "contracts whereby the insurers undertake, for a stipulated sum, to indemnify the insured against loss or damage by fire in respect to the property covered by the policy during a prescribed period of time, to an amount not exceeding the sum specified in the written contract." *Lycoming Fire Ins. Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473 (citing Ang. Ins. 43).

"A policy of insurance is a personal contract by which the insurer undertakes to indemnify the party named in the writing against loss in a manner and subject to the conditions therein described. The obligation does not pass with the insured property to an assignee or purchaser thereof without the compliance of the insurer." *Lett v. Guardian Fire Ins. Co.*, 25 N. E. 1088, 1089, 125 N. Y. 82.

A policy of life insurance is not, like a fire or marine policy, a mere contract of indemnity, but a contract to pay a certain sum of money in the event of death. *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192, 16 Wkly. Notes Cas. 181. Yet the insured is not entitled to his action on the policy unless he has, as the basis of his contract, an interest in the subject-matter insured. If it were not so, the whole system of life insurance would become a mere cover for the wickedest speculation by wager in human life, and thus prove the occasion for the commission of the grossest crimes. *Appeal of Corson*, 113 Pa. 438, 443, 6 Atl. 213, 214, 57 Am. Rep. 479.

A policy of marine insurance is a contract by which, for a consideration stipulated to be paid by one interested in a ship, freight, or cargo subject to marine risks, another undertakes to indemnify him against some or all of those risks during a certain voyage or period. *Matheson v. Equitable Marine Ins. Co.*, 118 Mass. 209, 211, 19 Am. Rep. 441.

The expression "policies of insurance," as used in Rev. St. 1889, § 5855, providing that in all suits upon policies of insurance on life hereafter issued it shall be no defense

that the insured committed suicide, applies to policies which cover loss of life from external, violent and accidental means alone, as well as those covering loss of life from usual and natural causes, and the fact that a policy of insurance covering loss of life from external violence or accidental means also contained a provision for indemnity in case of disability not resulting in death does not make it other than a policy of insurance on life. *Logan v. Fidelity & Casualty Co.*, 47 S. W. 948, 949, 146 Mo. 114.

A policy of insurance is a commercial contract based on the usages and customs of trade, expressed in a brief and inartificial form, and in some of its parts in peculiar and technical language, containing numerous stipulations, some of which are comprehended in a few short phrases, and others which arise solely by implication, and are not obvious on the face of the instrument. It cannot be correctly interpreted by regarding only the rules applicable to ordinary written contracts. The intention of the parties, as gathered from the tenor of the policy, is, as in all other cases, to be the guide, by following which a true exposition of the contract can be reached; and this intention cannot be ascertained unless the language used by the parties is construed with reference to the well-known and established practice of all commercial communities, to the particular meaning which is attached by commercial usage to certain words and phrases, to the nature and character of the risk or adventure to which the policy relates, and to the recognized rules of jurisprudence applicable to this species of contract. A warranty by the insured in a policy of insurance that the vessel insured shall be free from capture, seizure, or detention does not include a mutinous taking possession of the vessel by the mariners. *Greene v. Pacific Mut. Ins. Co.*, 91 Mass. (9 Allen) 217, 219.

A policy is but the evidence of a contract of insurance. *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. (5 Fost.) 169, 192.

An insurance policy is the evidence delivered to the insured of the contract of the insurer, and ordinarily of itself constitutes complete evidence of the contract, while the application, although it may modify the contract, is in the nature of defensive evidence intrusted to the insurer for his protection. As a matter of pleading, if the policy is set forth in an action upon it, and compliance with all the conditions precedent recited in it is averred, there is no necessity for referring to the application, and the complaint or declaration is sufficient upon its face. *American Credit Indemnity Co. v. Wood* (U. S.) 73 Fed. 81, 84, 19 O. C. A. 264.

A policy of insurance is an executory contract. *National Life Ins. Co. v. Minch*, 53 N. Y. 144, 151.

A policy of insurance and the premium note given therefor constitute a contract between the company and insured. *Matten v. Lichtenwalner*, 6 Pa. Super. Ct. 575, 577.

A policy of insurance is a contract, and, until the negotiations of the parties have brought them to such a stage that it may fairly be said that they have agreed upon something, no contract exists. *Baldwin v. Pennsylvania Fire Ins. Co.*, 20 Pa. Super. Ct. 238, 243.

A policy of insurance is a mere chose in action, and is not subject to attachment or garnishment. *Grace v. Koch (Tex.)* 1 White & W. Civ. Cas. Ct. App. 600, 602.

#### **Assignability.**

A policy of insurance is a contract of indemnity, personal to the party to whom it is issued, or for whose interest the insurer undertakes to be responsible in case of loss, and cannot be transferred to a third person, so as to be valid in his hands against the insurer, without the insurer's consent. *Kase v. Hartford Fire Ins. Co.*, 32 Atl. 1057, 58 N. J. Law (29 Vroom) 34.

A policy of insurance is a mere chose in action. It is nonnegotiable. It is not assignable at common law, so that the assignee can sue in his own name, though it may be payable to the insured, and his assigns. Still, if a loss happens, an equitable holder of the policy must sue in the name of the original insured. *Powers v. New England Fire Ins. Co.*, 38 Atl. 148, 149, 69 Vt. 494.

A policy of insurance against loss by fire is a personal contract of indemnity, and where a policy provides that it shall be void if any change take place in the interest, title, or possession of the property by legal process or voluntary act of the insured, a contract for the sale of the premises is a breach of the condition, and renders the policy void. *William Skinner & Sons' Shipbuilding & Dry Dock Co. v. Houghton*, 48 Atl. 85, 87, 92 Md. 68, 84 Am. St. Rep. 485.

A policy of life insurance is a mere chose in action for the payment of money, and an equitable assignment or a pledge of it may be made by parol. *Evans v. Bulman*, 46 Atl. 315, 316, 91 Md. 84.

#### **As an engagement.**

See "Engagement."

#### **Necessity of writing.**

"A policy of insurance is a mercantile contract having its origin in, and deriving its incidents from, the usages and laws of commercial nations. In many of the countries of Europe the contract is required to be in writing by positive ordinances, which set forth minutely the circumstances and stipu-

lations which it ought to express. The same is true of marine insurances in great Britain, a written policy being required by the stamp act (35 Geo. III, c. 63). Such is also the usage in different countries, and, indeed, the very term 'policy' imports that the party insured holds a written instrument to which that name has been given. In this state we have no positive law on the subject, and there is nothing in the nature of insurance which requires written evidence of the contract." *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, 317.

In the absence of any statutory provision to the contrary, a parol contract to insure is valid. *Phoenix Ins. Co. of Hartford v. Ireland*, 58 Pac. 1024, 1025, 9 Kan. App. 644.

A direction by a principal to his agent to procure a policy of insurance meant a written policy, and not a verbal contract, though such a contract might possibly be a valid one. *Manny v. Dunlap (U. S.)* 16 Fed. Cas. 658.

#### **As personal property.**

See "Personal Property."

### **POLICY OF LAW.**

The term "interest or policy of law," as used in Act April 15, 1869, providing that no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding, means the interest or policy of the law which before that time excluded parties from testifying in their own suits, or where they had an interest in the subject-matter in controversy, and does not include the public policy which prevents husband or wife from proving nonaccess. *Tioga County v. South Creek Tp.*, 75 Pa. (25 P. F. Smith) 433, 437.

#### **Public policy synonymous.**

The term "public policy" is equivalent to the "policy of the law." It is applicable to the spirit as well as the letter. Whatever tends to injustice of operation, restraint of liberty, commerce, and natural or legal right; whatever tends to the obstruction of justice or to the violation of a statute; and whatever is against good morals,—when made the object of a contract, is against public policy, and therefore void and not susceptible of enforcement. *Billingsley v. Clelland*, 41 W. Va. 234, 244, 23 S. E. 812, 815.

### **POLICY PLAYING.**

The term "policy" is well understood as meaning a particular kind of game played in a particular kind of way. *State v. Wilkerson*, 70 S. W. 478, 480, 170 Mo. 184.

The term "policy playing" is of recent origin, and "policy" is defined in Webster's Dictionary, when used as a noun, as a method of gambling by betting as to what number will be drawn in a lottery. *State v. Carpenter*, 22 Atl. 497, 498, 60 Conn. 97.

Playing policy is a method of gambling. *State v. Flint*, 28 Atl. 28, 63 Conn. 248 (citing *State v. Carpenter*, 60 Conn. 97, 102, 22 Atl. 497).

"Playing policy" is used to designate a gambling game which is operated by the sale of certificates which entitle the holder thereof to select three numbers. A large number of numbers are placed in a box, and three numbers are drawn therefrom, and the certificate holder who holds the certificate for such numbers receives a prize in money much larger than that paid for the certificate. *State v. Kansas Mercantile Ass'n*, 25 Pac. 984, 45 Kan. 351, 11 L. R. A. 430, 23 Am. St. Rep. 727.

#### As a lottery.

Policy playing, as described by a witness as the payment of money on the selection of certain numbers, which, if drawn, entitled the person playing to a much larger sum, is a lottery, within the meaning of Rev. St. p. 667, § 23, authorizing a purchaser of an interest in a lottery to recover double the sum paid. *Wilkinson v. Gill*, 74 N. Y. 63, 67, 30 Am. Rep. 264.

In holding that mere evidence of playing the game of policy was not evidence of a lottery, the court says: "We take judicial notice of the ordinary meaning of the words in the English language, but we do not take judicial notice of the slang used among gamblers. I have read in the newspapers of 'playing policy,' but I am glad to say that I do not know what the expression means, and have no knowledge which enables me to conclude whether or not it is playing at a game of chance." *State v. Russell*, 17 Mo. App. 16, 18.

Judicial notice will not be taken that a policy game is a species of lottery. *State v. Sellner*, 17 Mo. App. 39.

#### POLICY SHOP.

Pool selling does not constitute a lottery or a policy or bucket shop, within the meaning of a municipal ordinance prohibiting the keeping of such establishments. *People v. Reilly*, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47.

#### POLICY TICKETS.

Policy tickets are included in the term "lottery tickets." *Boylard v. State*, 16 Atl. 132, 133, 69 Md. 511.

## POLITICAL

The word "political" is defined by Bouvier to be pertaining to policy or the administration of government. *People v. Morgan*, 90 Ill. 558, 563.

The word "political," in its higher and true sense, means that which pertains to the government of a nation. In this sense, it includes the entire system of its laws—constitutional and statutory. In the fundamental law, the people first establish the framework of their political system. They establish the limitations and boundaries of power, and those principles which are to stand as permanent guides for the future action of the government. Within the limits thus established, the subsequent policies of the nation are regulated by its laws. The executive, as a branch of the legislative department, had a voice in determining what these laws shall be. And if it is proper to apply the word "political" to any department of the government, the Legislature is emphatically the political department. The executive, as such, only executes the policies of the nation; that is, he executes the laws. Undoubtedly the Constitution and laws do in many instances trust matters to the discretion of the executive. In such instances no other department can control the exercise of that discretion, but all are bound by it. *In re Kemp*, 16 Wis. 359, 396.

#### POLITICAL ACTION.

The fact that the determination of an action may have a political effect, and in that sense may effect a political object, does not make the controversy a political action; and the validity of the act of the Legislature redistricting the state into the various election districts for representatives, state senators, and assemblymen may be properly contested in the courts. *State v. Cunningham*, 53 N. W. 35, 52, 83 Wis. 90, 17 L. R. A. 145, 35 Am. St. Rep. 27.

#### POLITICAL CHARACTER.

"Political character," as used in Rev. St. 1879, § 5493, providing that a ballot shall not bear on it any device whatever except the names of the persons and designation of the offices to be filled, and that each ballot may bear a plain written or printed caption thereon, expressing its political character, includes independent candidates, as well as those who are the nominees of the regular party organizations. *Shields v. McGregor*, 4 S. W. 266, 268, 91 Mo. 534.

#### POLITICAL COMMITTEE.

In statutes relative to elections, the term "political committee" shall apply only to a



committee elected in pursuance of the chapter relative to elections. *Rev. Laws Mass. 1902, p. 104, c. 11, § 1.*

### POLITICAL CONVENTION.

In statutes relative to elections, the term "political conventions" shall apply only to a convention called and held in pursuance of the chapter relative to elections. *Rev. Laws Mass. 1902, p. 104, c. 11, § 1.*

### POLITICAL CORPORATION.

A political corporation is one which has principally for its object the administration of government, or to which the powers of government, or a part of such powers, have been delegated. It does not depend upon the magnitude or variety of the subjects over which power is granted by the Legislature, nor does its character as a political corporation depend on how much of the authority vested in the corporation is exercised directly by the people, and how much through a committee or commission. *Auryansen v. Kackensack Imp. Commission, 45 N. J. Law (18 Vroom) 113, 115.*

A political corporation is a public corporation created by the government for political purpose, and having subordinate and local powers of legislation. It is synonymous with municipal or public corporation. *Curry v. District Tp. of Sioux City, 17 N. W. 191, 192, 62 Iowa, 102 (cited in Cook v. Port of Portland, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533).*

The term "political corporation" is synonymous with the term "municipal corporations" or "public corporations." It is often used to signify a community clothed with extensive civil authority. *Winspear v. Holman Dist. Tp., 37 Iowa, 542, 544.*

A "political corporation" is defined by *Civ. Code, art. 429*, as one which has principally for its object the administration of a portion of the state to which a part of the powers of the government is delegated, and a sewerage and water board is such a corporation. *State ex rel. Saunders v. Kohnke, 33 South. 793, 795, 109 La. 838.*

### POLITICAL DISCRETION.

"Political discretion" embraces, combines, and considers all circumstances, events, and projects, foreign or domestic, that affect the national interest. *Wynehamer v. People, 2 Parker, Cr. R. 377, 398.*

### POLITICAL DIVISION.

In *Lydecker v. Englewood Tp. Drainage and Water Com'rs, 41 N. J. Law (12 Vroom) 157*, Mr. Justice Dixon thus states the distinc-

tive marks of political divisions: "That they embrace a certain territory and its inhabitants, organized for the public advantage, and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions; and that to the electors residing within each is, to some extent, committed the power of local government, to be wielded either mediately or immediately within their territory for the pecuniary benefit of the people there residing." *Allison v. Corker, 52 Atl. 362, 365, 67 N. J. Law, 596, 60 L. R. A. 564.*

A district composed of all or part of a township, with its inhabitants, set off for the purpose of lighting its public streets, is a political division, in the exercise of a governmental function to which the power to raise money by a general tax may be granted by the Legislature. *Smith v. Howell, 38 Atl. 180, 60 N. J. Law, 384.*

### POLITICAL OCCURRENCES.

"Political occurrences," as used in a charter party providing for demurrage for detention of the vessel by default of the charterer, excepting detentions caused by political occurrences, does not include a political occurrence which prevented the charterer from procuring a cargo, but did not prevent him from loading any cargo he might procure. *Sixteen Hundred Tons of Nitrate of Soda v. McLeod, 61 Fed. 849, 854, 10 C. C. A. 115.*

### POLITICAL OFFICE.

Political offices are such as are not connected immediately with the administration of justice, or the execution of the mandates of a superior officer. *Waldo v. Wallace, 12 Ind. 569, 572; Fitzpatrick v. United States (U. S.) 7 Ct. Cl. 290, 293.*

### POLITICAL PARTY.

A political party is a voluntary association of voters who are desirous of promoting a common political end, or carrying out a certain line of public policy. *Schafer v. Whipple, 55 Pac. 180, 181, 25 Colo. 400.*

The Legislature in the primary law not having defined a political party, we must resort to the generally accepted meaning in giving effect to that law. The popular use of that statutory term which we shall adopt is found in the latest edition of Webster's International Dictionary, and is as follows: "A number of persons united in opinion or action, as distinguished from or opposite to the rest of the community or association—especially one of the parts into which a people is divided on questions of public policy." A party consisting of a substantial number of persons having an organization and commit-

tee, and continued to propagate its views, which were different from and opposed to the views of its rival on the claims of both parties, comes within this definition. *Davidson v. Hanson*, 92 N. W. 93, 95, 87 Minn. 211.

Webster defines a party to be a part or portion of a greater number of persons or people of a larger community, or the like, united by some tie, as distinguished from or opposed to the rest. The Century Dictionary describes a party as a company or number of persons ranged on one side, or united in opinion or design, in opposition to others in the community. Burke says that a party is a body of men united for promoting by their joint endeavors the national interest upon some particular principle in which they are all agreed. Sedgwick, in his *Elements of Politics*, says: "By 'parties' I mean political combinations designed for indefinite duration, and having distinctive aims and opinions on some or all of the leading political questions of controversy in the state in which they are formed." A party must have distinctive aims and purposes and be united in opposition to others in the community within which it exists. A body of electors coming together for a single object, and with no continuity of aim or policy, is not authorized to file certificates of nomination under a statute authorizing political parties having cast 2 per cent. of the total vote cast at the last preceding election to file such certificates, though it in fact polled at the last preceding election over 2 per cent. of such vote; and thus a fraction of a political party is not authorized to nominate by certificate, though having polled, under a distinctive title, over 2 per cent. of the largest entire vote cast at the preceding election. *Certificates of Nomination of McKinley Citizens Party*, 6 Pa. Dist. R. 109, 110.

Political parties are voluntary associations for political purposes. They are governed by their own usages, and establish their own rules. Members of such parties may form them, reorganize them, and dissolve them at their will. The voters constituting such party are, indeed, the only body who can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom and liberty of the voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, rules, or doctrines of a political party, or to determine between conflicting claimants' rights growing out of its government. *Davis v. Hambrick*, 58 S. W. 779, 780, 109 Ky. 276.

In statutes relative to elections, the term "political party" shall apply to a party which

at the preceding annual state election polled for Governor at least 3 per cent. of the entire vote cast in the commonwealth for that office. *Rev. Laws Mass. 1902*, p. 104, c. 11, § 1.

A political party, within the meaning of the act relating to the nomination of candidates, is an affiliation of electors representing a political party which at the general election next preceding polled at least 5 per cent. of the entire vote cast in the state, county, precinct, or other electoral district for which the nomination is made for representative in Congress, or which shall present a petition, with the signatures of at least 5 per cent. of the electors of that district, stating their intention to form a new political party, giving the designation thereof. *Ann. Codes & St. Or. 1901*, § 2791.

### POLITICAL POWER.

Political power is the policy of government or its administration, and may be exercised either in the formation or administration of government, or both. Political power embraces all governmental powers and functions, whether exercised by one department or another, or the officers of one or the other. It follows that, if it be a political power, that of itself in no wise militates against its exercise by a person belonging to the judicial department of the government. *People v. Morgan*, 90 Ill. 558, 563.

"Political power," as the term is used in the Bill of Rights, declaring that all political power is inherent in the people, consists of the three great attributes of sovereignty, namely, legislative, executive, and judicial authority. This is all inherent in the people. *Stewart v. Polk County Sup'rs*, 30 Iowa, 9, 18, 1 Am. Rep. 238.

### POLITICAL QUESTION.

It is clearly a political question as to whether or not the proper state authorities shall create an office or shall provide to have it filled, as to how long an incumbent shall hold, and as to the manner in which he shall derive his title to it, with which the courts cannot interfere. *State v. Owens*, 63 Tex. 261, 268.

### POLITICAL RIGHT.

A "political right" is defined by Anderson to be a right exercisable in the administration of government, and Bouvier says: "Political rights consist in the power to participate directly or indirectly in the establishment or management of government." *People v. Barrett*, 67 N. E. 742, 743, 203 Ill. 99, 96 Am. St. Rep. 296.

Political rights are those which may be exercised in the formation or administration

of the government; the term "rights," as used in this definition, being synonymous with "power." *People v. Morgan*, 90 Ill. 558, 563.

Political rights consist in the power to participate directly or indirectly in the establishment or management of government. The elective franchise and the right to hold public office constitute the principal political rights of the citizens of the several states. *People v. Washington*, 36 Cal. 658, 662.

A political right is a right exercisable in the administration of the government. It is the power to participate directly or indirectly in the establishment or management of the government. Such rights are fixed by the Constitution. A court of equity has no jurisdiction to enjoin issuing notice of an election, and certifying the candidates thereat, under a law alleged to be unconstitutional, since that is a matter involving political, and not civil, rights. *Fletcher v. Tuttle*, 37 N. E. 683, 686, 151 Ill. 41, 25 L. R. A. 143, 42 Am. St. Rep. 220.

#### POLITICAL STATUS.

Lord Westbury, in *Udney v. Udney*, L. R. 1 H. L. Sc. 441, said: "The law of England and of almost all civilized countries ascribes to each individual at his birth two distinct legal states or conditions—one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status." *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 459, 169 U. S. 649, 42 L. Ed. 890.

#### POLL

See "Challenge to the Polls"; "Votes Polled."

"Poll" means the number or aggregate of heads—a list or register of heads or individuals who may vote in an election—so that a poll includes all who actually cast their votes at the election, those who stay away not being counted. *Citizens and Taxpayers of De Soto Parish v. Williams*, 21 South. 647, 649, 49 La. Ann. 422, 37 L. R. A. 761.

#### POLL BOOK.

Any poll book, see "Any."

#### POLL TAX.

See, also, "Capitation Tax."

Poll tax, as known in the legislative history of Alabama, is a tax upon the male inhabitants of a designated age for the maintenance of the public schools of the county in which it is levied and collected. *Southern Ry. Co. v. St. Clair County*, 27 South. 23, 25, 124 Ala. 491.

The term "poll tax," within the meaning of the constitutional provision prohibiting poll taxes, does not include compulsory labor imposed by statute upon persons residing in the several election districts of a county for the purpose of keeping the roads in repair, and therefore such statute is constitutional. *Short v. State*, 81 Atl. 322, 80 Md. 392, 29 L. R. A. 404.

A poll tax is not a tax on property, but is a capitation tax; that is, a specific sum levied upon each person. *People v. Ames*, 51 Pac. 426, 428, 24 Colo. 422.

The poll tax is a tax assessed against the party. *Willson v. Cantrell*, 40 S. C. 114, 133, 18 S. E. 517, 524.

The poll tax which is levied and collected in most of the cities of the state under charters similar to that of the plaintiff is closely analogous to, and seems to be to some extent a substitute for, the highway labor tax, or the highway poll tax, as it may be called, which from the earliest times has been levied and assessed upon the inhabitants of townships under general laws. This highway poll tax, although levied and assessed in labor, may be commuted for in money, and is as truly a tax as if, like the road tax assessed on lands, it were levied and assessed in money, but could be commuted for in labor. In at least one instance in the statutes it is styled a "poll tax" (*Gen. St. c. 10, § 15*). *City of Faribault v. Misenor*, 20 Minn. 396, 399 (*Gil. 347, 350*).

A tax is a pecuniary burden imposed for the support of the government, and a law which provides that all able-bodied men and citizens between the ages of 21 and 50 years shall work on the highways, imposes rather a military or jury service than a poll tax. *Leedy v. Town of Bourbon*, 40 N. E. 640, 641, 12 Ind. App. 486.

Revenue Act, § 10, providing for the levy and collection of a capitation tax of \$1 on every person leaving the state by any railroad, stagecoach, or other vehicle engaged in the business of transporting passengers for hire, to be paid by the person or company owning the road, coach, or vehicle, is not a poll tax, within the meaning of Const. art. 2, § 7, limiting the poll tax to \$4 upon all male residents of the state within certain ages. It is more properly a tax upon the

common carrier, regulated by the number of passengers transported. *Ex parte Crandall*, 1 Nev. 294, 313.

## POLLING PLACE.

In statutes relative to elections, the term "polling place" shall apply to a room or place provided by a city or town for an election or caucus. Rev. Laws Mass. 1902, p. 104, c. 11, § 1.

## POLLICITATION.

A pollicitation is, in the civil law, a sort of contract which arises from a promise made by one party only, without any consent or acceptance by the other. *McCulloch v. Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278, 283.

## POLLUTE.

A finding by the court, on the averment that defendants had deposited culm, muck, and dirt in a stream, that defendants had polluted the stream, is but another form of saying that they had deposited culm, muck, and dirt in it, as the bill charged. *Fricke v. Quinn*, 41 A. 737, 738, 188 Pa. 474.

## POLYGAMY.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law the second marriage was always void (2 Kent, Comm. 79), and, from the earliest history of England, polygamy has been treated as an offense against society. After the establishment of the ecclesiastical courts, and until the time of James I, it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offenses against the rights of marriage, just as they were for testamentary causes and the settlement of the estates of deceased persons. By the statute of 1 Jac. I, c. 11, the offense, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted generally, with some modifications, in all the colonies. The practice of polygamy is not within the protection of the constitutional provision guarantying the freedom of religion. *Reynolds v. United States*, 98 U. S. 145, 149, 162, 164, 25 L. Ed. 244.

In defining the offense of polygamy, the statute declares that, "if any person who has

a former husband or wife living marries another person, or continues to cohabit with such second husband or wife, he or she shall," except in cases therein specified, "be deemed guilty of the crime of polygamy." The excepted cases refer to a marriage, after a legal divorce, by one not the guilty cause thereof, and to one innocently contracted under the belief that the former wife or husband is dead, when such wife or husband has been continuously absent, either beyond the sea, or after a voluntary withdrawal, and without being heard from alive for the period of seven years. *State v. Armington*, 25 Minn. 29, 38.

## POLYGAMIST.

Any man is a polygamist or bigamist, who, having previously married one wife, still living, and having another at the time when he presented himself to claim registration as a voter, still maintains that relation to a plurality of wives, although from the date of the passage of the act of March, 1882, until the day he offers to register and vote, he may not, in fact, have cohabited with more than one woman. *Cannon v. United States*, 6 Sup. Ct. 278, 287, 116 U. S. 55, 29 L. Ed. 561 (citing *Murphy v. Ramsey*, 114 U. S. 15, 5 Sup. Ct. 747, 29 L. Ed. 47).

## POND.

See "Private Pond."

"Pond," as defined by Webster, is a confined or stagnant body of fresh water, and it is the body of water which comprises a pond. *Rockland Water Co. v. Camden & R. Water Co.*, 15 Atl. 785, 790, 80 Me. 544, 1 L. R. A. 388.

In respect to title, the law divides natural fresh-water ponds into two classes—the small, which pass by an ordinary grant of land, like brooks and rivers, from which, as conveyable property, they are not distinguished, and the large, which are exempted from the operation of such a grant, for the reasons that stop private ownership at the water's edge of the sea and its estuaries. Tide waters and large ponds are public waters. *Concord Mfg. Co. v. Robertson*, 25 Atl. 718, 719, 66 N. H. 1, 18 L. R. A. 679.

A pond created by a milldam includes the dam, even in judicial phrase. *Jackson v. Vermilyea* (N. Y.) 6 Cow. 677. A finding of the height of water in a pond is equivalent to finding the height of the dam. *Hutchinson v. Chicago & N. W. Ry. Co.*, 37 Wis. 582, 603 (citing *Aken v. Parfrey*, 35 Wis. 249).

The word "pond," in a lease giving the lessee the right to raise a dam as high as the water will rise in a certain pond, cannot be construed to mean the pond made by the dam existing at the time the lease was made, as

such construction would render it inoperative, but was used to designate the place where the flowage might be made; and it was held that the power conferred should be limited only by the barriers to the water around the pond and the premises described. *Smith v. Moodus Water Power Co.*, 35 Conn. 392, 398.

**As natural water course.**

See "Natural Water Course."

**As a designation of boundary.**

Where a pond is used to designate a boundary of land, the land only extends to the water's edge. *State of Indiana v. Milk* (U. S.) 11 Fed. 389, 395.

The term "pond," when used to designate a boundary or land on a natural, non-navigable pond, operates to fix the boundary at the natural shore of the lake, and the owner does not acquire the bed of the pond which is made dry by drainage and the natural action of a river in filling up the pond. *Noyes v. Collins*, 61 N. W. 250, 92 Iowa, 568, 26 L. R. A. 609, 54 Am. St. Rep. 571.

The term "pond" in a deed conveying the portion of a pond included in certain boundaries, includes the land covered by the water. In Co. Litt. 5, it is said: "If a man grant aquam suam, the soil shall not pass, but by the name stagnum, a pool, the water shall pass, and the land also. So gorges and gulf is water and land, and therefore by grant thereof by that name the soil doth pass." *Goodrich v. Eastern R. R.*, 37 N. H. 149, 164.

"Pond," as used in a deed conveying land as being bounded on a pond, which pond is raised to an artificial height in the winter, and allowed to remain at its natural level in the summer, should be construed to mean low-water mark of the pond in its natural state; and hence the deed conveys land to that point, without regard to the fact that it may have been executed in the winter. *Paine v. Woods*, 108 Mass. 160, 169.

Where a lot of land was conveyed and described as bounding on one end "upon a pond," and it appeared that there was a narrow cove or arm of the pond extending from the pond across the lot, and that, if the land conveyed was limited by this cove, the lines would not correspond with those of the adjoining lots—there remaining a portion of land not conveyed between the cove and the pond—it was held that the land granted extended across the cove to the main body of water called the pond. *Nelson v. Butterfield*, 21 Me. (8 Shep.) 220, 229.

**Stream distinguished.**

A controlling distinction between a stream and a pond or lake is that in the one

case the water has a natural motion—a current—while in the other the water is, in its natural state, substantially at rest. *Hardin v. Jordan*, 11 Sup. Ct. 838, 839, 140 U. S. 371, 35 L. Ed. 428; *Trustees of Schools v. Schroll*, 12 N. E. 243, 246, 120 Ill. 509, 60 Am. Rep. 575.

"A body of water half a mile long and a quarter of a mile wide in the broadest part, fed by two streams, which has no current, and the bed of which is shaped like the bowl of a spoon, with a depth of sixteen feet in places, and a sluggish outlet four feet in depth, is a pond or lake, as distinguished from a stream or river." *Gouverneur v. National Ice Co.*, 11 N. Y. Supp. 87, 89, 57 Hun, 474.

## PONE.

See "Writ of Pone."

## PONY.

Though a pony is defined by Webster to be a small horse, the terms "horse" and "pony" are not, in common usage and acceptance, synonymous or convertible terms; but, on the contrary, the term "pony" is used to distinguish from horses in general a peculiar breed, having well-known and strongly marked characteristics. Thus a description in a chattel mortgage of "one pair of clay-bank horses" is not sufficient to describe a yellow pony with some white about him. *Golden v. Cockrill*, 1 Kan. 259, 263, 81 Am. Dec. 510.

## PONY HOMESTEAD.

The exemption provided for by Code 1873, § 2866, that "the following property of every debtor who is the head of a family shall be exempt from levy and sale by virtue of any process whatever under the laws of this state," is generally called a "pony homestead." *Bennett v. Trust Co. of Georgia*, 32 S. E. 625, 626, 106 Ga. 578.

## POOL.

**As a body of water.**

Stagnum (in English, a pool) consists of water and land; and therefore by the name of "stagnum," or a pool, the water and land shall pass also. *Johnson v. Rayner*, 6 Gray, 107, 110 (citing Co. Litt. 5); *Goodrich v. Eastern R. R.*, 37 N. H. 149, 164.

The word "pool" was defined in 1 Smith's Laws, p. 314, which was an act regulating fishery in the Schuylkill river, the first section of which applied to the practice which had grown up of drawing several seines or nets in the same pools or fishing places, as "so much of said river as extends from one

side or bank to the other side or bank thereof, and from the place where seines or nets have been usually thrown in to the place where they have been usually taken out." *Hart v. Hill* (Pa.) 1 Whart. 124, 132.

The words "fishery, pool, or fishing place," as defined in the act of 1808, can only refer to a place on the shore to which a fishery is annexed, and there can be no pool or fishery in reference to fishing by claim of common right on the river. A person thus fishing can be in no sense the owner or possessor of a fishery. There can be no pool or fishing place which is his by any other right, and authority is given to all the inhabitants of the state. *Bennett v. Boggs* (U. S.) 3 Fed. Cas. 221, 225.

A pool or fishing place is defined by the statute to be "from the place or places where seines or nets have been usually thrown into the water to the place or places where they have been usually taken out, or from the place or places where they may be hereafter thrown into the water to the place or places where they may be taken out." *Tinicum Fishing Co. v. Carter*, 61 Pa. (11 P. F. Smith) 21, 36, 100 Am. Dec. 597.

#### **As a combination of stakes.**

See "Auction Pools"; "Combination Pools"; "Mutual Pools."

A pool is a combination of stakes, the money derived from which goes to the winner. *Ex parte Powell*, 66 S. W. 298, 299, 43 Tex. Cr. R. 391; *Commonwealth v. Ferry*, 15 N. E. 484, 489, 146 Mass. 203; *Reilly v. Gray*, 28 N. Y. Supp. 811, 814, 77 Hun, 402.

The term "the pool" is used, in gambling on horse races by means of pools, to designate the amount of money deposited by the various persons betting on their choice of horses or on the field. *James v. State*, 63 Md. 242, 248.

In horse racing, ball games, etc., as defined by the Century Dictionary, a "pool" means the combination of a number of persons, each staking a sum of money on the success of a horse in a race, a contestant in a game, etc.; the money to be divided among the successful betters according to the amount put in by each. It is therefore one of the forms of making bets or wagers on horse races, and comes within the prohibition of Act Feb. 29, 1896, making "unlawful a bet or wager by any ways, means or devices, or the receiving or recording or registering or forwarding, or purporting, or pretending to forward, any money, thing or consideration of value to be bet or wagered upon the result of any trial of speed or power or endurance or skill of animal or beast, which is to take place beyond the limits of the commonwealth." *Lacey v. Palmer*, 24 S. E. 930, 931, 93 Va. 159, 31 L. R. A. 822, 57 Am. St. Rep. 795.

#### **As a game played on a billiard table.**

As billiards, see "Billiards."

Pool is a game played on a billiard table with six pockets (Cent. Dict.); it is one of the various games played on a six-pocket billiard table (Stand. Dict.); and it is treated in Webster's Dictionary and in the Encyclopædia Britannica as a kind of billiards; and hence it is within Code, § 5002, prohibiting any person who keeps a billiard hall from permitting any minor to remain in such hall. *State v. Johnson*, 79 N. W. 62, 108 Iowa, 245.

In an action to recover the purchase price for billiard tables, the defense interposed was that the tables were sold with the knowledge, intent, and purpose on the part of the parties that the same were to be and should be used as implements for gambling, in violation of the statute. To sustain this defense, defendant showed that there were sold in connection with the tables what is called a "pin pool set," and printed rules for playing the pin pool game, and he relied on the rule, which provided, "If a player neglects to claim the pool when he has made it, before the next play, he must wait until his turn comes again, when he may declare pool; but, if another makes pool in the meantime, that other is entitled to it;" and it was claimed that "pool" meant "stakes," and so that the rule contemplated playing for stakes. The court held that the evidence introduced was insufficient to show that the word "pool," as used in the game, necessarily means stakes, and said: "It appears to us to be a word applied to the result in favor of the winner, and that money or other valuable thing may or may not be staked upon the result, as the parties agree." *Brunswick & Balke Co. v. Valteau*, 50 Iowa, 120, 123, 32 Am. Rep. 119.

"Pool," within the meaning of the statute prohibiting the playing of pool, provided money be bet on the game, includes the game of pool, though played upon a licensed billiard table or tenpin alley. *Stone v. State*, 3 Tex. App. 675, 676.

#### **As a speculative operation in stocks.**

Pool is a joint adventure by several owners of a specified stock or other security, temporarily subjecting all their holdings to the same control for the purpose of a speculative operation, in which any of the shares contributed by one, and any profit on the shares contributed by another, shall be shared by all alike. *Green v. Higham*, 61 S. W. 798, 799, 161 Mo. 333.

A pool is defined to be a combination of persons contributing money to be used for the purpose of increasing or depressing the market price of stocks, grain, or other commodities; also the aggregate sums so contributed (Webster). *Mollyneaux v. Witten-*

berg, 58 N. W. 205, 208, 39 Neb. 547 (citing Black, Law Dict. p. 910).

#### **Real estate pool.**

The word "pool," in reference to a real estate pool, is of modern date, and may not be well understood; but, in reference to a real estate pool, it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic. *Kilbourn v. Thompson*, 103 U. S. 168, 195, 26 L. Ed. 377.

#### **POOL MEASURE.**

Pool measure is an allowance claimed by ancient custom in the port of London of one chaldron to every score, the basis of which measure is the chaldron, a well-known quantity, being a multiple of so many bushels. *Parish v. Thompson*, 3 East, 525, 526, 530.

#### **POOL ROOM.**

A pool room is one in which pools are sold. *Ex parte Powell*, 66 S. W. 298, 299, 43 Tex. Cr. R. 391.

A pool room is a place where people bet or take chances. *People v. McCue*, 83 N. Y. Supp. 1088, 1089, 87 App. Div. 72.

#### **POOL SELLER.**

A pool seller is one who sells pools on any event—as horse races, boat races, etc. *Ex parte Powell*, 66 S. W. 298, 299, 43 Tex. Cr. R. 391.

#### **POOL SELLING.**

Pool selling imports a transaction, where the money of some person other than the seller of the pool is to be received by him. *People v. Bennett* (U. S.) 113 Fed. 515, 516.

In a contract by which a fair association conveyed the official pool selling privilege of a race track for a certain period, the term "pool selling" was another name for betting and gambling on horse races. *Ullman v. St. Louis Fair Ass'n*, 66 S. W. 949, 951, 167 Mo. 273, 56 L. R. A. 606.

Pool selling is simply a scheme for facilitating betting on horse races. The manager is the stakeholder. The better deposits his money and selects his horse. In one kind of pool the highest bidder has the first choice of horses. The event of the race determines the winner, and he gets the whole, less the commission of the manager. *Commonwealth v. Ferry*, 146 Mass. 203, 15 N. E. 484, 485. And such pool selling is not a lottery, within the meaning of Const. N. Y. art. 1, § 10, prohibiting lotteries or the sale of lottery tickets. *Reilly v. Gray*, 28 N. Y. Supp. 811, 814, 77 Hun, 402. There exist all the characteristics of betting. The fact

that several may combine upon the same horse does not change the character of the transaction. The pool manager has nothing to do with the race or with the moneys, except to safely hold them until the race is decided, and then hand them over to the winner or winners, less his commissions. The essence of the whole thing is the betting, and that should determine the category to which such transactions belong. *People v. McCue*, 83 N. Y. Supp. 1088, 1089, 87 App. Div. 72.

Pool selling does not constitute a lottery or a policy or bucket shop, within the meaning of a municipal ordinance prohibiting the keeping of such establishments. *People v. Reilly*, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47.

#### **POOL TABLE.**

As billiard table, see "Billiard Table."

#### **POOL TICKET.**

A pool ticket is a ticket entitling the holder to a share in the proceeds of a pool. *Ex parte Powell*, 66 S. W. 298, 299, 43 Tex. Cr. R. 391.

#### **POOLING CONTRACT.**

Pooling may be defined to be the aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. The expression "combination in the form of trust," in Act Cong. July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibiting every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, and in the Louisiana act of July 5, 1890, prohibiting every contract, combination in the form of trust, or conspiracy in restraint of trade or commerce, etc., would seem to point to just what, in popular language, is meant by "pooling." *American Biscuit & Mfg. Co. v. Klotz* (U. S.) 44 Fed. 721, 725.

A contract between competing railroad corporations to divide their earnings from the transportation of freight in fixed proportions is a pooling contract, and has long been held void by the courts, as against public policy. Such a contract does not merely restrict competition, but tends to destroy it. *United States v. Trans-Missouri Freight Association* (U. S.) 58 Fed. 58, 65, 7 O. C. A. 15, 24 L. R. A. 73.

#### **POOR.**

See "Casual Poor"; "Town's Poor."

The term "poor" is used in two senses. We use it in one sense simply as opposed to the term "rich." Thus we speak of the ordinary laborers, mechanics, and artisans

as poor people, without a thought of describing persons who are other than self-supporting. We use the term also to describe that class who are entirely destitute and helpless, and therefore dependent on public charity. Dictionaries recognize this twofold sense. Thus Webster gives these definitions: "First. Destitute of property; wanting in material riches or goods; needy; indigent. It is often synonymous with 'indigent' and with 'necessitous,' denoting extreme want. It is also applied to persons who are not entirely destitute of property, but who are not rich, as a poor man or woman; poor people. Second. (Law) So completely destitute of property as to be entitled to maintenance from the public." When we speak of the relief of the poor as a public duty, and one which may justify taxation, we use the term only in the latter sense. Something more than poverty, in that sense of the term, is essential to charge the state with the duty of support. It is, strictly speaking, the pauper and poor man who have claims on public charity. *State v. Osawkee Tp.*, 14 Kan. 418, 421, 19 Am. Rep. 99.

Webster defines the word "poor": "Destitute of property; wanting in material resources or goods; needy; indigent; necessitous; denoting extreme want." It is applied to persons who are not destitute of property, but who are not rich. In law it means so completely destitute of property as to be entitled to maintenance from the public. "Pauper" and "poor" have nearly the same meaning, and they both embrace several classes. A bequest to the poor of the city of Green Bay, where there were no city paupers nor poor fund at the time of the testator's death, was void for uncertainty as to what classes of poor it applied. *In re Hoffman's Estate*, 36 N. W. 407, 409, 70 Wis. 522.

A bequest to the poor of a certain community does not apply to persons receiving public aid, for the reason that, if so applied, it would simply ease taxes, and so benefit the property owners rather than the poor. *Attorney General v. Clarke*, 1 Amb. 422; *Attorney General v. Wilkinson*, 1 Beav. 370, 372; *In re Waterman's Will*, 28 Atl. 1026, 18 R. I. 632.

The use of the term "poor of a county" in a charitable bequest to a county for the support of the poor of such county means the paupers of the county who are dependent on the county for support. There is no legal indefiniteness or impracticability in the use of the term which will call for the application of the doctrine of *cy pres*. *Heuser v. Harris*, 42 Ill. 425, 430.

A bequest in trust for the poor and aged will be construed to mean not the poor who are abundantly able to provide for them-

selves, but the poor who need assistance, and the aged—those aged people who are properly subjects of charity. *Coleman v. O'Leary's Ex'r* (Ky.) 70 S. W. 1068, 1074.

The word "poor," as used in a statute providing that the town shall be liable for the support of any poor person having a settlement therein, has a restricted and technical meaning, and is practically synonymous with "destitute"; denoting extreme want and helplessness. *Juneau County v. Wood County*, 85 N. W. 387, 388, 109 Wis. 330 (citing *Town of Rhine v. City of Sheboygan*, 82 Wis. 354, 52 N. W. 444; *Town of Ettrick v. Town of Bangor*, 84 Wis. 259, 54 N. W. 401; *Wisconsin Keeley Institute Co. v. Milwaukee County*, 95 Wis. 158, 70 N. W. 68, 36 L. R. A. 55, 60 Am. St. Rep. 105).

The poor referred to in a contract to maintain the poor of the township means legal paupers; that is, persons required to be kept and maintained by the overseers of the poor. Those only are poor, within the meaning of the term as there used, who have been previously declared to be paupers by a justice of the peace. *Sayres v. Inhabitants of Springfield*, 8 N. J. Law (3 Halst.) 166, 169.

A bequest for the special benefit of the worthy "poor white American. Protestant, Democratic widows or orphans" of a certain town meant those who had exhausted all means of support, and were in a condition to require public aid for supplies for their existence. It included those who were paupers and were receiving such aid. *Beardsley v. Selectmen of Bridgeport*, 3 Atl. 557, 558, 53 Conn. 489, 55 Am. Rep. 152.

The term "poor" may be used to characterize minor children who do not own property in their own name, although they earn their own living. *Woods v. Perkins*, 9 South. 48, 43 La. Ann. 347.

The term "poor of Eldred township," in a will creating a trust for the benefit of the poor of Eldred township, is sufficiently definite as a description of the beneficiaries. *Trim v. Brightman*, 31 Atl. 1071, 168 Pa. 395.

## POOR CHILDREN.

See "Children of the Poor."

"Poor children," within the meaning of a statute making it lawful for the overseers of the poor to put out as apprentices all poor children whose parents are dead, or by the said magistrates found to be unable to maintain them, etc., means children who are paupers in the common and popular acceptation of that term—that is, those so poor as to be unable to provide for themselves, and having no one of sufficient pecuniary ability to care for them, and therefore a charge upon the bounty and gen-



erosity of the public. *In re Whiting* (Pa.) 3 Pittsb. R. 129, 132.

### POOR PERSON.

Any poor person, see "Any."

The term "poor person," as used in the statute relating to the keeping of a poor book, has a settled and legal signification, and is applied to those who may rightfully claim alms from the public bounty. Its meaning is the same as that of pauper or indigent person. *Warren County Com'rs v. Osburn*, 4 Ind. App. 590, 592, 31 N. E. 541, 542.

In construing a statute providing that "no person shall be removed as a pauper from one city or town to any other city or town of the same or any other county, or from any county to any other county, but every poor person shall be supported in the county where he may be, and if he shall become poor, sick, or infirm, he shall be supported and relieved by the superintendent of the poor at the expense of the county," the court said: "It is assumed by the plaintiffs that the words 'poor person,' referred to in the statute, mean those who depend on their daily labor for their support. We think this is an erroneous construction, in that the terms 'poor person' and 'pauper' are used interchangeably in the statute; and a person who has always supported his family and himself by his labor cannot be designated a pauper, nor is he such a poor person as is referred to in the statute as one liable to become a public charge. An able-bodied man, who has always maintained himself and family by his own exertions, and who has come into another county, and there, without fault upon his part, by means of an accident, has become unable to support himself, is many degrees removed from the condition of a pauper." *Wood v. Simmons*, 4 N. Y. Supp. 368, 370, 51 Hun, 325.

The fact that a woman having four small children dependent on her is a "poor person," within the meaning of a statute which provides that every person who is sick or in any other way disabled or enfeebled so as to be unable by his work to maintain himself shall be maintained by the county or town in which he may be, is shown by evidence that she had but \$125 when she was widowed, and immediately afterwards, for several months, was, because of sickness, unable to work. *Bartlett v. Ackerman*, 21 N. Y. Supp. 53, 55, 66 Hun, 627.

Within the meaning of a statute providing that, if a person is poor and in need of assistance for himself or family, the overseer of the poor shall relieve such person, etc., a man who is in poor health and in need of medical attendance, and has no

property, is poor, though he lives with his wife on premises belonging to her, worth about \$80, and mortgaged for a small sum. He could live upon the land, but it was not otherwise available for his relief. Having no disposable interest in the real estate, he was not of sufficient ability to provide for his needs. *Town of Springfield v. Town of Chester*, 35 Atl. 322, 323, 68 Vt. 294.

An insane wife, absent from her husband, and expressing need of food and shelter, is a poor person, within the meaning of 1 Rev. St. 616, § 14, providing for the maintenance of such persons by the county or town. *Goodale v. Lawrence*, 88 N. Y. 513, 517, 42 Am. Rep. 259.

The term "poor person," in Rev. St. c. 46, §§ 5, 6, relative to the payment of expenses incurred for the relief of poor persons, etc., is not to be confined to poor persons who have been a public charge, or, in other words, to paupers, in the strict, technical sense of the term, but to include all poor and indigent persons standing in need of relief. *Hutchings v. Thompson*, 64 Mass. (10 Cush.) 238, 239.

Within the meaning of an act providing for the support of poor persons, a poor person is a pauper, in the common and popular acceptance of that term; that is, one having no sufficient pecuniary ability to provide for himself, and having no relative or friend able, and by law liable, to provide for him. *In re Whiting* (Pa.) 3 Pittsb. R. 129, 133.

A poor person, within the meaning of statutes relative to the aid of the poor, includes one who, having no property except growing crops, not worth more than \$25, and having no means of support but his labor, sustains a personal injury rendering him helpless for several weeks. *Blodgett v. Town of Lowell*, 33 Vt. 174.

The head of a family, who owns 160 acres of productive farm land, worth \$800, besides cattle and considerable other personal property, is not a poor person, for whose support the town is liable. *Town of Ettrick v. Town of Bangor*, 54 N. W. 401, 402, 84 Wis. 256.

A head of a family, owning three acres of land, on which there is a house having a dance hall connected with it, valued at \$1,200, and which is incumbered for \$450, is not a poor person, for whose support the town is liable. *Town of Rhine v. Town of Sheboygan*, 52 N. W. 444, 445, 82 Wis. 352.

One who, from old age and decrepitude, is unable to work, and is in destitute circumstances, is a "poor person" within the meaning of poor laws, notwithstanding he was the owner of an interest in land occupied by his wife and children, from which he had been driven by their cruelty and violence, and to which he was unable to assert his

claim. *Jasper County v. Osborn*, 13 N. W. 104, 106, 59 Iowa, 208.

A person without a pauper record, who moves from one county to another, with property sufficient for the reasonable support for himself and family, and engages in business, and is, after said removal, overtaken by sickness or other misfortune, is not within the class of poor which may be relieved at the expense of the county from which he has removed. *Hardin County v. Wright County*, 24 N. W. 754, 755, 67 Iowa, 127.

Aged, infirm, lame, blind, or sick persons, who are unable to support themselves, and when there are no other persons required by law to maintain them, shall be deemed poor persons. Rev. St. Mo. 1899, § 8994.

A poor person is one who is indigent—dependent upon charity—and the term is sometimes applied to one who, though not a pauper, is not rich, but, as used in Code Civ. Proc. § 459, authorizing certain persons to sue as a poor person, it is defined to mean one who is not worth \$100 besides the wearing apparel and furniture necessary for himself and his family, and the subject-matter of the action. *McNamara v. Nolan*, 34 N. Y. Supp. 178, 179, 13 Misc. Rep. 76.

A poor person is one who is an object of charity, but, as used in an act authorizing the bringing of actions as poor persons, will be considered to include a child whose parent is possessed of ample means to prosecute the action. *Bonadua v. Third Ave. R. Co.*, 30 N. Y. Supp. 410 (citing *Shapiro v. Burns*, 7 Misc. Rep. 418, 27 N. Y. Supp. 980).

"Poor person," as used in Rev. St. 1881, § 60, providing that any poor person, not having sufficient means to prosecute or defend an action, may sue as a pauper, includes a nonresident. *Pittsburgh, C. & St. L. Ry. Co. v. Jacobs*, 36 N. E. 301, 302, 8 Ind. App. 556.

#### POOR PREACHERS.

A conveyance to trustees for the benefit of "poor and godly preachers" meant those for whom no public provision was made by the state, but who subsisted on the voluntary contributions of their respective flocks. *Attorney General v. Shore*, 11 Sim. 592, 635.

#### POOR RELATIONS.

A bequest to "poor relations" meant those who were poor and objects of charity. *Brunsdon v. Woolredge*, 1 Amb. 507.

The bequest of personality to the testator's wife, and at her decease to be divided between her and the testator's poor relations equally, is to be construed as if the word "poor" were not in it. There is no distinguishing between degrees of poverty, for, if degrees of poverty were to be taken into

consideration, it would open a field of inquiry into the relative poverty of relations, rendering it very difficult, if not impracticable, ever to arrive at a just conclusion as to who were poor. *McNeilledge v. Galbraith* (Pa.) 8 Serg. & R. 43, 44, 11 Am. Dec. 572.

Where a testator devises the surplus of his personal estate to his poor relations, the Countess of Winchelsea, being a relation as near as any to the testator, and not having an estate proportionate to her quality, was decreed entitled to a share, as the word "poor" is frequently used as a term of endearment and compassion, rather than to signify an indigent person, as one speaking of one's father says, "My poor father," or one's child, "My poor child." *Anonymous*, 1 P. Wms. 327.

#### POPULAR ELECTION.

The words "popular election" mean an election which is participated in by the people at large. *Reid v. Gorsuch*, 51 Atl. 457, 459, 67 N. J. Law, 396.

#### POPULAR GOVERNMENT.

If the body of the nation keeps in its own hands the empire or the right of command, it is a popular government. *Stark v. McGowen* (S. C.) 1 Nott & McC. 387, 392 (citing *Vatt. Law Nat.* 1-2).

#### POPULATION.

"Population," as used in a New Jersey Code for the classification of cities of the state for the purposes of municipal legislation in relation thereto (N. J. Sup. Rev. 506), in distinguishing classes of cities by population, means population as determined by an official enumeration officially promulgated. The city's population, within the meaning of the statute, cannot be determined, like any other fact, by evidence. The word as here used has reference to an official census. In *re Assessment for Construction of Sewer*, 23 Atl. 517, 518, 54 N. J. Law, 156.

The word "population" shall be taken to mean that as shown by the last preceding state or national census, unless otherwise specially provided. Rev. St. Utah 1898, § 2498; Code Iowa 1897, § 48, subd. 23.

#### POPULIST.

A "populist" is one who is a member of the People's Party. *Porter v. Flick*, 84 N. W. 262, 263, 60 Neb. 773.

#### PORCELAIN WARE.

The words "china ware and porcelain ware," in the tariff act (Act July 24, 1897, c.

11, § 1, Schedule A, par. 96, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633]) fixing a duty on such ware, do not include porcelain on which pictures have been painted—the porcelain being manufactured and used only for the purpose of being used for such purpose—but such articles are only dutiable as paintings not otherwise provided for. *Arthur v. Jacoby*, 103 U. S. 677, 678, 28 L. Ed. 454.

Artistic paintings in oil upon a plain slab of porcelain, intended and used mostly for ornamental purposes, and not susceptible to any other use, and whose valuable and distinctive feature is the painting, and not the porcelain, are dutiable as paintings in oil and water color, under paragraph 465 of the tariff act of 1890, and not as "porcelain ware painted," under paragraph 100. *In re Davis Collamore* (U. S.) 53 Fed. 1006.

## PORCH.

As building, see "Building."

Under Act May, 1807, allowing lot owners a space of 10 feet "for erecting porches in front of houses, for doors of cellars, for an area to allow light to apartments below the level of ground, for a grass plat and shrubbery, or for other purposes of utility or ornament, as the inclination and taste of the proprietor may direct," owners of lots are not confined particularly to erections called "porches." Any other erections of a similar nature, and used for similar purposes, would fall within the meaning of utility; but a flight of steps from the street to the second story of the building does not bear a sufficiently near relation to a porch to come within the meaning of the act. *People v. Carpenter*, 1 Mich. (1 Man.) 273, 284.

## PORK.

Webster defines "pork" as the flesh of swine, fresh or salted, used for food. *Whitson v. Colbertson*, 7 Ind. 193, 196.

## PORK HOGS.

By the term "pork hogs," as used in a contract to deliver pork hogs at a porkhouse, slaughtered hogs are intended, as a porkhouse is a place for weighing, cutting up, etc., while, if live hogs had been intended, the slaughterhouse would have been selected as the place of delivery. *Alexander v. Dunn*, 5 Ind. 122, 124.

## PORK ON FOOT.

The designation "pork on foot," as used in the exemption statute, embraces hogs that may in due season, and at the convenience of the debtor, be prepared for and converted into pork, as well as those that may be ready

for the knife at the time the officer appears with his execution or attachment. *Byous v. Mount*, 17 S. W. 1037, 1038, 89 Tenn. (5 Pickle) 361.

## PORT.

See "At Port or Sailed"; "Foreign Port"; "Home Port"; "Next Port Reached." "Safe Port."

"Port" is used in two senses—first, according to the popular understanding, as denoting a particular place; and, second, in a larger acceptation, as comprising under one name a district of many places classed together for the purpose of revenue. *Dock Co. v. Browne*, 2 Barn. & Adol. 43.

"Port" means generally a harbor or shelter to vessels from a storm. *Wall v. East River Ins. Co.*, 10 N. Y. Super. Ct. (3 Duer) 264, 287.

"Port" means the waters within the gate or door, or outlet toward the sea. *United States v. New Bedford Bridge* (U. S.) 27 Fed. Cas. 91, 122.

A port is a haven, and somewhat more; that is, for arriving and unloading ships, etc. *United States v. Morel* (U. S.) 26 Fed. Cas. 1310, 1311.

A "port," in sea phrase, may be said to be any safe station for ships; but in law it is described as a place for arriving and loading and unloading of ships in the manner prescribed by law, and near a city or town, for the accommodation of mariners, and securing and vending of merchandise. *The Wharf Case* (Md.) 3 Bland, 361, 362, 369.

By the Roman law a port is defined to be "locus conclusus, quo importantur merces, et unde exportantur." A port is also defined to be a place, either on the seacoast or on a river, where ships stop for the purpose of loading and unloading, from whence they depart, and where they finish their voyage. A bank or wharf is a necessary appendage to land, in order to constitute a port. *Packwood v. Walden* (La.) 7 Mart. (N. S.) 81, 88.

A port, in the commercial sense, and by the most ancient definitions, is an inclosed place where vessels lade and unlade goods for export or import. The port is not any place within the geographical limits of the same name where ships might load and unload, but where they in fact do so; i. e., where they are accustomed to do so. Commercially considered, a port is a place where vessels are in the habit of loading and unloading goods; and the limits of the port, as respects a delivery under a bill of lading, turn purely on the question of fact, within what limit ships and merchants have been accustomed to receive and deliver cargo con-

signed to the port designated, without any necessary regard to geographical or physical divisions, or to police or statutory regulations. *Devato v. 823 Barrels of Plumbago* (U. S.) 20 Fed. 510, 515.

A port, within the meaning of the terms home and foreign ports, on the Missouri river, is any place where steamboats may land with safety, and lie moored to the shore, and not merely those places designated by acts of Congress as ports of entry and for other purposes. *Rees v. The General Terry*, 13 N. W. 533, 537, 3 Dak. 155.

The term "port," as used in Rev. St. § 4347, providing that no merchandise shall be transported from one port of the United States to another port of the United States in a vessel belonging wholly or in part to a subject of any foreign power, means any place from which merchandise may be shipped, and includes an island without a port of entry. *Petrel Guano Co. v. Jarnette* (U. S.) 45 Fed. 675, 677.

The word "port" generally means a harbor or shelter to vessels from storms, but, as used in a policy of insurance which insured a ship at and from New York to the port of Cecil in the province of Yucatan, with liberty to proceed to one other port in said province, it cannot be taken in this sense, but must be taken to designate landing places, as there are no ports, properly speaking, on the coast of Yucatan. *De Longuemere v. New York Fire Ins. Co.* (N. Y.) 10 Johns. 120, 125.

The word "port," in a marine policy exempting the insurer from any "risk in port, except sea risk," cannot be limited to port of departure or destination, but is used in contradistinction to the "high seas," and embraces any port into which the vessel may properly go. *Patrick v. Commercial Ins. Co.* (N. Y.) 11 Johns. 9, 12.

Within the meaning of the act of Congress and the usages of navigation, the breakwater in Delaware Bay constitutes a port, in the proper and maritime sense of the term. *The William Law* (U. S.) 14 Fed. 792, 794.

"Port," as used in Laws N. Y. 1862, c. 482, as amended, providing that a lien for repairs on a domestic vessel shall cease at the expiration of 12 months after the debt was contracted, unless at the time of expiration the vessel shall be absent from the port at which said debt was contracted, is not synonymous with the word "place," and North Brother Island is within the port of New York. *Trundy v. The Tawtemlo* (U. S.) 53 Fed. 835.

The word "port," as used in the section of the Revised Statutes providing for the marking of the names and home ports of

vessels on their bows and sterns, shall be construed to mean either the port where the vessel is registered or enrolled, or the place in the same district where the vessel was built, or where one or more of the owners reside. U. S. Comp. St. 1901, p. 2831.

The word "port," as used in the title relating to the collection of duties upon imports, may include any place from which merchandise can be shipped for importation, or at which merchandise can be imported. U. S. Comp. St. 1901, p. 1861.

The term "ports and havens," within the rule that all ports and havens are within the body of the counties of the realm, means not merely port and haven towns, but all the tide waters included within the harbors and franchises. *De Lovio v. Bolt* (U. S.) 7 Fed. Cas. 418, 429.

#### PORT CHARGES.

In a charter party requiring the charterers to pay all port charges of the vessel imposed during the contract of carriage, the term "port charges" meant dues, impositions, and exactions in foreign ports, and included tonnage dues imposed by the government of the port of destination. *Smith v. Drew* (U. S.) 22 Fed. Cas. 524, 525.

#### PORT OF BOSTON.

The term "port of Boston," as used in Rev. St. c. 32, which relates to pilotage in the port of Boston, etc., is synonymous with the words "harbor of Boston," and includes all ports which use the several channels leading to the city of Boston itself. This embraces the mouths of the various rivers which empty into its harbor. It is not confined in its application to the city of Boston. *Martin v. Hilton*, 50 Mass. (9 Metc.) 371, 378.

#### PORT OF DELIVERY.

"Port of delivery" is a phrase used to distinguish the port of unlivery or destination from any port at which the vessel touches in the course of the voyage, or for other purposes, as for advice, refreshment, inquiry after markets, or in consequence of stress of weather, or other necessity. *The Two Cathelines* (U. S.) 24 Fed. Cas. 424, 429.

#### PORT OF DEPARTURE.

The "port of departure," within the rule that a merchant bound for the United States must procure a bill of health from the consular officer of the United States at the port of departure, is not the last port at which the ship stops while bound for the United States, but the port from which she cleared. *The Dago* (U. S.) 61 Fed. 986, 989, 10 C. C. A. 224.

**PORT OF DESTINATION.**

The term "port of destination," as used in a policy of marine insurance for one year from a certain date, providing that if the ship was at sea at the end of the year the policy should continue in force at pro rata premium until she arrived at her port of destination, means any foreign port at which a vessel may have arrived in the course of her voyage, and not the home port of such vessel. *Gookin v. New England Mut. Marine Ins. Co.*, 78 Mass. (12 Gray) 501, 516, 74 Am. Dec. 609.

A vessel has arrived at a port of destination, within the meaning of a policy of insurance on a vessel, providing that, if she was on a passage at the end of the term, the risk should continue until arrival at port of destination, when she has arrived at an open roadstead of islands for the purpose of taking in cargo. *Washington Ins. Co. v. White*, 103 Mass. 238, 241, 4 Am. Rep. 543 (citing *Gookin v. New England Mut. Marine Ins. Co.*, 78 Mass. [12 Gray] 501, 516, 74 Am. Dec. 609).

The term "port of destination," as used in a marine policy, designates a port at which by the terms of a charter party the vessel is to stop for orders, in order to determine whether she is to discharge at the port, or to proceed to another port. *Wales v. China Mut. Ins. Co.*, 90 Mass. (8 Allen) 380, 383.

In certain cases a port of destination is the same as a port of actual delivery. *Blanchard v. Bucknam*, 3 Me. (3 Greenl.) 1, 5 (citing *Giles v. The Cynthia* [U. S.] 10 Fed. Cas. 369).

**PORT OF DISCHARGE.**

See "Last Port of Discharge."

"Port," as used in a policy of marine insurance against capture or seizure in the ship's port of discharge, includes the haven of the port into which the ship comes to anchor for the purpose of discharging its cargo, and is not confined to the other places where the customhouse is situated, and where the usual convenience for landing exists only in greater abundance. Lord Hale, in his tract "*De Portibus Maris*," says: "A port of the sea includes more than the broad place where the ships unload, and sometimes extends many miles." He also says that "a port is a haven, and something more. It is a place for arriving and unloading of ships. It hath a superintendence of a single signature upon it—somewhat of franchise and privilege. It hath a ville, etc.; that is, the caput portus, etc. So that a port is quid aggregatum, consisting of somewhat that is natural, viz., an access of the sea, whereby ships may conveniently come, can station

against wind, where they may safely lie, and a good shore where they may well unload; something that is artificial, as keys and wharves, etc.; something that is civil, viz., privileges and franchises, etc." As used in the policy, the parties meant a "port" in its natural, and not merely in its technical or artificial, sense. *Dalglish v. Brooke*, 15 East, 295, 303.

In construing a policy of insurance on the cargo of a vessel assured after she had sailed "at and from Boston to her port of discharge in Europe," the court said: "The assured has the right to obtain advice at his port of arrival respecting the markets, and, having informed himself, has a right to proceed to such port as promises the best sales, and is still protected by the policy; he not being obliged to discharge his cargo at the first port he makes." *Coolidge v. Gray*, 8 Mass. 527, 531.

The term "port of discharge," in a marine policy on a vessel from a foreign port to a port of discharge in the United States, does not include a port in the United States which the vessel enters merely to inquire for market, but the insurance continues in force while the vessel proceeds to another port for the purpose of discharging her cargo. *Lapham v. Atlas Ins. Co.*, 41 Mass. (24 Pick.) 1, 6.

Within the meaning of a policy insuring a vessel to her port of discharge, the port at which the principal part of the cargo is discharged is intended; and where a vessel insured at and from Salem to her port or ports of discharge in the river La Plata discharged all her cargo, except a few bundles of shingles, at Montevideo, where she took on board merchandise intended for another vessel of the owner, then lying in Buenos Ayres, and proceeded to that port, where she was lost, it was held that the insurance terminated at Montevideo. *Upton v. Salem Commercial Ins. Co.*, 49 Mass. (8 Metc.) 605, 609, 613.

A brig and cargo were insured at Gibraltar to the port of discharge in the United States. She sailed to New York, and, while there awaiting orders as to the place of unloading, unloaded a part of her cargo, which was in a perishable condition, then sailed to Middletown to discharge her cargo, and while on the way was stranded. The court said: "To constitute a port of discharge, it is not necessary that every article of the cargo should be there landed. Part may be discharged at one port, and part at another. Each becomes a port of discharge, and the policy terminates at the first. As a general rule, then, if a ship, under such policy, arrives in port, and there voluntarily, and without cause of necessity, breaks bulk and discharges any part of her cargo, she has made

such port her port of discharge; but if the ship, while delayed at her port of arrival, awaiting for orders, has goods on board in a perishing condition, so that they cannot with safety be transported to the intended port of discharge, it is highly reasonable that such goods should be landed without prejudice to the rights of either party. The landing of goods under such circumstances will not make a port of discharge." *Sage v. Middletown Ins. Co.*, 1 Conn. 239, 242.

The term "port of discharge," as used in a marine policy insuring a vessel until she arrives at a port of discharge, means a place at which it is usual to discharge cargo, and to which she is destined for the purpose of discharging cargo, and the policy cannot be extended or revived after she has discharged part of her cargo there by removal to another port, or to another place in the same port, either for the purpose of discharging the rest of her cargo, or for any other purpose. *Bramhall v. Sun Mut. Ins. Co.*, 104 Mass. 510, 513, 6 Am. Rep. 261 (citing *Leigh v. Mether*, 1 Esp. 411; *Coolidge v. Gray*, 8 Mass. 531; *Dodge v. Essex Ins. Co.*, 78 Mass. [12 Gray] 65; *Fay v. Alliance Ins. Co.*, 82 Mass. [16 Gray] 455).

#### **Port of arrival not synonymous.**

"The port of discharge," within the meaning of a marine policy on a vessel to its port of discharge, is not synonymous with the term "port of arrival." They certainly are not so used in common parlance, and in no book can we find that in a legal sense they mean one and the same thing. Thus, in construing such a policy on a ship to a port of discharge in the United States, the fact that the vessel first landed at New York, and then attempted to go to another port to unload, was held not to make New York the port of discharge, within the meaning of the policy. *King v. Middletown Ins. Co.*, 1 Conn. 184, 197.

#### **Port of destination not synonymous.**

The phrases "port of discharge" and "port of destination," as used in the maritime law, are not equivalent. To constitute a port of destination a port of discharge, some goods must be unladen there, or some act done to terminate the voyage there. *United States v. Barker* (U. S.) 24 Fed. Cas. 985, 986; *Schermacher v. Yates* (U. S.) 57 Fed. 668, 669.

The term "port of discharge," as used in shipping articles for an outward voyage, and back to a final port of discharge in the United States, means the port where either goods or ballast are discharged, or some other act done which in effect terminated the voyage there, though such port may have been a port of destination. *Schermacher v. Yates* (U. S.) 57 Fed. 668, 669.

#### **PORT OF ENTRY.**

In the case of *Cross v. Harrison*, 57 U. S. (16 How.) 164, 14 L. Ed. 889, it was said "that collection districts and ports of entry are no more than designated localities within and at which Congress had extended the liberty of commerce in the United States, and that so much of its territory as is not within a collection district must be considered as having been withheld from that liberty. It is very well understood to be a part of the law of nations that each nation may designate, upon its own terms, the ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere within its jurisdiction is a violation of its sovereignty." *De Lima v. Bidwell*, 21 Sup. Ct. 743, 749, 182 U. S. 1, 45 L. Ed. 1041.

#### **PORT OF FALMOUTH.**

The term "port of Falmouth," as used in a warrant constituting a branch pilot for the coast of Martha's Vineyard, and over Nantucket Shoals, and authorizing such pilot to receive fees for piloting vessels to the port of Holmes Hole and Falmouth, is broad enough to include all the ports in Falmouth; there being more than one. *Smith v. Swift*, 49 Mass. (8 Metc.) 329, 332.

#### **PORT OF LOADING.**

An offer by an insurance company to insure a vessel on a voyage from Liverpool to Cuba and to Europe by Falmouth, offering to insure at a somewhat higher rate than the owners had proposed, and saying that it was worth something to cover the risk at the port of loading in Cuba, implies that the port of loading might be different from the port of discharge. A policy which insured to port of discharge in Cuba did not conform to the contract. *Equitable Safety Ins. Co. v. Hearne*, 87 U. S. (20 Wall.) 494, 496, 22 L. Ed. 398.

#### **PORT OF NEW ORLEANS.**

The term "port of New Orleans," as used in a marine insurance policy from a certain place to the port of New Orleans, in mercantile understanding, embraces the wharves of Lake Pontchartrain, as well as the levee on the Mississippi river. This definition is not governed by geographical or political divisions. *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 27 Ala. 77, 99.

#### **PORT OF SHIPMENT.**

The term "port of shipment," as used in Rev. St. c. 91, § 26, giving every person who labors in mining, quarrying, or manufacturing slates in any quarry a lien on the slates

for 30 days after the slates arrive at their port of shipment, means the shop or storehouse from whence slate mantels were sold and delivered, which was a little way distant from the railroad station from which they were shipped. When mantels are completed and ready for delivery at the shop or storehouse, they have arrived at their port of shipment. *Union Slate Co. v. Tilton*, 73 Me. 207, 210.

#### PORT OF UNLIVERY.

"Port of unlivery" is a phrase used in maritime law to designate the port in which the vessel is to discharge its cargo. The *Two Catherine*s (U. S.) 24 Fed. Cas. 424, 429.

#### PORT RISK.

In an insurance policy describing the risk as port risk in the port of New York, the term "port risk" means a risk upon a vessel lying in the port, and before she takes her departure on another voyage; and a policy will be deemed to have ceased to be operative where a vessel left her pier for another voyage in tow of a tug, and struck a rock a short distance from the pier, the voyage having begun. *Nelson v. Sun Mutual Ins. Co.*, 71 N. Y. 453, 459; *Slocovich v. Orient Mut. Ins. Co.*, 14 N. E. 802, 806, 108 N. Y. 56.

#### PORTABLE.

"Portable," as used in a mortgage deed of certain property, including a portable steam engine, should be construed as synonymous with "movable." *Goff v. Pope*, 83 N. C. 123, 124.

#### PORTABLE STEAM ENGINE.

As building, see "Building (In Lien Laws)."

#### PORTER.

Porter is a malted liquor of a dark brown color, moderately bitter, and possessing tonic and intoxicating qualities. *State v. Oliver*, 26 W. Va. 422, 426, 53 Am. Rep. 79.

The terms "ale," "porter," and "beer," as used in a statute providing that it shall be unlawful for any persons or person to sell any "ale, porter, beer," or other malt or spirituous liquors, as a beverage, within said township, etc., each mean a certain well-defined liquor, made from malt, containing a certain percentage of alcohol, sufficient to render the same intoxicating. *Murphy v. Inhabitants of Montclair Tp.*, 39 N. J. Law (10 Vroom) 673, 676.

#### PORTICO.

A deed from the commonwealth required the front walls of the buildings on a street to be set back 22 feet from the street, and provided that steps, windows, porticoes, and other usual projections appurtenant to said front walls are to be allowed in the reserved space, subject to certain conditions. Held, that the word "porticoes" should be construed to include a porch. "The tendency in modern times, no doubt, has been to diminish 'porch' to the shelter in front of the door of a building; and we are very willing to assume that, with the constant growth of distinctions and nice discriminations in the meaning of the words, 'portico' retains more of the original suggestion of length, and of a roof supported by pillars, among architects and scholarly persons, and that 'porch' is more specially appropriated to a smaller structure, generally with closed sides. But the distinction is not carefully preserved in common speech. With us, 'portico,' as well as 'porch,' has shrunk, and usually means a shelter in front of a door. See, also, *Dyche & P. Dict.* 1754; *Imperial Dict.* 1882, 'Portico.' When porticoes are cut down to the little structures which we all know, we think that special reference to the mode of support has vanished almost as completely as the length. The parties to this deed did not mean by 'portico' a walk covered with a roof supported by columns, at least on one side. They meant the shelter to the door of a building, familiar to Massachusetts and to Boston. We are of opinion that they used it as a generic word, including a shelter with closed sides, as well as one with pillars. We agree that, in determining the scope of the word, we must look at the object of the restrictions, and of the exceptions to it. But as we have said, the permission extended to the more serious structures with closed sides, and therefore there is no reason for excluding porches." *Attorney General v. Ayer*, 20 N. E. 451, 452, 148 Mass. 584.

A city ordinance permitted the erection of "porticoes, steps, or other ornamental structures" at a certain place, at a distance of nine feet from the building line. Held, that the words "porticoes, steps, or other ornamental structures" should be construed to include a porch. *Garrett v. Janes*, 3 Atl. 597, 602, 65 Md. 260.

#### PORTION.

An indictment charging defendant with feloniously taking a portion of a crop of standing corn is not defective for not following the words of the statute, which makes it grand larceny to feloniously take a part of a standing crop, since "portion," as used in the indictment, means a "part." *Holly v. State*, 54 Ala. 238, 240.

Where commissioners appointed by an ordinance on which a special assessment was based reported that the ordinance provided for the construction of a system of waterworks, the cost of certain "portions" to be paid for by special assessment, they being appointed to make an estimate of the cost of such portions, and submitted their estimate thereof, the word "portions," as therein used, together with the fact that the estimate was limited to certain items mentioned in the report of the cost, showed that they understood the ordinance to mean that the construction of the local part of the improvement was to be paid for by special assessment, and hence that the ordinance was not void on the ground that it included improvements not local. *Harts v. People*, 49 N. E. 539, 540, 171 Ill. 373.

Gen. St. 1894, § 5521, provides that a homestead consisting of any quantity of land, not exceeding 80 acres, not included in the platted portion of any incorporated town, city, or village, shall not be subject to attachment, etc. "Portion," as here used, means that platted, general, or grand division of the city which is urban in its character, not excluding every piece or remnant of unplatted land which may lie within such portion. The term used is not "platted portions." The statute contemplates but one platted portion of the city, not several, and all such unplatted pieces or remnants lying in such portions are included within it. *National Bank of Republic of New York v. Banholzer*, 69 Minn. 24, 28, 71 N. W. 919, 920.

#### Gift inter vivos.

The word "portion," which is often used with reference to the gift inter vivos which shall operate as an ademption of a given legacy, is clearly a word of technical import when used in that connection. It is generally used for the purpose of indicating or signifying that part of a person's estate which a child shall be entitled to upon the death of such person, but which has been given to the child by such person, while living, as an advancement or provision. Where there is a great disparity between the gift made inter vivos, and the legacy to a child bequeathed in the will—the amount of the legacy being largely in excess of the amount of the gift—it seems that the gift cannot be regarded as either a portion or an advancement, within the legal meaning of those terms, which will operate either as an ademption or a satisfaction pro tanto of the legacy, unless the testator, in making the gift, declare his intention, or unless the circumstances clearly indicate such intention, that such gift shall so operate. *State v. Crossley*, 69 Ind. 203, 209.

#### In will.

According to lexicographers, the word "portion" has for one of its meanings "the

part of the inheritance given to a child." *Hope v. Rusha*, 88 Pa. 127, 130.

"Portion," as used in a codicil to a will relating to the share and portion of testator's estate given to his daughter, is broad enough to include, and is intended to cover, all the property or estate thus received. "Portion" is defined in *Bouv. Law Dict.* 350, to be that part of a parent's estate, or of the estate of one standing in the place of a parent, which is given to a child. The words "share," "part," and "portion" are very frequently used as synonymous. When applied to property acquired from one's ancestor, the word "portion" is the most comprehensive that can be used. *Appeal of Lewis*, 108 Pa. 133, 136.

"Portion," as used in a will providing that "that portion of my estate hereby willed to my three children," etc., "shall be held in trust," etc., and requiring "said portion to be kept loaned," will be understood to have been used as descriptive of the estate itself, and not of the equitable rights of the beneficiaries of the trust. *Davenport v. Kirkland*, 40 N. E. 304, 307, 156 Ill. 169.

The word "portion," in a will containing a power of appointment to give such portion of certain property as the donee shall think proper to certain beneficiaries, "or the children which they now have, or which they may hereafter have," was construed to mean portions or parts to be given, different persons. *Thrasher v. Ballard*, 14 S. E. 232, 233, 35 W. Va. 524.

Where a will gave a widow the whole estate, real and personal, for life, with power to advance to the five children of testator "their portion," as might be agreed upon between the widow and the executors, it was held that decedent died intestate as to the remainder, and that each child became, at his death, vested by law with one undivided one-fifth share of the property in remainder, to be enjoyed upon the termination of the estate given to the widow by the will, or sooner by the exercise of the power of advancement. *In re Miller's Will*, 70 Tenn. (2 Lea) 54, 57.

#### Same—Accrued shares.

"Portion," as used by testators in devising certain portions to certain beneficiaries, is synonymous with "share," and does not comprise an accrued share. *Henley v. Robb*, 7 S. W. 190, 192, 86 Tenn. (2 Pickle) 474.

The use of the word "portion" or "share" in a will is not sufficient to pass accrued shares. *Glover v. Condell*, 45 N. E. 173, 183, 163 Ill. 566, 35 L. R. A. 360.

#### Same—Fee.

"Portion," as used in a will providing that testator's daughter should keep her share in her own sole and separate right,



and, should she die without leaving issue, her portion should revert to her brothers, or either of them, or their heirs or survivors, is more applicable to a fee than to a life estate, and seems to imply that such daughter has an interest in the principal as such, and not merely a right to the income. *Phelps v. Phelps*, 11 Atl. 596, 597, 55 Conn. 359.

#### **Same—Gift already made.**

"Portion," as used in a will providing that, in case any legatee should die before final distribution, his portion should go to his issue, or, in default thereof, to the survivors, does not indicate a gift already made. It is equivocal, and may mean an immediate gift, or be merely descriptive of gifts to be made in the future. *Dougherty v. Thompson*, 60 N. E. 760, 763, 167 N. Y. 472.

"Portion," as used in a will providing that, in case any legatee should die without issue and before payment, his or her legacy and portion should go to the surviving brothers and sisters, and in all cases the share of any one under age should be kept invested and on interest until he or she should arrive at full age or be lawfully married, is equivocal, and may indicate either a vested estate in the original legatee, to be divested in case of his death before payment in favor of issue or survivors, or may mean a future estate to vest, in case of the legatee's death, in the issue or survivor, as substituted legatees, at the deferred period. *Smith v. Edwards*, 88 N. Y. 92, 108.

#### **PORTIONS FOR CHILDREN.**

The term "portions for children," as used in the Thellusson act, providing that nothing in the act shall extend to any provision for raising portions for children, etc., means sums of money secured to them out of property springing from or settled upon their parents, and does not include a gift to children, not made or secured to them out of property springing from or settled on their parents, where there is nothing in the nature or context of the instruments to indicate otherwise, notwithstanding the gift is a part of the estate of which the parent is the residuary legatee. *Jones v. Maggs*, 9 Hare, 605, 607, 10 Eng. Law & Eq. Rep. 159, 161.

#### **PORTO RICO.**

As foreign country, see "Foreign Country."

#### **PORTO RICAN.**

As citizen, see "Citizen."

#### **PORTRAIT.**

A portrait is a picture of men and women, either heads or greater lengths, drawn

from life; the word being used to distinguish face painting from history painting. *Duke of Leeds v. Lord Amherst*, 13 Sim. 459, 462.

#### **POSITION.**

See "Confidential Position"; "Public Position."

"Position," as used when speaking of the position of anything, is synonymous with "situation," and is defined by Worcester to mean "the state of being placed, posture." *Jones v. Tuck*, 48 N. C. 202, 205.

The term "position," as used in *Laws* 1899, p. 231, being an act in regard to honorably discharged soldiers and sailors holding public positions, applies to those positions which are analogous to offices, as distinguished from mere employment, the duties of which are continuous and permanent, especially pertaining to the position assumed, and not to those which are occasional or temporary, or where the services are of a general character, such as may from time to time be directed by a superior without being indicated by the special nature of the employment; and a clerk in a city treasurer's office will be deemed to hold a position. *Macdonald v. City of Newark*, 26 Atl. 82, 83, 55 N. J. Law (26 Vroom) 267; *Pierson v. O'Connor*, 22 Atl. 1091, 55 N. J. Law (26 Vroom) 36; *Lewis v. Jersey City*, 17 Atl. 112, 51 N. J. Law (22 Vroom) 240; *Stewart v. Hudson County*, 38 Atl. 842, 61 N. J. Law, 117.

"Position" is an indefinite term, and may include officers, or it may be limited to employes, and as used in *Laws* 1883, c. 583, tit. 22, § 29, providing that all persons holding a position in the city of Brooklyn receiving a salary, who shall be honorably discharged soldiers, shall not be removed from such position except for good cause, is limited solely to employes. *People v. England*, 45 N. Y. Supp. 12, 13, 16 App. Div. 97.

*Pamph. Laws* 1882-83, p. 136, relating to the depositories of money, uses the words, "The Governor shall declare said office vacant," and in the same section the words used are, "And the Governor may declare the position vacant." As thus used, the words "position" and "office" are synonymous. The word "office" is used in the sense of place, position, and agency, and not in the sense that it is a public office. *Colquitt v. Simpson*, 72 Ga. 501, 510.

#### **Assessor.**

"Position," as used in *Laws* 1896, c. 821, § 1, providing that honorably discharged soldiers and sailors shall be preferred for appointment in the public service, and that no such person holding a "position" by appointment or employment shall be removed except for incompetency or misconduct, applies to subordinate positions, and does not include

the office of assessor in New York, which is a public office, and the assessor vested with discretion in the performance of his duties, and not subject to the direction and control of a superior officer. *People v. Van Wyck*, 52 N. E. 559, 561, 157 N. Y. 495.

#### **Bridge tender.**

The duties of a bridge tender being not otherwise defined than by the term "bridge tender," and being in their nature continuous and permanent, constitute the employment a position within the meaning of the act relating to the discharge of old soldiers. *Lewis v. Jersey City*, 17 Atl. 112, 51 N. J. Law (22 Vroom) 240.

#### **Carpenter.**

A person employed by a board of chosen freeholders to work as a carpenter, at daily wages, about the county courthouse, under the direction of the county superintendent, does not hold a "position" within the purview of the Veteran Act of March 14, 1895 (3 Gen. St. p. 3702), relating to the removal of a veteran from an office or position. *Kreigh v. Hudson County*, 40 Atl. 625, 62 N. J. Law, 178.

#### **Deputy warden of an almshouse.**

The place of a deputy warden of an almshouse is a position within civil service laws relating to old soldiers, since his duties consist in rendering assistance to the warden in the discharge of his functions, and hence are continuous and permanent, as are those of his superior. *Stewart v. Hudson County*, 38 Atl. 842, 61 N. J. Law, 117.

#### **Guard or keeper in jail.**

A person employed as a guard or keeper in a county jail, such employment being for no specified time, is a person holding a position, within the meaning of Act March 14, 1895 (P. L. 1895, p. 317), forbidding the removal of an honorably discharged Union soldier from any position or office under the government of any county of the state the term of which is not fixed by law, except after hearing and upon good cause shown. *Cavanaugh v. Essex County*, 33 Atl. 943, 944, 58 N. J. Law (29 Vroom) 531.

#### **Janitor of courthouse.**

The janitor of a county courthouse, appointed by the board of chosen freeholders of such county, is holding a position, as distinguished on one side from a public office and on the other from mere employment. *Daily v. Essex County*, 33 Atl. 739, 740, 58 N. J. Law (29 Vroom) 319.

The janitor of a county courthouse does not hold a public office, but holds a "position" within the meaning of 3 Gen. St. p. 3702, forbidding the removal of an honorably dis-

charged Union soldier from an office or position except for cause. A "position," within the purview of the statute, is defined to be a place the duties of which are continuous and permanent, and which pertain to the position as such. *Bilderback v. Hudson County Chosen Freeholders*, 42 Atl. 843, 845, 63 N. J. Law, 55 (citing *Stewart v. Same*, 61 N. J. Law, 118, 38 Atl. 842).

#### **POSITION OF PERIL.**

A steamship on the ocean, with her thrust shaft broken, is, in the opinion of maritime men, considered in a "position of peril," although the shaft may be repaired on board. *The Heckla (U. S.)* 62 Fed. 941, 943.

#### **POSITIVE.**

"Positive" in common parlance means absolute, certain. *Coleman v. Roberts*, 1 Mo. 97, 100.

"Positive" is defined by Webster to mean direct, express, opposed to circumstantial. *Schrack v. McKnight*, 84 Pa. 28, 30.

#### **POSITIVE AGREEMENT.**

The use of the word "positive" in an instruction that, if the jury should find certain services had been done by the plaintiff at the request of the defendant, the law raised a presumptive promise on the part of defendant that he would pay therefor, unless they should find a positive agreement to the contrary, was held to be erroneous on the ground that it was used by the court to indicate that the promise must be express, and not implied. *Coleman v. Roberts*, 1 Mo. 97, 100.

#### **POSITIVE DUTY.**

The term "positive duty," when used in a statement that it is a municipality's positive duty to keep the streets in proper repair, is not used in the sense that the corporation insures the safe condition of its streets, or that it is bound to maintain them in that condition without reference to the difficulties in the way of doing so, since there may be defects that are practically irremediable; and the duty is only that it should employ, in performing its duty as to the streets, the diligence, care, and skill that an ordinarily prudent person having a similar duty to perform would employ. *Blyhl v. Village of Waterville*, 58 N. W. 819, 57 Minn. 115, 47 Am. St. Rep. 596.

#### **POSITIVE EVIDENCE.**

"Positive evidence" is that which, if believed, establishes the truth or falsehood of a fact in issue, and does not arise from any presumption. It is distinguished from "cir-

cumstantial evidence." *Cooper v. Holmes*, 17 Atl. 711, 712, 71 Md. 20.

"Evidence, whether written or oral, is either positive or presumptive. Positive evidence is the direct proof of the fact or point at issue. Presumptive evidence consists in the proof of some other fact or facts from which the point at issue may be inferred." *Davis v. Curray*, 5 Ky. (2 Bibb) 238, 239.

Positive or direct evidence "is when a witness can be called to testify to the precise fact which is the subject of an issue on trial." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 310, 52 Am. Dec. 711.

### POSITIVE FRAUD.

By "positive fraud" must be understood a willful and corrupt purpose and intention to deceive and injure. *Cox v. Buck* (S. C.) 3 Strob. 367, 372.

Where the party intentionally or by design misrepresents a material fact or produces a false impression in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage of him, in every such case there is a positive fraud in the truest sense of the terms. There is an evil act with an evil intent—"Dolum malum ad circumveniendum"—and the misrepresentation may be as well by deeds or acts as by words; by artifices to mislead as well as by positive assertions. *Douthitt v. Applegate*, 6 Pac. 575, 578, 33 Kan. 395, 52 Am. Rep. 533.

### POSITIVE LAWS.

Positive or revealed laws are not founded on the general constitution of human nature, but only on the will of God, though in other respects such law is established on very good reason, and procures the advantage of those to whom it is sent. The ceremonial or political laws of the Jews are of this class. (*Burlamqui*.) *Borden v. State*, 11 Ark. 519-527, 44 Am. Dec. 217.

### POSITIVE PROOF.

The Prohibitory Liquor Law, § 20, provides that, to entitle any liquors to the exemption contained in the section, it must be made to appear by positive proof that they are of a foreign production, imported under the laws of the United States, and contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe. "Positive proof," within the meaning of the statute, does not mean such only as will establish the fact in controversy as an absolute certainty beyond the possibility of doubt, as this would be to exclude all human testimony, but by the term we are to understand the statute to require direct proof, as contradistinguished

from that which is circumstantial, or merely presumptive. Mr. Greenleaf, in his work on Evidence uses the terms "direct" and "positive" as synonymous, and as opposed to "circumstantial" or "presumptive" evidence. *Niles v. Rhodes*, 7 Mich. 374, 378.

In a suit for wages as a clerk the court charged that, where defendant set up negligence in keeping accounts, or appropriation of money on the part of the plaintiff by way of recoupment, if the plaintiff did not have sole control or management, but defendant and other employes had management and control of the goods, there must be positive proof of the negligence or misappropriation. The word "positive," as used in such instruction, was used by the court as equivalent to "affirmative." The legal opposing sort of evidence to positive is "negative." Every affirmative issue must be proved by positive evidence. None can be established by negative evidence. Whoever holds the affirmative of the issue must establish it by positive proof. The defendant held the affirmative of the plea, and on him was the burden of establishing it by affirmative or positive proof. *Falkner v. Behr*, 75 Ga. 671, 674.

In an action of assumpsit to recover the subscription price of certain shares of stock defendant requested the following instruction: "That if the jury believed evidence that defendant wanted the stock in his own name, plaintiff was bound to subscribe for it in the defendant's name, and anything beyond that is a violation of the letter of attorney, and not binding on defendant without positive proof of subsequent ratification." The court refused to affirm the point that defendant would not be liable without positive proof of subsequent ratification, and it was held there was no error in this. The word "positive" is too strong. It is defined by Webster to mean "direct, express, opposed to circumstantial." The proof should be satisfactory, but it may be such without being positive. *Schrack v. McKnight*, 84 Pa. 26, 30.

### POSITIVE SALE.

Where it was announced that an auction sale would be a "sale positive," such phrase was equivalent to a "sale without reserve," and hence it was a fraud on the part of the vendee to employ a buyer to keep up the price on his behalf, and such fraud was a bar to an action for a specific performance. *Walsh v. Barton*, 24 Ohio St. 28, 36, 46.

### POSITIVE SERVITUDE.

The term "positive servitude" is used to designate a servitude by which the proprietor of the servient estate is required to suffer something to be done upon his property by another. *Rowe v. Nally*, 32 Atl. 198, 199, 81 Md. 367.

**POSITIVE TESTIMONY.**

The terms "direct or positive testimony" are used to designate the testimony of those who speak of their own actual and personal knowledge of the fact in controversy. The proof in such case rests upon faith in the veracity, impartiality, opportunity for observation, accuracy of memory, etc., of the witnesses. The proof applies immediately to the factum probandum, without any intervening process. *State v. Miller*, 32 Atl. 137, 141, 9 Houst. (Del.) 564.

"Positive testimony" is that which bears directly upon the facts in the case. Negative testimony is not as to the immediate fact or occurrence, but facts from which you might infer that the act could not possibly have happened. In other words, the one is affirmative, the other negative. Therefore positive testimony is more reliable and is stronger than negative testimony. *Barclay v. Hartman*, 43 Atl. 174, 175, 2 Marv. (Del.) 351.

**POSSE COMMITATUS.**

A "posse commitatus" signifies the whole power of the county. All able-bodied male persons over fifteen years of age may be summoned to act as members of it, and refusal to act will be deemed a misdemeanor. *Commonwealth v. Martin*, 7 Pa. Dist. R. 219, 224.

**POSSESS.**

According to etymology the word "possess" means to sit upon; hence to occupy in person; to have and to hold. Thus the first lexical meaning given to the word in the Century Dictionary is to own; have as a belonging; property. The second definition in Webster's Dictionary is to have legal title to. In popular usage the word "possess" includes real and personal property to which one has title as his landed possessions. So in Scripture, "The house of Jacob shall possess their possessions." The legal idea of possession, though varying according to circumstances, still embraces the conception of right as well as that of physical control. *Fuller v. Fuller*, 34 Me. 475, 479, 24 Atl. 946.

Possess is defined by Webster as "to occupy in person." *Evans v. Foster*, 15 S. W. 170, 171, 79 Tex. 48.

"Possess" is frequently used in the sense of "own," "entitled to." *Brantly v. Kee*, 58 N. C. 332, 337.

General words in a deed, as "all the property I possess," or "my property," or "my estate," do not pass or purport to pass anything which was not held by the grantor as his own property. They do not apply to the property of others in the occupancy of the

grantor. *Jones v. Sasser*, 18 N. C. 452, 463. See, also, *Hemingway v. Hemingway*, 22 Conn. 462, 472; *In re Qualifications of Electors*, 35 Atl. 213, 19 R. L. 387.

**POSSESSED.**

See "Lawfully Possessed."

All I am or die possessed of, see "All."

"Possessed" is a variable term in the law, and has different meanings, as it is used in different circumstances. It sometimes implies the temporary interest in lands, as we say 'A man is possessed,' in contradistinction to being seised. It sometimes implies a corporeal having, as we say, 'A man is seised and possessed,' but it sometimes implies no more than that one has a property in a thing; that he has it as owner; that it is his. In this sense it may be used even though an intruder may have excluded the owner for the time being, and there is never any impropriety in making use of the term when the only possession the intruder has is apparently subordinate to that of the general owner." *City of Detroit v. Moran* (Mich.) 7 N. W. 180, 181.

By a residuary clause in a will a testator devised all the rest and residue of his estate, real and personal, wherever it might be situated, that he might die possessed of, not previously enumerated, to his son W. Held, that the words "die possessed of" were intended to embrace everything that the testator had a right to dispose of by will, and was not limited merely to property and claims which were actually in existence or had accrued at the time of his death, but included as well the rents of his real estate and the interest on obligations which accrued after his death. *Whitehead v. Gibbons*, 10 N. J. Eq. (2 Stockt.) 230, 239.

**As claimed.**

An allegation in a declaration in ejectment that the plaintiff was possessed in fee of the lands claimed means that the plaintiff claims in fee. *Jarrett v. Stevens*, 15 S. E. 177, 36 W. Va. 445.

An allegation in ejectment that the plaintiff was possessed in fee of land is equivalent to an allegation that he was seised in fee, or that he owned and claimed in fee. Possession is one of the elements of title, and is prima facie evidence of title. Possession implies that it is held under title. *Jarrett v. Stevens*, 15 S. E. 177, 36 W. Va. 445.

**As held by lawful title.**

Webster defines "possessed" as meaning held by lawful title. An admission in the answer of an action to recover against a sheriff for the unlawful sale of plaintiff's land for taxes that plaintiff was possessed of the same at the time of the sale was a

sufficient admission of the title which plaintiff was required to prove under Laws 1895, c. 119, § 66. *Wooten v. White*, 34 S. E. 508, 125 N. C. 403.

The term "possessed" in the constitutional requirement that an elector who was qualified to vote by reason of ownership of real estate shall be one who is really and truly possessed in his own right of real estate, etc., is to be construed as meaning the possession of the holder of a legal title, for, as what is known as an "equitable estate" is not, strictly speaking, an interest in land, but only a right which can be enforced in equity, the right to the possession in such cases is in the holder of the legal title. In *re Qualifications of Electors* (N. I.) 35 Atl. 213.

The term "possessed" imports that something is held by lawful title, and an allegation in a pleading that plaintiff was possessed of the goods, etc., is equivalent to an allegation that he was lawfully possessed. *Sheldon v. Hoy*, 11 How. Prac. 11, 16.

#### As denoting ownership.

A devise of "all my estate which I shall die possessed of" includes all the property of which he died the owner, the word "possessed" being used to denote ownership, and not merely personal or corporeal occupation. *Hemingway v. Hemingway*, 22 Conn. 462, 472.

#### As seised.

As used in *Comp. Laws N. M.* 1884, p. 1306, § 2750, declaring that the words "bargained and sold" in conveyances of hereditary real estate shall mean that the grantor at the time of the execution of such conveyance is "possessed of an irrevocable possession in fee simple" to the property conveyed, the term "possessed of an irrevocable possession in fee simple" means "seised of an indefeasible estate in fee simple." *Douglass v. Lewis*, 9 Sup. Ct. 634, 635, 131 U. S. 75, 33 L. Ed. 53.

The term "possessed" in our statute (*Gen. St.* § 618) providing that a widow may have dower in lands of which her husband "died possessed in his own right" is more comprehensive than the word "seised," which is employed in those of some other states, the courts of which have felt bound to exclude dower in equitable estates. And under such statute dower may be assigned in an equitable remainder in fee, though the possession was in the trustee. Such dower interest is subject to the paramount title of the trustee for purposes of the trust. *Greene v. Huntington*, 46 Atl. 883, 886, 73 Conn. 106.

#### POSSESSIO PEDIS.

"*Posseccio pedis*" is synonymous with the word "occupation" and the phrase "sub-

jection to the will and control," and signifies actual possession. *Lawrence v. Fulton*, 19 Cal. 683, 690.

"*Posseccio pedis*" does not require actual occupancy, but it implies inclosure and use of the ground inclosed. "I will not undertake to indicate in what way it [the land] should be used. In general, it should be cultivated, or perhaps it might be sufficient that it should be used for a pasture." The inclosing and sowing down of a small turnip patch on a tract of land, and occupying it but for one year, and occasionally cutting and drawing from it fire wood and other timber, would not be sufficient to defeat another, or give a title to the land under the statute of limitations. *Porter v. Kennedy* (S. C.) 1 McMul. 354, 357.

#### POSSESSION.

See "*Actual and Continued Change of Possession*"; "*Actual Possession*"; "*Adverse Possession*"; "*Chose in Possession*"; "*Constructive Possession*"; "*Delivery of Possession*"; "*Estate in Possession*"; "*Exclusive Possession*"; "*Full and Complete Possession*"; "*Hostile Possession*"; "*Immemorial Possession*"; "*Innocent Possession*"; "*Lawful Possession*"; "*Mortgagee in Possession*"; "*Naked Possession*"; "*Natural Possession*"; "*Notorious Possession*"; "*Peaceable Possession*"; "*Scrambling Possession*"; "*Tenant in Possession*"; "*Uninterrupted Possession*"; "*Visible Possession*."

Change of possession, see "Change."

Possession is a detention or enjoyment of a thing which a man holds or exercises by himself or by another, who keeps or exercises it in his name. *Casey v. Mason*, 59 Pac. 252, 254, 8 Okl. 665; *Tidwell v. Chiricahua Cattle Co.* (Ariz.) 53 Pac. 192, 195; *Redfield v. Utica & S. R. Co.* (N. Y.) 25 Barb. 54, 58; *Evans v. Foster*, 15 S. W. 170, 171, 79 Tex. 48; *Sunol v. Hepburn*, 1 Cal. 254, 265.

The possession which is necessary as an element in the acquisition of title by prescription must have three qualities; it must be long, continual, and peaceable. *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. Law (14 Vroom) 605, 621; *Pollard v. Barnes*, 56 Mass. (2 Cush.) 191, 198.

Possession is denoted by the exercise of acts of dominion over the property, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state; such acts to be so repeated as to show that they are done in the character of owner, and not as an occasional trespasser. *Staton v. Mullis*, 92 N. C. 623, 632 (citing *Williams v. Buchanan*, 23 N. C. 535, 35 Am. Dec. 760); *Frisbee v. Town of Marshall*, 30

S. E. 21, 23, 122 N. C. 760 (citing *Williams v. Buchanan*, 23 N. C. 535, 35 Am. Dec. 760).

"Possession," taken in the proper sense, is defined in 1 Domat. Lib. 3, tit. 7, § 1, arts. 1, 2, "as the detention of a thing which he who is the master of it, or he who has reason to believe that he is so, has in his own keeping, or in that of another person by whom he possesses. Possession implies a right and a fact; the right to enjoy annexed to the right of property, and the fact of the real detention of a thing that would be in the hands of a master or of another for him. Again, one may possess corporeal things, whether they be movables or immovables, according to the differences of their nature. Thus one may possess movables by keeping them under lock and key, or having them otherwise at one's disposal. Thus one possesses cattle either by shutting them up or giving them to be kept. Thus one possesses a house by dwelling in it, or trusting it to a tenant, or building in it. Thus one possesses lands by cultivating them, reaping the fruits, going and coming through them, and disposing thereof at pleasure. But although possession implies the possession of what we possess, yet this detention ought not to be understood as if it were necessary to have always either in our hands or in our sight the things of which we have possession, but, after the possession has been once acquired, it is preserved without an actual detention." *Sunol v. Hepburn*, 1 Cal. 254, 263.

Possession of land, to constitute a notice to a purchaser of the possessor's title, must be not only exclusive and uninterrupted, but it must also be open, notorious, and visible. And it must indicate the occupant. The fact that lands are under cultivation does not of itself suggest that any one other than the reputed owner of the premises is in possession of them. In order to charge a purchaser with notice, the occupation must be of a character which would put a prudent person upon inquiry. It must indicate that some one other than he who appears by the record to be the owner has rights in the premises. *Cox v. Devinney*, 47 Atl. 569, 570, 65 N. J. Law, 389.

The term "possessions of another," as used in St. 1893, § 229, providing that every person guilty of using, or procuring, encouraging, or assisting another to use, any force or violence in entering upon or detaining any lands or possession of another, etc., is guilty of a misdemeanor, means the right to use, occupy, and enjoy the property to the exclusion of all others—a mere possessory interest—and does not imply any higher interest in lands. *Foust v. Territory*, 58 Pac. 728, 729, 8 Okl. 541.

"Possession" of lands means a foothold, an actual entry and possession in fact, a standing upon it, an occupation of it.

*Churchill v. Onderdonk*, 59 N. Y. 134, 136. It is denoted by the exercise of acts of dominion over it, in making the ordinary use of it, and taking the ordinary profits from it, caring for it, having it in one's power and under his control. Where a husband and wife live on her land, and he does such acts merely as grow out of the marital relations, and which must exist in every case where a husband lives with his wife in her home on her land, he does not have such possession as will constitute a covenant for quiet enjoyment, etc., contained in their deed of such land, a covenant by him running with the land, which inures to the covenantee's grantee. *Mygatt v. Coe*, 42 N. E. 17, 21, 147 N. Y. 456.

The "possession" required by Pub. St. c. 11, § 13, is "that which the law recognizes as such, not a mere presence on or dealing with the land or a part of it, which falls short of such a relation to it that the supposed possessor could sue for a trespass." In *Lynde v. Brown*, 9 N. E. 735, 143 Mass. 337, it is said that possession may be an unqualified seisin of the freehold or an exclusive occupation. A widow occupying land together with her children cannot be said to be "in possession" for the purpose of taxation, unless she has dissembled the children. *Kerslake v. Cummings*, 61 N. E. 760, 761, 180 Mass. 65.

Possession is that condition of fact under which one can exercise his power over a corporeal thing to the exclusion of all others. *Rice v. Frayser* (U. S.) 24 Fed. 460, 463.

The word "possession," as used in the act relating to the preservation of game, shall include both actual and constructive possession. Gen. St. Minn. 1894, § 2187.

Possession is the detention or enjoyment of a thing which we hold or exercise by ourselves or by another who keeps or exercises it in our name. Civ. Code La. 1900, art. 3426.

A possession obtained by an act of trespass in building a fence is not such possession as will support an action of forcible entry and detainer against a claimant who destroys the fence. This possession is of a sort which the court says has been aptly called a "scrambling possession." *Dyer v. Reitz*, 14 Mo. App. 45, 46.

The word "possessions" may no doubt include real estate, if so intended, though such would not be its technical signification. Where a will gave to testator's son all his real estate situated in a certain town, and also all the residue "of my personal estate and possessions of whatever kind and name," and many years afterwards a parcel of land, not situated in that town, unexpectedly descended to testator, it was held that the lat-

ter real estate was not devised by the will. *Blaisdell v. Hight*, 69 Me. 306, 308, 31 Am. Rep. 278.

The occupation of a house on mortgaged premises by a husband and wife, the latter being the mortgagee, under an agreement between the husband and the wife's mother, who was supposed to be the owner of part of the premises, is not such a "possession of the premises" by the mortgagee, within Gen. St. c. 140, § 15, as will entitle the mortgagor, on a bill in equity to redeem, to have the rent of the tenement applied towards the payment of the mortgage debt. *Sanford v. Pierce*, 126 Mass. 146.

Possession of land may be acquired and held in different modes; such as by inclosure, by cultivation, by the erection of buildings or other improvements, or in fact by any use that clearly indicates an appropriation to the use of the person claiming to hold the property. The land must be appropriated to an individual use in such a manner as to apprise the community or neighborhood that it is in the exclusive use and enjoyment of the person so appropriating it. The possession of land may be acquired by any use which clearly indicates an appropriation by the person who claims to hold the property. The possession should be of such open and visible character as to apprise the world that the property has been appropriated and is occupied. It must also be of such a character as to indicate who the occupant is, and it must be consistent with such use and occupancy as the property is suited for or adapted to. The occupancy must be exclusive. Such possession cannot be made out by inference, but only by clear and positive proof. Cutting timber on vacant and unoccupied land on one or two occasions for rails, posts, and ties does not constitute such possession as will enable one to claim the land under the statute requiring the payment of taxes for seven years with color of title and subsequent taking of possession. *Travers v. McElvain*, 55 N. E. 135, 136, 181 Ill. 382.

#### **Access distinguished.**

"Possession," as used in St. Ark. § 305, requiring an assignee of property for the payment of debts, before he shall be entitled to take possession, to make a full and complete inventory and description of such property, and also give a bond conditioned to execute the trust and faithfully perform his duties, means "much more than access." Possession is that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all others. "Access" means liberty to approach and inspect the property, and that is all the assignee can do until he gives the bond. "Right of possession" belongs to the assignor until his assignee qualifies. *Rice v. Frayser* (U. S.) 24 Fed. 460-463.

#### **As actual possession.**

Possession, in order to constitute a bar, must be an actual possession of some part of the land in dispute, and possession not within the bounds of the disputed part is not sufficient to authorize the bar of the statute. *Elliott v. Cumberland Coal & Coke Co.*, 71 S. W. 749, 750, 109 Tenn. 745 (citing *Peck v. Houston*, 73 Tenn. [5 Lea] 227; *Coal Creek Min. Co. v. Heck*, 83 Tenn. [15 Lea] 497).

As used in Civ. Code, § 613, providing that an action quieting title may be brought by any person in possession by himself or tenant of real property, the word "possession" means an actual one, and not a mere constructive one. *Christy v. Springs*, 69 Pac. 864, 865, 11 Okl. 710.

A party may be in possession of land without a personal representative thereon, or without having personally cultivated or improved it. *Barstow v. Newman*, 34 Cal. 90.

#### **As constructive possession.**

"Possession," as used in the statement of the rule that, in the absence of any notice to the contrary, a person who sells personal property in his possession sells it with an implied warranty of title, is to be construed broadly so as to include a constructive as well as actual possession. So it is held that the possession by a bailee or agent or a tenant in common of a vendor is sufficient, and that, to constitute the exception, it must appear that the goods were in the adverse possession of a third person, or else that the vendor had either no interest in them, or a mere naked interest without either actual or constructive possession. *Reynolds v. Roberts*, 57 Vt. 390, 396.

#### **As control.**

By possession is meant that condition under which one can exercise his power over property at his pleasure to the exclusion of all others; and where an assignor for the benefit of creditors at the time of delivering the deed to his assignee also delivered the keys to the stores in which the goods were situated, this was such a delivery of possession as to avoid the assignment under a statute providing that, before an assignee should be entitled to possession of the property, he should file an inventory thereof, and give bond in double the estimated value. *Gilkeron-Sloss Commission Co. v. London*, 13 S. W. 513, 514, 53 Ark. 88, 7 L. R. A. 403.

The term "possession," in a statute making the person in possession of Texas or Cherokee cattle liable for infection of other cattle, "must have been intended as that usual and well-known possession that men usually have of personal property; and where a party has a mere lien, and not the actual control, of the cattle, he cannot be re-

garded in possession in the sense the word is used in the statute." *Smith v. Race*, 76 Ill. 490, 491.

A mortgagee of chattels, in order to have possession authorizing recovery of damages against one seizing them, must in person or by his agent have the chattels in his control; and hence in such an action it was error to charge that if the mortgagee, by his agent, had done everything which could reasonably be done by way of taking possession, then the property should be considered as in his possession. *Jones v. Hess* (Tex.) 48 S. W. 46, 47.

"Possession," as used with relation to an action for trespass on real property, means "that position or relation which one occupies with respect to a particular piece of land which gives to him its use and control and excludes all others from a like use or control." *Fort Dearborn Lodge v. Klein*, 3 N. E. 272, 273, 115 Ill. 177, 56 Am. Rep. 133.

By possession is meant that by which one can exercise his power over property at his pleasure to the exclusion of all others. *Gilkerson-Sloss Commission Co. v. London*, 13 S. W. 513, 514, 53 Ark. 88, 7 L. R. A. 403.

"Possession," as used in Cr. Code, § 75, making it criminal for any employé, etc., to embezzle funds, moneys, or securities in the care and possession of the employé, etc., has perhaps a slightly different and broader meaning than the word "care," but it may also mean "to keep" "to take or seize hold," "to hold or occupy" as the owner of property might do. *Ker v. People*, 110 Ill. 627, 649, 51 Am. Rep. 706.

#### **Custody distinguished.**

"Possession" and "custody" are not convertible terms. To constitute possession mere temporary custody is not sufficient. There must be combined with it the control, care, and management of the property; so that under a statute relating to theft, if the property be in the mere temporary custody of a servant or other person, the indictment need not allege the possession to be in such temporary custodian. *Emerson v. State* (Tex.) 25 S. W. 289, 290.

#### **Inclosure and cultivation required.**

A fence is not indispensable to statutory possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property; but there are many other acts which are equally evincive of such an intention, such as entering upon land and making improvements thereon, raising a crop of corn, felling and selling the trees thereon, etc., under color of title. An entry into possession of a tract of land under a deed containing specific metes and bounds gives a constructive possession

of the whole tract if not in any adverse possession, although there may be no fence or inclosure around the ambit of the tract, and an actual residence only on a part of it. To constitute actual possession, it is not necessary that there should be any fence or inclosure of the land; and where one entered into possession of a tract of land under a deed describing it by metes and bounds he is in possession of the whole tract unless some part of it was in the adverse possession of some other claimant, although his actual settlement and improvements were on a small parcel only of the tract. *Ellicott v. Pearl*, 35 U. S. (10 Pet.) 412, 442, 9 L. Ed. 475.

Possession, within the rule that to constitute title by adverse possession there must be such possession as the land reasonably admits of, is not to be construed as meaning that land which is uninclosed and uncultivated should be inclosed and cultivated merely because it is capable of inclosure and cultivation. The possession is gauged by the actual state of the land, and not with reference to its capability of being changed into another state which would reasonably admit of another character of possession. *Goodson v. Brothers*, 20 South. 443, 445, 111 Ala. 589.

It is not necessary that land shall be inclosed with a fence, or that a house should be erected upon it, to constitute a possession, or that it should be reduced to cultivation. Such improvements or acts of dominion over the land as would indicate persons residing in the immediate neighborhood, who have the exclusive control and management over the land, would be sufficient to constitute possession. If the land is a timber lot, controlled and used to supply a farm in the neighborhood with fuel, rails, or posts, such use will constitute possession, though the land may not adjoin the farm, or may not be inclosed. *Hubbard v. Kiddo*, 87 Ill. 578.

#### **As evidence of payment.**

Possession of a bill of exchange, which has been in circulation, by the acceptor, is prima facie evidence of its payment. *Close v. Field*, 9 Tex. 422, 424.

#### **As evidence of title or ownership.**

Possession is good evidence of title against all persons except the owner. *Rogers v. Bates*, 1 Mich. N. P. 93, 94.

Possession of personal property is prima facie evidence of title, good against everybody but the rightful owner. *Tolerton & Stetson Co. v. Petrie*, 82 N. W. 199, 201, 12 S. D. 595.

Possession is prima facie evidence of title against all persons not having a better right. It constitutes, or rather answers for, a right of property. *Commonwealth v. Finn*, 108 Mass. 466, 468.



Possession is presumptive evidence of title, but not of any particular title. *Ferguson v. Witsell* (S. C.) 5 Rich. Law, 280, 57 Am. Dec. 744.

Possession is evidence of title of a chattel, but it is merely prima facie, and never conclusive. *Keatner v. Kelser*, 4 Pa. Dist. R. 479, 480.

Possession of negotiable paper without explanation is prima facie evidence that the holder is the proper owner or lawful possessor of the instrument. *Hand v. Savannah & C. R. Co.*, 17 S. C. 219, 256 (citing *Marion Co. v. Clark*, 94 U. S. 278, 24 L. Ed. 59).

#### **As lawful possession.**

1 Stat. 660, § 43, providing that if any chest shall be found in the "possession of any person" unaccompanied with marks or certificates showing the payment of revenue thereon, it shall be presumptive evidence that the same is liable to forfeiture, means the possession of a purchaser of such goods, and not in the possession of a wrongdoer. *651 Chests of Tea v. United States* (U. S.) 22 Fed. Cas. 253, 257.

The word "possession," as used in Comp. Laws 1888, § 3450, providing that, if a purchaser of property at an execution sale "fails to recover possession because of irregularity in the sale," etc., means a possession coupled with a right of property, and not a mere naked possession, such as might be acquired under a void sale. The statute is remedial in its character, and should receive a liberal interpretation. *Utah Nat. Bank v. Beardsley*, 37 Pac. 586, 587, 10 Utah, 404.

The possession which is required by Pub. St. c. 11, § 13, providing that taxes on certain lands shall be assessed to the person who is either the owner or in possession thereof, etc., is that which the law recognizes as such; not a mere presence on or dealing with the land, or a part of it, which falls short of such a relation to it that the supposed possessor could sue for a trespass. *Kerslake v. Cummings*, 61 N. E. 760, 761, 180 Mass. 65.

#### **Occupancy synonymous.**

The words "possession" and "occupancy," as used in Revenue Law, § 216 (Rev. St. 1874), are convertible terms, and are practically synonymous. *Walker v. Converse*, 36 N. E. 202, 204, 148 Ill. 622 (citing *Taylor v. Wright*, 13 N. E. 529, 121 Ill. 455).

"Possession," when applied to land, is nearly synonymous with "occupancy," and may, in contemplation of law, exist in the same manner by and through a tenancy. *Walters v. People*, 21 Ill. (11 Peck) 178.

Where an attempt is made to show title to property by reason of possession for more than 20 years, the word "possession" is a

synonym for "occupancy." *Webb v. Rhodes*, 61 N. E. 735, 736, 28 Ind. App. 393.

In common parlance "possession" is a word often used as a substitute for "occupancy." Thus, in actions of ejectment it is ordinary practice to ask direct questions about possession in examinations, concerning occupancy. *Wilson v. Purl*, 34 S. W. 884, 888, 133 Mo. 367.

#### **Occupation distinguished.**

There is a distinction between "possession" and "occupation," because there may be a legal or constructive possession where there is no actual occupation. *Ward v. Dewey*, 16 N. Y. 519, 531.

#### **Right to occupy and enjoy implied.**

Possession of real property implies something more than the mere right to enter upon the same and look at the same, or occupy the same. Possession of real property implies the right to occupy and enjoy it. *Bailey v. Bond* (U. S.) 77 Fed. 406, 408, 23 C. C. A. 206.

A "possession" is something more than a mere right or title whether to a present or future estate. It implies a present right to deal with the property at pleasure, and to exclude other persons from meddling with it. *Sullivan v. Sullivan*, 66 N. Y. 37, 41, 42. The heirs of a testator who has by will created a valid life estate, followed by a void remainder, cannot, merely as reversioners, maintain an action for partition under Code Civ. Proc. § 1537, which applies only where the apparent devise of the present estate is alleged and proved to be void. *Garvey v. Union Trust Co.*, 29 App. Div. 513, 518, 52 N. Y. Supp. 260.

#### **As ownership.**

"Possession," as used in a will giving testator's wife possession of one-third of his personal estate, means ownership. The testator meant a possession without limitation as to time. *Woodford's Ex'rs v. Woodford* (N. J.) 14 Atl. 273, 274.

"Possession," as used in the assessment law, does not mean a visible or actual possession of the land itself, but a vested ownership of freehold quantity. As the land (the thing owned) lasts forever, and the ownership must be as lasting, the owner, by himself and his heirs, as a kind of corporation, is regarded as living forever; for the quantity of ownership is measured by time. The freehold in possession is the first part of such ownership, and the rest of it, for all time is in the remainderman and his heirs. *State v. South Penn. Oil Co.*, 24 S. E. 688, 695, 42 W. Va. 80.

#### **As permanent possession.**

To entitle a person to use force in defending the possession of premises, his pos-

session need not be permanent, if lawful, and one who unlawfully takes possession of premises by force acquires no lawful possession, and may be forcibly ejected by the owner. *State v. Howell*, 53 Pac. 314, 315, 21 Mont. 165.

#### **As property.**

See "Property."

#### **Residence not required.**

To have possession does not require actual residence. Wherever there is subjection of land to the will and control of another, with title in him, it is occupied by that other. It is in the actual legal possession of that other. When a nation or body of people have the title to land, and the same is subject to their will and control, it is occupied by them. Legally it is in their possession. *United States v. Rogers* (U. S.) 23 Fed. 658, 666.

A possession of land may exist without any actual residence. It is enough if the inclosures are kept up, and the doors of the house closed, so as to indicate that the premises are not abandoned. The use of land inclosed for pasturing or grazing stock is as much a possession as if it were cultivated, but the actual continuance or ranching of stock on a place would not constitute possession if the intention to abandon has been evidenced by declarations or actions. There must be a concurrence of act and intention to fill the idea of actual occupancy or possession. *Fuller v. Jackson* (Tenn.) 62 S. W. 274, 282.

The possession of land sufficient to bar an adverse title thereto under the statute of limitations limiting writs of right to thirty years cannot be construed as meaning that there should be an actual residence or fence by the party claiming the benefit of the statute; that is, an actual residence on the land, or a *pedis possessio* of it by an inclosure. *Ellicott v. Pearl*, 35 U. S. (10 Pet.) 412, 442, 9 L. Ed. 475.

#### **Seisin synonymous.**

According to the modern authorities there seems to be no legal difference between the words "seisin" and "possession," although there is a difference between the words *disseisin* and *dispossession*. *Slater v. Rawson*, 47 Mass. (6 Metc.) 439, 444.

The term "possession," though sometimes used in the sense of "seisin," does not fully express the technical meaning of that term. Seisin in fact includes possession, yet it implies something more. Even the latter term is ambiguous, and much has been said and written in attempts to define its true signification. *Fort Dearborn Lodge v. Klein*, 3 N. E. 272, 273, 115 Ill. 177, 56 Am. Rep. 133.

#### **Possession as bailee.**

In a statute which prescribes that "peaceable possession of slaves for the space of five years shall be sufficient to give the possessor the right of property therein," the word "possession" means a possession which is adverse under a claim of title, however unfounded that claim may be, and has no application to a possession merely as bailee of the owner. *Spencer v. McDonald*, 22 Ark. 466, 473.

#### **Possession of burglar's tools.**

The word "possession" as used in statutes imposing a punishment for having possession of burglar's tools or other implements of crime, cannot be limited to manual touch or personal custody. One who deposits the prohibited articles in a place of concealment may be deemed to have them in his possession, and where implements of crime were left by one in care of his wife they were not less in his possession than if they had remained in the place where he had concealed them. *State v. Potter*, 42 Vt. 495, 505.

#### **Possession of lessor or lessee.**

An owner of land, who has built houses thereon, leased the same, and lives with one of his tenants, is "in possession," within 1 Starr & C. Ann. St. c. 57, § 2, providing that the grantee of a "grantor in possession" may maintain forcible entry and detainer against such grantor for the premises conveyed. *Muller v. Balke*, 47 N. E. 355, 356, 167 Ill. 150.

The term "possession" in Rev. St. c. 76, § 3, providing that the appraisers in the levy of an execution on real estate shall state the nature of the estate and its value, and whether it is in possession, reversion, or remainder, does not mean that the debtor himself occupies the land, but he may possess it by a tenant. *Stinson v. Rouse*, 52 Me. 261, 266.

#### **Possession of licensee.**

By the possession of a thing we always conceive the condition in which not only one's own dealing with a thing is physically possible, but every other person dealing with it is capable of being excluded. Property upon a man's land, and especially property annexed to the land which cannot be removed without the consent of the owner, cannot be held to be beyond his possession, though used by a mere licensee. *Webster Lumber Co. v. Keystone Lumber & Mining Co.*, 42 S. E. 632, 635, 51 W. Va. 545.

#### **Possession of mining claim.**

By possession of a mining claim, actual personal presence on the ground is not meant; but, if a party has discovered a ledge with a well-defined wall rock, and within the limits of such claim has posted and recorded

his notice as required by law, marked its boundaries by placing sufficient stakes at the corners of his claim, so that such claim can be regularly identified thereby, and then performed the amount of work thereon required by law to hold the same, such acts constitute possession of the claim. *McKinstry v. Clark*, 1 Pac. 759, 762, 4 Mont. 370.

#### **Possession of slave.**

The term "possession," within the rule that there can be no larceny unless the taking is from the actual or constructive possession of the owner of the property taken, includes the possession by a slave of his master's property, as the possession of a slave is the possession of his master, the slave acquiring no right of property by possession. *Hite v. State*, 17 Tenn. (9 Yerg.) 198, 205.

#### **Stock on range.**

"Possession," within the meaning of the rule that, to constitute larceny, the stolen property must be taken from the possession of the owner, correctly characterizes the relation existing between the owner of stock and the stock while the latter is on its accustomed range. *Huffman v. State*, 12 S. W. 588, 589, 23 Tex. App. 174; *McGrew v. State*, 20 S. W. 740, 741, 31 Tex. Cr. R. 336; *Jones v. State*, 3 Tex. App. 498, 499.

#### **POSSESSION ANIMO DOMINE.**

"Possession animi domine," to form the basis of title to land by adverse possession, must be at least in its commencement a corporeal possession, and must be continuous, uninterrupted, peaceable, public, and unequivocal. Such a possession, without any title whatever, for thirty years, will enable the possessor who invokes the plea of prescription to hold dominion over the land against the world. *Vicksburg, S. & Pac. Ry. Co. v. Le Rosen*, 26 South. 854, 856, 52 La. Ann. 192.

#### **POSSESSION BY RELATION OF LAW.**

"Possession by relation of law" is where the party in actual possession becomes dispossessed, and is afterwards restored by reentry, or in some other lawful manner. He is then, during the period which has intervened between the dispossession and the restoration, deemed in "possession by relation of law." Possession by relation is not so efficacious as possession in fact, for, while the latter affects all persons, and reaches all purposes, the former extends only to some purposes and persons. *Bacon v. Sheppard*, 11 N. J. Law (6 Halst.) 197, 20 Am. Dec. 583.

#### **POSSESSION FENCE.**

"Possession fence" is an inclosure made by the lapping of fallen trees, and apparent-

ly constructed only for the purpose of indicating a claim to the ownership surrounded thereby. *Freedman v. Bonner* (Tex.) 40 S. W. 47, 48.

#### **POSSESSION IN FACT.**

"Possession in fact" is where the party is in the actual use and enjoyment of land or other real estate at the commission of an injury thereto. *Bacon v. Sheppard*, 11 N. J. Law (6 Halst.) 197, 20 Am. Dec. 583.

Possession in fact is nothing more than a simple holding or detention of a thing which is under our control without the intention of acquiring a thing for ourselves. Such is the possession of a bailee, a tenant, and others who possess a thing in the name of another, and not in their own. The possession in fact and by the will is the holding of a thing with the intention of excluding all others from its use, or, as it is expressed in the *Partidas*, that holding or detention which a man has of things corporeal, by the aid both of the body and the mind. *Sunol v. Hepburn*, 1 Cal. 254, 262.

#### **POSSESSOR.**

See "Bona Fide Possessor."

A "possessor" does not mean "owner." *Ainsa v. United States*, 22 Sup. Ct. 507, 510, 184 U. S. 639, 46 L. Ed. 727.

An opinion stating that the ownership of ice was in the possessor of the water, etc., means the owner of the water. *Bigelow v. Shaw*, 32 N. W. 800, 802, 65 Mich. 341, 8 Am. St. Rep. 902.

#### **POSSESSORY ACTION.**

An action which has for its immediate object to obtain or recover the actual possession of the subject-matter, as distinguished from an action which merely seeks to vindicate the plaintiff's title, or which involves the bare right only; the latter being called a "petitory action." *Black, Law Dict.*

Replevin and ejectment are both possessory actions. *Atwater v. Spalding*, 90 N. W. 370, 371, 86 Minn. 101, 91 Am. St. Rep. 331.

#### **POSSESSORY CLAIM.**

Where a pre-emptor has filed his declaratory statement, but has not paid for the land, he has a "possessory claim," within Act Cong. March 3, 1875, § 3, providing for condemnation of such holdings in the public lands by railroads; and is therefore entitled to compensation for a right of way taken through his land. *Enoch v. Spokane Falls & N. Ry. Co.*, 33 Pac. 966, 967, 6 Wash. 393.

**POSSESSORY LIEN.**

See "Factor's Lien."

A possessory lien, when applied to an attorney's lien, is a lien which attaches to all papers, documents, or moneys that come into the hands of the attorney professionally, without any special contract in regard to the same. Having possession, he has the right to retain them against his client, assignments, or attachments, until the balance due him for legal services is paid. The client cannot discharge him and withdraw such papers or moneys from his hands without paying the general balance due him for professional services. *Weed Sewing Mach. Co. v. Boutelle*, 56 Vt. 570, 578, 48 Am. Rep. 821.

**POSSESSORY TITLE.**

See "Good as a Possessory Title."

**POSSIBILITY.**

See "Mere Possibility"; "Naked Possibility"; "Reasonable Possibility."

A legal "possibility," as such term is used in connection with real estate, is an estate founded on a contingency which may or may not happen. *Kinzie v. Winston* (U. S.) 14 Fed. Cas. 649, 651.

"A 'possibility' is defined to be an uncertain thing, which may happen, or a contingent interest in real or personal estate. Possibilities are divided into, first, a possibility coupled with the interest. This may, of course, be sold, assigned, transmitted, or devised. Such a possibility occurs in executory devises and in contingent springing or executory uses. Secondly, a bare possibility of hope of succession. This is a case of an heir apparent during the life of his ancestors, and it is evident he has no right he can assign, devise, or release." *Bodenhamer v. Welch*, 89 N. C. 78-81.

"The word 'possibility' has a general sense, in which it includes even executory interests which are the objects of limitation. But in its more specific sense it is that kind of contingent benefit which is neither the object of a limitation, like an executory interest, nor is founded on any loss or recoverable seisin, like a writ of entry. And what is termed a bare or mere possibility signifies nothing more than an expectancy, which is specifically applied to a mere hope of succession, unfounded in any limitation, provision, trust, or legal act whatever; such as the hope which an heir apparent or presumptive has of succeeding to the ancestor's estate." *Needles v. Needles*, 7 Ohio St. 432, 442, 70 Am. Dec. 85 (citing *Smith, Real & Personal Property*).

The word "possibility," as used by common-law writers, relative to the possibility of an estate, has never applied to interests which were vested either in interest or possession, but always to remote and improbable contingencies. *Vint v. Ring* (U. S.) 28 Fed. Cas. 1200, 1203.

An instrument purporting to convey all the interest which a son "has or may have in the estate of his father as heir at law, devisee, legatee, or next of kin" does not convey any interest. The interest attempted to be conveyed is a bare "possibility," which is not the subject of a grant. *Stover v. Eycleshimer* (N. Y.) 46 Barb. 84, 86.

As an estate or property.

See "Estate"; "Property."

**POSSIBILITY OF BENEFIT.**

A policy of life insurance is a "possibility of benefit," within the meaning of St. 5 Geo. II, c. 30, § 1, providing that all the effects of a bankrupt of which he was possessed or interested in, or whereby he had or might expect any profit, possibility of profit, benefit, or advantage whatsoever, should be delivered to his assignee. *Schondler v. Wace*, 1 Camp. 487, 488.

**POSSIBILITY OF REVERTER.**

"Possibility of reverter" denotes no estate, but, as the name implies, only a possibility to have the estate at a future time. Of such possibilities there are several kinds, of which two are usually denoted by the term under consideration: First, the possibility that a common-law fee may return to the grantor by breach of a condition subject to which it was granted; second, the possibility that a common-law fee other than a fee simple may revert to the grantor by the natural determination of the fee. *Carney v. Kain*, 40 W. Va. 758, 781, 23 S. E. 650.

**POSSIBLE.**

See "As Nearly as Possible"; "As Soon as Possible"; "As Speedily as Possible."

Probable distinguished, see "Probable."

The word "possible," as defined by Webster, means liable to happen, or to come to pass, capable of existing or of being conceived or thought out, capable of being done, not contrary to the nature of things. *Topeka City Ry. Co. v. Higgs*, 16 Pac. 667, 674, 38 Kan. 375, 5 Am. St. Rep. 754.

If witnesses subscribed a will where the testator could see them do it by some slight movement of his head, or by turning and opening his eyes, or the like, but, being able to make such change, omitted it because he

had no desire to see, or was careless or indifferent about it, it was certainly "possible" for him "to see" the witnesses subscribe. *Aikin v. Weckerly*, 19 Mich. 482, 506.

Everything is deemed possible except that which is impossible in the nature of things. Civ. Code Cal. 1903, § 1597; Civ. Code Mont. 1895, § 2152; Rev. Codes N. D. 1899, § 3868; Civ. Code S. D. 1903, § 1221.

## POST.

See "Military Post."

### As advertise or give notice.

The verb "post" is defined in Webster's Dictionary as follows: "To attach to a signpost, or other usual place of affixing public notices; to advertise; as to post a notice." As used in Rev. Civ. St. art. 3230, providing that the clerk shall "post" at least five copies of the order for an election, etc., means that notice shall be given to the electors, etc. *Voss v. Terrell*, 34 S. W. 170, 171, 12 Tex. Civ. App. 439.

"Posted," as used in a railroad rule requiring that the rules and regulations should be posted in the stations, etc., means that such rules and regulations shall be advertised in the form of a poster in such stations, or in other words than printed in bill or placard form. They should be so attached to something in a conspicuous place in the station that they can, in the position in which they are placed, or without being removed, be read conveniently by the public. *State v. Pensacola & A. R. Co.*, 9 South. 89, 92, 27 Fla. 403.

The word "post," when used with reference to a notice, means to attach to a post, a wall, or other usual place of affixing public notices; to bring to the notice or attention of the public by affixing to a post or putting it in some public place. *Allen v. Allen*, 91 N. W. 218, 220, 114 Wis. 615.

### As a military establishment.

"Post," as used in a contract with the government to transport supplies, etc., from posts, depots, or stations, means "a military establishment where a body of troops is permanently fixed, and is not used in the sense of railway depots, posts, or stations." *United States v. Caldwell*, 86 U. S. (19 Wall.) 264, 268, 22 L. Ed. 114.

### As a mode of conveying intelligence.

"A post, etymologically defined, is a mode of conveying written or unwritten intelligence to and from appointed stations at regular intervals, or whenever the performance of such service may properly be required." *United States v. Kochersperger* (U. S.) 26 Fed. Cas. 803.

### As a piece of timber or metal.

A post is defined as a piece of timber, metal (solid or built up), or other substance of considerable size, set upright, and intended as a support to a weight or structure resting upon it, or as a firm point for the attaching of something; so that a fire escape of sheet metal, which is fastened along the outer edge, but is not supported in the center, cannot be said to have a center post, so as to infringe a patent having such post. *Kirker-Bender Fire Escape Co. v. Chicago Beach Hotel* (U. S.) 116 Fed. 359, 362, 53 C. C. A. 579.

The call in a deed for a post as a monument for a boundary is not satisfied by a stump. *Pollard v. Shively*, 5 Colo. 309, 316.

### POST LETTER.

A letter delivered by a post-office inspector at the window of the outer hall of the general post office to another inspector, who hands it to a third, who keeps it locked up all night, and on the following morning gives it to a sorter to put in among the letters to be sorted by a party whose honesty was under suspicion by the post-office authority, is not a "post letter" within the meaning of the statute 1 Vict. c. 36, making it an offense to steal a post letter from the mails. *Reg. v. Shephard*, 36 Eng. Law & Eq. 599, 601.

A letter with a fictitious address, dropped into the letter box of a post office receiving house, in order to test the honesty of an employé in the post office, is a "post letter" within the statute 1 Vict. c. 36, § 26, making it an offense to steal post letters. *Reg. v. Young*, 2 Car. & K. 466.

### POST NOTES.

Post notes "are a species of obligation resorted to by banks when the exchanges of the country, and especially of the banks, have become embarrassed by excessive speculation. They are intended to enter into the circulation of the country as part of its medium of exchange; the smaller ones for ordinary business, and the larger ones for heavier operations. They are intended to supply the place of demand notes which the banks cannot afford to issue, or which issue to relieve the interests of commerce or of the banks, or to avoid a compulsory suspension. They are under seal or without seal, and at long or short dates, with more or less interest as the necessities of the bank may require. They may be secured; still as they are intended and issued not merely as evidences of loans, and to be thrown into a stock market, but as a part of the circulating medium they are called 'post notes.'" *Appeal of Hogg*, 22 Pa. (10 Harris) 479, 488.

"Post notes" differ from other promissory notes only as to the time of payment. D. set up a banking establishment, and gave to certain trustees a bond and warrant of attorney, reciting that "whereas, he has already and is about to issue his certain promissory notes for the payment of divers sums of money on their being presented at his banking house according to the tenure and effect of such notes: Now, the condition is such that if the above-bonded D. shall at all times hereafter pay and discharge all promissory notes made payable by him as aforesaid, then the said application shall be void." It was held that this embraced all notes, whether in the nature of bank notes, or payable on demand, or post notes payable at any future period. In *re Dyott's Estate* (Pa.) 2 Watts & S. 463, 489.

### POST OFFICE.

"Post offices and post roads," as used in the federal Constitution authorizing Congress to establish "post offices and post roads," not merely authorizes Congress to designate the routes over which the mail shall be carried and the offices where letters and other documents shall be received to be distributed or forwarded, but authorizes the carriage of the mail and all measures necessary to secure its safe and speedy transit and a prompt deliverance of its contents, and to prescribe what shall be carried, and its weight and form, and the charges to which it shall be subject; and the right to designate what shall be carried necessarily involves the right to determine what shall be excluded, but does not confer on Congress the right to authorize any officers connected with the postal service to invade the secrecy of letters and sealed packages in the mail, and all regulations of that kind must be in subordination to the constitutional guaranty of the right of the people to be secure in their papers, and the guaranty against unreasonable searches and seizures extends to papers thus closed against inspection wherever they may be; and in the enforcement of such regulations the distinguishment must be made between what is intended to be free from inspection, such as letters and sealed packages, and what is open to inspection, as newspapers, magazines, etc.; and letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. In *re Jackson*, 96 U. S. 727, 733, 24 L. Ed. 877.

"Post office," as used in Post-Office Act March 3, 1825 (4 Stat. 108, § 22), providing for the punishment of any person stealing any letter or packet out of any post office, has in general acceptance both a generic

and specific sense. In its ordinary use the term embraces the business of keeping, forwarding, and distributing mailable matter equally with the place where such business is conducted, and manifestly such place, to constitute a post office, need not be a building set apart for that use, or any apartment or room in a building, but, according to the extent of business done, may be a desk, or a trunk, or a box carried about a house, or from one building to another. The place of the deposit of the mailable matter would in this sense constitute the post office, and anything taken out of that receptacle or keeping would be taken out of or from the post office, without regard to the distance of removal or to inclosures or rooms. *United States v. Marsells* (U. S.) 26 Fed. Cas. 1167.

"A post office, according to the primary meaning of the word, is an apartment or building at an appointed station for the local transaction of the business of the mail." *United States v. Kochersperger* (U. S.) 26 Fed. Cas. 803.

The post office is not necessarily the building in which the business of the department of government is carried on, but the agency through which this is done, and it is in part located in the post office building. In *Casco Nat. Bank v. Shaw*, 79 Me. 376, 10 Atl. 67, 1 Am. St. Rep. 319, depositing a letter in a mail box is said to be as truly mailing it as though placed in the building in which the post office was kept, and a deposit in a mail box attached to a railroad station at the place from which a money package was mailed, of a letter of advice, the box being under the sole custody of the local postmaster, constituted a deposit in the post office within the requirement of a policy insuring bankers against loss of money packages provided a letter of advice thereof should be deposited in the post office. *Banco de Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 95 N. W. 232, 234.

"Post office," as used in a United States statute providing for the punishment of any person who shall steal mail from or out of any post office, does not mean the building in which the post office is kept, but the case or pigeon holes where the letters are deposited. *United States v. Nott* (U. S.) 27 Fed. Cas. 189, 191.

### POST ROAD.

A "post road" is a highway by land or water, made by statute an avenue over which mails may be lawfully transmitted. *Railway Mail Service Cases* (U. S.) 13 Ct. Cl. 199, 204; *United States v. Kochersperger* (U. S.) 26 Fed. Cas. 803, 812.

**Post route distinguished.**  
See "Post Routes."

**POST ROUTES.**

A "post route" is a post road, or definite portion thereof, over which mails are usually transported by contract. *Railway Mail Service Cases* (U. S.) 13 Ct. Cl. 199, 204.

"A post route, in the general sense of the term, is the appointed course or prescribed line of transportation of the mail." *United States v. Kochersperger* (U. S.) 26 Fed. Cas. 803, 812.

The term "post routes" in Rev. St. § 3982 [U. S. Comp. St. 1901, p. 2712], includes the streets of the city of New York. *United States v. Easson* (U. S.) 18 Fed. 590.

**Post roads distinguished.**

The word "post routes," as used in Act March 3, 1851, § 10, authorizing the Postmaster General to establish post routes within certain towns, is not synonymous with "post roads." *United States v. Kochersperger*, 9 Am. Law Reg. 145, 167.

"Post route," as used in Rev. St. § 3982 [U. S. Comp. St. 1901, p. 2712], providing that no person shall establish any private express for the conveyance of letters or packages by regular trips or at stated periods over any post route which is or may be established by law from any city, town, or place to any other city, town, or place, between which mail is regularly carried, must be construed to include letter carrier routes in a city; post routes being the appointed course or prescribed line of mail transportation which would include letter carrier routes. "Post routes" and "post roads" are not synonymous terms. And hence one employing carriers for the collection and delivery of letters daily in a city, such carriers making regular trips at stated periods over the letter carrier routes in such cities established by the Postmaster General in substantially the same manner as a regular mail matter route of the Post Office Department, is acting contrary to the statute, and searches and seizures relating to the matters thus conveyed cannot be enjoined by such person. *Blackham v. Gresham* (U. S.) 16 Fed. 609, 611.

**POSTING AS REQUIRED BY LAW.**

By "posting as required by law" is meant that the notice must be actually posted the requisite number of days before the election is held. *Nelson v. State* (Tex.) 75 S. W. 502, 503.

**POSTMASTER.**

See "Deputy Postmaster."

**POST-MORTEM.**

A post-mortem examination is an examination of a body after death, and does not

necessarily imply an autopsy, which is an examination of a dead body, by dissection to ascertain the cause of death. *Wehle v. United States Mut. Acc. Ass'n*, 31 N. Y. Supp. 865, 866, 11 Misc. Rep. 36.

A "post-mortem examination," as generally understood, means the dissection of the body, made within a few hours, or at the furthest a few days, after the death. *Stephens v. People* (N. Y.) 4 Parker, Cr. R. 396, 475.

**POST OBIT.**

Post obit agreements or bonds are those given by a borrower of money by which he undertakes to pay at some existing or legal rate of interest on or after the death of a person from whom he has expectations in case of surviving him. This character of agreements are not always void. They are so when it is shown to the courts that the contracts are inequitable or unconscientious. When advantage is taken of the weakness, necessity, or ignorance of the other, or such extraordinary disparity exists between the sum advanced and the sum to be received as clearly appears to be contrary to good conscience, the courts will declare the agreement fraudulent and void as being against the policy of the law. They partake generally of the nature of a wager, and contain no principle by which the value of the chance may be calculated so as to enable the court to ascertain whether they are reasonable or unconscionable. *Crawford v. Russell*, 62 Barb. 92, 95.

A "post obit bond" is an agreement on the receipt of a sum of money by the obligor to pay a larger sum, exceeding the legal rate of interest, on the death of the person from whom he has some expectation, if the obligor be then living. This contract is not considered as a nullity, but it may be made on reasonable terms, in which the stipulated payment is not more than a just indemnity for the hazard. But whenever an advantage is taken of the necessity of the obligor to induce him to make this contract, he is relieved as against an unconscionable bargain on payment of the principal and interest. *Boynton v. Hubbard*, 7 Mass. 112, 119.

**POSTED WATERS.**

"Posted waters are all waters on lands posted as provided in this chapter. Public waters; all waters of which the state has jurisdiction except private preserve and posted waters." V. S. 4562. Elsewhere in the same chapter it is provided that the owner or occupant of inclosed or cultivated land may, by posting notices as thereby required, prohibit shooting, trapping, or fishing thereon, under a prescribed penalty. *State v.*

Therault, 70 Vt. 617, 619, 41 Atl. 1030, 1031, 43 L. R. A. 290, 67 Am. St. Rep. 695.

The term "posted waters," as used in the chapter relating to the preservation of fish, game, birds, etc., means all waters on lands posted as provided in the chapter. V. S. 1894, 4562.

## POSTER.

A large bill posted for advertising purposes. *State v. Pensacola & A. R. Co.*, 9 South. 89, 92, 27 Fla. 403.

## POSTERITY.

"Posterity," as used in a devise of real estate, embraces not only children, but descendants to the remotest generation. *Breckinridge v. Denny*, 71 Ky. (8 Bush) 523.

"Posterity," comprehends all the descendants in the direct line. *Civ. Code La.* 1900, art. 3556, subd. 24.

## POSTHUMOUS CHILD.

A posthumous child is a child born after the death of the father. "A posthumous child inherits from his deceased father just as if he had been born in the lifetime of such father and had survived him. For all the beneficial purposes of heirship, a child en ventre sa mere is considered as absolutely born. The doctrine that posthumous children inherited in the same manner as if they had been born in the lifetime of their father and were surviving heirs has been universally adopted in the United States, and this relates back to the conception of the child if it is born alive." *Pearson v. Carlton*, 18 S. C. 47, 55.

Posthumous children are those who are born after the death of their father. *Civ. Code La.* 1900, art. 30.

## POSTLIMINY.

"Postliminy" is defined to be the principle of the law of nations under which property, if taken by the enemy in time of war, is restored to its former state upon coming again under the power of the nation to which it formerly belonged. *Doss v. Cradock*, 1 Dallam, Dig. (Tex.) 592, 593.

"The right of 'postlimini,' says Vattel, is that in virtue of which persons and things taken by the enemy are restored to their former state on coming actually into the power of the nation to which they belong." *Leitensdorfer v. Webb*, 1 N. M. 34, 44.

## POSTPONE.

Code, § 306, subd. 8, authorizing the allowance of calendar fees when a cause has

been regularly put on the calendar, and has been "postponed," or has not been reached, cannot be construed to include the staying of proceedings for the return of a commission. The term "postpone" has reference to something occurring at the circuit which has the effect to delay the trial. *Shufelt v. Power* (N. Y.) 13 How. Prac. 89, 90.

## POSTPONEMENT.

The word "postponement," as used in speaking of the postponement of legal proceedings, is synonymous with the word "continuance." *State v. Underwood*, 76 Mo. 630, 639.

"The word 'postponement' is usually preferred to the word 'continuance' when the purpose is to obtain a continuance to another day during the term at which the case is fixed, rather than to a future term." *State v. Nathaniel*, 28 South. 1008, 1010, 52 La. Ann. 558.

## POTENTIAL

"Potential" means having latent power; endowed with energy adequate to a result; efficacious; existing in possibility, not in act. *Dickey v. Waldo*, 97 Mich. 255, 261, 56 N. W. 608, 611, 23 L. R. A. 449.

The word "potential" means in possibility, not in act, not positively; in efficacy, not in actuality. *Long v. Hines*, 19 Pac. 796, 797, 40 Kan. 220, 10 Am. St. Rep. 192.

## POTENTIAL EXISTENCE.

The rule of law is well established that things having no potential existence cannot be the subject of mortgage and sale. There are, however, exceptions to this rule; as, where a merchant mortgages his stock of goods and all future additions thereto. The difficulty seems to arise in determining what comes within the definition of the term "potential existence." The definition of the word "potential" is "having latent power, endowed with energy adequate to a result, efficacious, existing in possibility, not in act." Sir W. Hamilton said: "Potential existence means merely that the thing may be at some time; actual existence that it now is." In the legal sense, things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor. When one possesses a thing from which a certain product, in the very nature of things, may be expected, such product, we think, has a potential existence. Where a contract provided that two of the parties thereto should furnish the other party a certain number of peach trees, which the latter was to plant and cultivate on a portion of his land, the first named parties to receive one-half of the peaches grown on such trees during any



two of such years as they might select in consideration for their furnishing the trees, it was held that the peaches to be grown on such trees had such a potential existence at the time the contract was executed as made them the subject of a valid contract. *Dickey v. Waldo*, 97 Mich. 255, 261, 56 N. W. 608, 611, 23 L. R. A. 449.

### POTENTIALLY.

"Potentially," means in possibility, and not in act, not positively; in efficiency, not in actuality; and hence mere ownership or possession of the soil does not carry with it the production of crops, potentially. *New Lincoln Hotel Co. v. Shears*, 78 N. W. 25, 28, 57 Neb. 478, 43 L. R. A. 588, 73 Am. St. Rep. 524; *Cole v. Kerr*, 28 N. W. 598, 599, 19 Neb. 553. Thus, a chattel mortgage upon crops not planted cannot be construed to cover such crops after they are planted, on the theory that the mortgagor was potentially in possession of such crops. *Cole v. Kerr*, 28 N. W. 598, 599, 19 Neb. 553.

### POTESTATIVE CONDITION.

The "potestative condition" is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other to bring about or to hinder. *Civ. Code La. 1900, art. 2024.*

### POTTERY BUILDING.

A "pottery building," within the meaning of a fire policy on a pottery building, was held not to include an adjoining two-story brick building built at a different time, though the under story was used as a boiler room from which power was furnished to the pottery building. *Forbes v. American Ins. Co.*, 41 N. E. 656, 657, 184 Mass. 402.

### POTTERY BUSINESS.

"Pottery business," as used in a letter proffering the sale of the business, and reciting that the writer owned the good will, brands, patents, molds, designs, horses, wagons, trucks, tools, and all necessary implements used in their "pottery business," and have the right to carry on a general business in the manufacture and sale of clay products, is not just as specific, just as limited, just as close a definition as if the writers had said the sanitary pottery business which they are transacting. *Trenton Potteries Co. v. Oliphant*, 39 Atl. 923, 935, 56 N. J. Eq. (11 Dick.) 680.

### POULTRY.

The word "poultry" includes pigeons. *Commonwealth v. Lewis* (Pa.) 25 Wkly. Notes Cas. 432, 433.

### POUND.

Sir Robert Peel defines "pound" as a definite quantity of gold with a mark on it to determine its weight and fineness. *Borie v. Trott*, 5 Phila. 366, 403.

According to the standard fixed by 4 U. S. Stat. 700, the British sovereign, which is a coin representing a pound sterling, is equivalent to about four dollars and eighty-seven cents. *Schermerhorn v. Talman*, 14 N. Y. 93, 135.

#### As place for impounding animals.

See "Town Pound."

A "pound" is defined to be a place where beasts subject to be impounded are to be confined, kept, and fed. *Harriman v. Fifield*, 36 Vt. 341, 345.

A town pound for impounding of stray animals, etc., is an inclosed piece of land, secured by a firm structure of stone or of posts and timber placed in the ground. *Wooley v. Inhabitants of Groton*, 56 Mass. (2 Cush.) 305, 308.

Where a pound is located by county commissioners, it will continue to be the proper place to impound stock until changed by the proper authority. *Colp v. Halstead*, 63 Ill. App. 116, 118.

### POUND BREACH.

"Pound breach is among the defenses cognizable in the sheriff's court as being common grievances, in direct contempt of the authority of the law by which pounds are provided for the legal detainment of distresses, etc. 3 Hawk. P. C. 144. The precedents of indictments for pound breach describe the taking or driving away the beast impounded as part of the offense." And in *Co. Litt. 47b*, it is said: "If the owner breach the pound and take away his goods, the party distraining may have his action de parco fracto." The inference that must be drawn from these various authorities is that the driving or conveying away the impounded cattle is a part of the offense of pound breach. *State v. Young*, 18 N. H. 543, 544.

### POUNDKEEPER.

The office of poundkeeper is a public office, created by law. A municipal corporation has no power to appoint such an officer, unless the authority for that purpose is especially given by its charter. *White v. Tallman*, 26 N. J. Law (2 Dutch.) 67, 69.

### POUNDS STERLING.

A note payable in "pounds sterling," or British sovereigns, is payable in money just as much and as certain as if it was payable

in dollars. The case is different from a note made payable in currency, which may be money only conventionally, but not legally. But where a note is made payable in a particular denomination of foreign money, as pounds sterling, it is payable in money the same as if it was payable in a denomination of domestic money. *King v. Hamilton* (U. S.) 12 Fed. 478, 479.

## POUNDAGE.

"Poundage" in practice is the amount allowed to the sheriff or other officer for commissions on the money made by virtue of an execution. *Bowe v. Campbell* (N. Y.) 2 Civ. Proc. R. 232, 234.

## POVERTY.

"Poverty" cannot be construed as synonymous with "insolvency," so as to render a person incompetent to act as administratrix. Thus a young man starting out in life with good health, mind, and strength may be in poverty, but not be insolvent in any sense. *Appeal of Bowersox*, 100 Pa. 434, 438, 45 Am. Rep. 387.

## POWDER.

Where an indictment for murder charged that defendant murdered deceased by shooting with "powder" and leaden balls, it was sufficient though not using the term "gunpowder," the court remarking that, though technically "powder" might be a mass of fine particles of any substance, yet, when used in connection with an allegation of shooting and the use of leaden balls, any person might know that gunpowder was meant. *Blankenship v. Commonwealth* (Ky.) 66 S. W. 994, 995.

## POWER.

See "Appointing Power"; "Banking Powers"; "Beneficial Power"; "Corporate Powers and Privileges"; "Delegated Power"; "Discretionary Power"; "Exclusive Power"; "General Power"; "Governmental Power"; "Implied Powers"; "Incidental Power"; "Judicial Power"; "Judiciary Powers"; "Legislative Power"; "Military or Usurped Power"; "Ministerial Power"; "Particular Power"; "Police Power"; "Political Power"; "Taxing Power"; "Visitorial Power"; "Water Power."

Other power, see "Other."

The word "power" is sometimes used in the same sense as "right." *Rap. & L. Law Dict.* Sometimes the liability to be sued is spoken of as a corporate power in defining

the powers of corporations. 4 Am. & Eng. Enc. Law, pp. 188, 189. "The capacity to be acted upon in some particular manner" is also one of the definitions of power. *Worcester Dict.* The word "power" in *Laws* 1884, c. 308, giving to officers of a village incorporated under a special charter the same powers as are prescribed in any general act for the incorporation of villages, includes not only the ability to act, but the same capacity to be acted upon. *Freligh v. Village of Saugerties*, 53 N. Y. St. Rep. 741, 743, 24 N. Y. Supp. 182.

A husband's interest in his wife's real estate during her life is not a "power" within the meaning of *Bankr. Act* July 1, 1898, c. 541, § 70, subd. a, cl. 3, 30 Stat. 565 [U. S. Comp. St. 1901, p. 8451], vesting in a bankrupt's trustee "powers which he might have exercised for his own benefit"; the court saying: "However the husband's right in his wife's real estate should be described, it certainly is not a power." *Hesseltine v. Prince* (U. S.) 95 Fed. 802.

### As ability.

"A power is an ability to do." *Remington v. Peckham*, 10 R. I. 550, 553.

"Power," as used in *Const. art. 1, § 1, par. 20*, providing "that the power of the courts to punish for contempts shall be limited by legislative acts," means the right, ability, or faculty of doing something. It is an ability to act regarded as latent or inherent; the faculty of doing or performing something; capacity for action or performance. *Bradley v. State*, 36 S. E. 630, 631, 111 Ga. 168, 50 L. R. A. 691, 78 Am. St. Rep. 157.

### As authority.

In *Rev. St. art. 363*, which, after defining the powers of a marshal as to city matters, provides that in the prevention and suppression of crime and arrest of offenders he shall have, possess, and execute like power, authority, and jurisdiction as the sheriff of a county under the laws of a state, "authority," as applied to executive officers, seems to be a convertible term with "power," for the authority of such officers is their lawful power. *Newburn v. Durham*, 32 S. W. 112, 115, 10 Tex. Civ. App. 655.

### As duty.

"When a statute confers upon a corporation a power to be exercised for the public good, the exercise of the power is not discretionary, but imperative; and the words "power" and "authority" in such case may be construed "duty" and "obligation." *Commonwealth v. Marshall*, 3 Wkly. Notes Cas. 182, 185 (quoting *Anne Arundel County Com'rs v. Duckett*, 20 Md. 468, 83 Am. Dec. 557). And in *Gilmore v. City of Utica*, 121

N. Y. 561, 568, 24 N. E. 1009, 1011, the court say: "Generally, permissive words used in statutes conferring power and authority upon public officers or bodies will be held to be mandatory where the act authorized to be done concerns the public interest or the rights of individuals." *Angel v. Methodist Protestant Church of Williamsport*, 62 N. Y. Supp. 410, 412, 47 App. Div. 459.

"It was said in *City of Baltimore v. Marriott*, 9 Md. 160, 66 Am. Dec. 326, that it is a well-settled principle that when a statute confers a power upon a corporation to be exercised for the public good the exercise of the power is not merely discretionary, but imperative; and the words 'power' and 'authority' in such case may be construed 'duty' and 'obligation.'" *Magaha v. City of Hagerstown*, 51 Atl. 832, 835, 95 Md. 62, 93 Am. St. Rep. 317; *Angel v. Methodist Protestant Church*, 62 N. Y. Supp. 410, 412, 47 App. Div. 459.

"Power to find defendant guilty of murder, manslaughter, or not guilty," as used in an instruction in a homicide case stating to the jury that they have the power to find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter, or not guilty, is equivalent to an instruction that it is the duty of the jury to find the defendant guilty of any of the offenses specified or not guilty. *People v. Pool*, 27 Cal. 572, 582.

A provision in the charter of a town that the mayor and council should have "power and authority" to pass ordinances for the comfort, good order, health, and safety of the inhabitants, is held not merely to confer power to pass such ordinances, but to make it imperative to do so; the words "power and authority" being construed as equivalent to "duty and obligation." *Cochrane v. City of Frostburg*, 31 Atl. 703, 705, 81 Md. 54, 27 L. R. A. 728, 48 Am. St. Rep. 479.

#### As right.

"Power," as used in the Gen. Railroad Laws, art. 1, § 4, subd. 4, giving to every railroad corporation, subject to the limitations and requirements of the same, "power" to construct its road across, along, or on any highway, is synonymous with the word "right," and the effect of the provision is to give the railroad subject to certain conditions, the right to build its road along the highway. In *re Lima & H. F. Ry. Co.*, 22 N. Y. Supp. 967, 969, 68 Hun. 252.

"Power" is sometimes used in the same sense as "right." Sometimes the liability to be sued is spoken of as a corporate power in defining the power of corporations. The capacity to be acted upon in some particular manner is also one of the definitions of power. In *Laws 1884, c. 308*, where the Leg-

islature said that the officers of any village incorporated by a special charter shall have the same "powers" as are prescribed in any general act for the incorporation of villages, it meant that such officers should thereby not only have the same ability to act, but the same capacity to be acted upon, and the same rights as are granted to villages or to the officers of villages incorporated under the general laws of the state. *Freligh v. Saugerties*, 24 N. Y. Supp. 182, 185, 70 Hun. 589.

#### Steam distinguished.

"Power," as used in a lease of a building together with "power," not exceeding six-horse, for the conduct of the lessee's business (that of a steam laundry); also steam for washing machines and dryrooms—is used for a different purpose and to accomplish a different end than the word "steam"; the one to be an addition to the other. The common speech of people indicates that there is a difference between "steam" and "power," in the popular understanding at least, for we speak of heating our houses by or with steam, but never by or with power. We inquire of a manufacturer by what power he runs his mill, and he replies steam, water, or electric power, as the case may be, and the question excites no surprise. If, however, "steam" and "power" mean the same thing, it would be a very idle inquiry as to what power was used to run the mill inquired about. Steam is an element of power, and when that power is transmitted or applied by means of a mechanism termed a steam engine it furnishes what is known as applied or transmitted power or motion for practical purposes, like the running of machinery. Steam, however, is not the only source of power, as there is water power, electric power, etc. *Reynolds v. Washington Real-Estate Co.*, 49 Atl. 707, 710, 23 R. I. 197.

#### As a manufactured product.

Within the articles of incorporation of a company to procure reservoirs for storage and use of water for power, irrigation, manufacturing, and other beneficial uses and purposes, the word "power" clearly means a manufactured product—that is, the products of a manufacturing establishment; and is authorized by the provisions of the Constitution permitting the taking of private property for reservoirs for milling, the word "milling" being synonymous with "manufacturing." *Denver Power & Irrigation Co. v. Denver & R. G. R. Co.*, 69 Pac. 568, 569, 30 Colo. 204.

#### POWER COUPLED WITH AN INTEREST.

A "power coupled with an interest" is a power which accompanies, or is connected

with, an interest. The power and the interest are united in the same person. But if by the word "interest" we are to understand an interest which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be coupled with it. *Hunt v. Rousmanier*, 21 U. S. (8 Wheat.) 174, 203, 5 L. Ed. 589; *Missouri v. Walker*, 8 Sup. Ct. 929, 931, 125 U. S. 339, 31 L. Ed. 769; *Daniel v. Felt* (U. S.) 100 Fed. 727, 729; *Walker v. Denison*, 86 Ill. 142, 146; *Carter v. Slocumb*, 29 S. E. 720, 122 N. C. 475, 65 Am. St. Rep. 714; *Tinsley v. Dowell*, 26 S. W. 946, 949, 87 Tex. 23; *Daugherty v. Moon*, 59 Tex. 397, 399; *Ballard v. Travellers' Ins. Co.*, 25 S. E. 956, 957, 119 N. C. 187; *Stephens v. Sessa*, 64 N. Y. Supp. 28, 30, 50 App. Div. 517.

A power simply collateral and without interest, or a naked power, is when, to a mere stranger, authority is given to dispose of an interest in which he had nothing before, nor hath by the interest creating the power any estate whatsoever. *Hunt v. Rousmanier's Adm'r*, 21 U. S. (8 Wheat.) 174, 5 L. Ed. 589. A mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land that it becomes a part of the security and irrevocable. *Muth v. Goddard*, 72 Pac. 621, 626, 28 Mont. 237 (citing *First Nat. Bank v. Bell*, S. & C. Min. Co., 8 Mont. 32, 19 Pac. 403).

Where the right or authority to do the act is connected with or flows from an interest in the subject on which the power is to be exercised, the power is said to be "coupled with an interest"; but where it is disconnected from any interest of the donee in the subject-matter, it is a naked power. *Griffith v. Maxfield*, 51 S. W. 832, 835, 66 Ark. 513.

The term "power coupled with an interest" means an interest in the subject on which the power is to be exercised, and not merely an interest in that which is produced by the exercise of power. The interest which can protect a power after the death of the person who creates it must be an interest in the thing itself; in other words, the power must be ingrafted on an estate in the thing. *Johnson v. Johnson*, 3 S. E. 606, 610, 27 S. C. 309, 13 Am. St. Rep. 636; *Willingham v. Rushing*, 31 S. E. 130, 131, 105 Ga. 72.

The phrase "coupled with an interest," as connected with a power of sale, means an interest in the thing sold, and a commission out of the proceeds of a sale to be made is not such an interest. *Kolb v. Bennett Land Co.*, 74 Miss. 567, 570, 21 South. 233.

An interest which can protect a power after the death of the person who creates it must be an interest in the thing itself. A "power coupled with an interest" is a power which accompanies or is connected with an interest, both being united in the same person. An interest which is produced by the exercise of the power is not united with it, but the former extinguishes the latter, and therefore cannot be said to be coupled with it. *Yeates v. Pryor*, 11 Ark. (6 Eng.) 58, 78 (quoting *Hunt v. Rousmanier*, 21 U. S. [8 Wheat.] 174, 5 L. Ed. 589).

A "power coupled with interest" is a right or authority to do some act, together with an interest in the subject on which the power is to be exercised. A power of this class survives the person creating it. When a power is coupled with an interest, it may be executed by the survivor. *Clark v. Hornthal*, 47 Miss. 434, 534.

A "power coupled with an interest" is a power to act with reference to specific property, the actor or possessor of the power having at the same time a pecuniary interest in the property itself; and hence a contract by which an owner of real estate agreed to give a broker the exclusive right to sell certain property for 185 days, in consideration of valuable services performed and to be performed, did not confer on the broker "a power coupled with an interest." *Simpson v. Carson*, 8 Pac. 325, 326, 11 Or. 361.

A "power coupled with an interest" is one ingrafted on an estate or on the thing itself; and the power and the estate must be united and coexist. It is not enough to constitute such power that the one exercising it was to have an interest in the proceeds arising from the execution of the agency. There must be an interest in the thing itself which is the subject of the power, and not merely in that which is produced by the exercise of the power. *Alworth v. Seymour*, 44 N. W. 1030, 42 Minn. 526.

A "power coupled with an interest" must create an interest in the thing itself upon which the power is to operate; the power and estate must be united or be coexistent; and this class of powers survive the principal, and may be executed in the name of the attorney. *Bonney v. Smith*, 17 Ill. (7 Peck) 531, 533.

A "power coupled with an interest" is a power given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the subject over which the power is to be exercised. *Atwater v. Perkins*, 51 Conn. 188, 198.

"A 'power coupled with an interest' is where the grantee has an interest in the estate, as well as in the exercise of the power." *Flanagan v. Brown*, 11 Pac. 706, 708, 70 Cal. 254.

"Where the right or authority to do the act is connected with or flows from an interest in the subject on which the power is to be exercised, the power is said to be coupled with an interest; but where it is disconnected from any interest of the donee in the subject-matter, it is a naked power." *Griffith v. Maxwell*, 51 S. W. 832, 835, 66 Ark. 513.

A power of attorney given as collateral security for a debt is not a "power coupled with an interest." There is a difference between a power coupled with an interest and a mere interest or benefit in the execution of a power. If a man authorize one as his attorney to sell his ship and apply the proceeds to the payment of a debt due to him, the latter may have an interest that the power should be executed, but the power is not coupled with any interest in the thing conveyed. It would be otherwise in case of a conditional assignment of the ship to one as collateral security with a power to make an absolute sale. Justice Kent distinguishes the powers by saying: "A power simply collateral and without interest, or a naked power, is when, to a mere stranger, authority is given to dispose of an interest in which he had not before, nor hath by the instrument creating the power, any estate whatsoever; but when power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land." A power, too, may be a naked power, and yet may be executed, or by its very terms must be executed, after the death of the party creating it. *Hunt v. Ennis* (U. S.) 12 Fed. Cas. 913, 915.

#### POWER IN THE ABSTRACT.

Power in the abstract, see "Abstract Power."

#### POWER IN TRUST.

See "General Power in Trust"; "Special Power in Trust."

A "power in trust" is defined to be a mere authority or right to limit a use. In case of a power in trust, the beneficiary must be some one besides the grantor. There must be some third person, besides the devisee or grantee of the power, who is called the "appointee." *Fellows v. Heermans* (N. Y.) 4 Lans. 230, 256.

A "power in trust" is a power to be exercised by the grantee, not for his own benefit at all, but entirely for the benefit of some other person or persons. *Delaney v. McCormack*, 88 N. Y. 174, 181.

A "power in trust" is a mere authority or right to limit and use, while an "estate in trust" is an estate or interest in the subject.

A trustee is always invested with a legal estate, but this is not necessary with respect to the donee of the power. In the case of a power in trust, there is always a person other than the donee or grantee of the power, which person is called the "appointee," answering to the *cestui que trust* in a simple trust. Every estate and interest not embraced in an express trust, and not otherwise disposed of, remains in or reverts to the person who created the trust. *Sterricker v. Dickinson* (N. Y.) 9 Barb. 516, 519.

A power is in trust when any person or class of persons, other than its holder, has, by the terms of its creation, an interest in its execution. *Rev. St. Okl.* 1903, § 4106; *Rev. Codes N. D.* 1899, § 3410; *Civ. Code S. D.* 1903, § 327.

#### POWER OF ALIENATION.

See "Suspension of Power of Alienation."

Though the statutes use the term "power of alienation" in reference to real estate, and the term "unqualified ownership" with reference to personal property, in prohibiting perpetuities the terms are synonymous. *Ladd v. Mills* (U. S.) 20 Fed. 792, 793; *Gott v. Cook* (N. Y.) 7 Paige, 521, 542; *Everitt v. Everitt*, 29 N. Y. 39, 71.

#### POWER OF APPOINTMENT.

A "power of appointment" is defined as a power of disposition given a person over property not his own, by some one who directs the mode in which that power shall be exercised by a particular instrument. *Heinemann v. De Wolf* (R. I.) 55 Atl. 707, 709, 710.

#### POWER OF ATTORNEY.

See, also, "Letter of Attorney."

The term "power of attorney" indicates a power or authority under seal. *Williams v. Conger*, 8 Sup. Ct. 933, 945, 125 U. S. 397, 31 L. Ed. 778.

A power of attorney imports a deed. *Cutler v. Haven*, 25 Mass. (8 Pick.) 490, 493.

A power or letter of attorney is an instrument by which the authority of one person to act in the place and stead of another as attorney in fact is set forth. *White v. Furgeson*, 64 N. E. 49, 51, 29 Ind. App. 144.

A power of attorney is an instrument by which the authority of an attorney in fact or private attorney is set forth. It differs from a warrant of attorney, as the latter is an instrument authorizing an attorney at law to appear in an action on behalf of the maker or to confess judgment against him.

A power of attorney in War Revenue Act June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286], requiring stamps on powers of attorney, does not include a warrant of attorney. *Treat v. Tolman* (U. S.) 118 Fed. 892, 893, 51 C. O. A. 522.

### POWER OF DISPOSAL.

See "Dispose of."

### POWER OF NATURALIZATION.

See "Naturalization."

### POWER OF SALE.

See, also, "Sell."

A power of sale is not an ordinary accompaniment of a mortgage, but is a power coupled with an interest, in its nature irrevocable, which entirely changes the character of the instrument by cutting off the right of redemption. *Capron v. Attleborough Bank*, 77 Mass. (11 Gray) 492, 493.

A power of sale imposes only a power to convey by an independent conveyance drawn and executed with all the formalities, and subject to all the conditions, incident to ordinary deeds. *Appeal of Clarke*, 39 Atl. 155, 162, 70 Conn. 195.

### POWER TO BORROW MONEY.

See "Borrow."

### POWER TO CONVEY.

See "Convey."

### POWER TO MORTGAGE.

See, also, "Mortgage."

A power to mortgage is a power to give the same security under that name in as full and effectual a manner as the party himself who created the power could give. *Taggart v. Stanbery* (U. S.) 23 Fed. Cas. 615, 618 (citing *Nixon v. Hyserott* [N. Y.] 5 Johns. 58).

### POWER TO PLEDGE.

See, also, "Pledge."

The essential difference between a power to sell and a power to pledge is stated as follows: "It is manifest that, when a man is dealing with other people's goods, the difference between an authority to sell and an authority to mortgage or pledge is one which may go to the root of all motives and purposes of transaction. The object of a person who has goods to sell is to turn them into money; but, when those goods are deposited

by way of security for money borrowed, it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated; and if, on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely, that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title, unaccompanied by any indebtedness, to their full equivalent in money." *Allen v. St. Louis Nat. Bank*, 7 Sup. Ct. 460, 462, 120 U. S. 20, 30 L. Ed. 573 (citing *City Bank v. Barrow*, 5 App. Cas. 664, 670).

### POWER TO PRESERVE.

See "Preserve."

### POWER TO REGULATE COMMERCE.

See "Regulate Commerce."

### POWERS.

See "General Power"; "Naked Power"; "Special Power."

A power is an authority enabling one person to dispose of the interest which is vested in another. *Goodill v. Brigham*, 1 Bos. & P. 192, 197. A power is an authority enabling one person to dispose of the interest which is vested in another. A power, when conferred by will, is a plain authority derived from the will itself, not an estate, and has none of the elements of an estate. It is defined by Bouvier as "an authority enabling a person, through the medium of the statute of uses, to dispose of an interest in real property vested either in himself or in another person." A general power of disposition existing as a power does not imply ownership. *Burleigh v. Clough*, 52 N. H. 267, 271, 272, 13 Am. Rep. 23 (citing *Williams*, Real Prop. 245; Co. Litt. 271b; *Eaton v. Straw*, 18 N. H. 320, 331); *Bouton v. Doty*, 37 Atl. 1064, 1068, 69 Conn. 531. If it be a joint one coupled with an interest it will survive if one of the donees of the power die, but where it is a mere naked authority it will not survive. A proviso in a will that three persons take as trustees the real estate of the testator, and devote the same to the maintenance and erection of an institution for the education of poor children, vests a naked power in the trustees, and therefore on the death of one of them before the will takes effect the trust becomes void. *Hadley v. Hadley*, 46 N. E. 823, 824, 147 Ind. 423.

A power is an authority retained by or conferred upon a person to deal with prop-

erty so as to affect, more or less, estates or interests therein, possessed either by himself or by others, albeit underived therefrom. *Griffith v. Maxfield*, 51 S. W. 832, 835, 66 Ark. 513.

A power is a method of causing a use, with its accompanying estate, to spring up at the will of a given person. *Bouton v. Doty*, 69 Conn. 531, 542, 37 Atl. 1064.

A power is a mode of disposing of property which operates under the statute of uses and wills and vests in the donee of the power a present, indefeasible, executory interest. *Bouton v. Doty*, 37 Atl. 1064, 1068, 69 Conn. 531; *Griffith v. Maxfield*, 51 S. W. 832, 835, 66 Ark. 513.

A power is not an estate or interest in lands; unexercised, it is an incumbrance; and, when exercised, the act performed by virtue of it is considered and construed as done by the donor of the power. *Eells v. Lynch*, 21 N. Y. Super. Ct. (8 Bosw.) 465, 482.

Civ. Code, § 894, declares that a power is a lien on real property which it embraces from the time the instrument in which it is contained takes effect. *Sacramento Bank v. Alcorn*, 121 Cal. 379, 384, 53 Pac. 813.

A "power" is defined to be a liberty or authority reserved by or limited to a party to dispose of real or personal property for his own benefit or for the benefit of others, and operates upon an estate or interest vested either in himself or in some other person; liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it, either wholly or partly. *Butler*, note 1, to Co. Litt. 342b; 1 *Chance*, Powers, § 1. Where a charter of a benevolent society provides for the payment of a fixed sum to the widow, child, children, or to such person or persons to whom the deceased may have disposed of the same by will or assignment, and that if there be no widow, child, or children, or the deceased shall have made no disposition by will or assignment of the sum accruing upon his death, then the board shall appropriate such sum as may be necessary for funeral expenses, the excess to go to the permanent fund of the association, the right of disposition given by the charter is a mere power. "We know of no case in which the *jus disponendi* authorized by charters under provisions like the present has been declared a mere power; but powers arise at common law under bonds to convey estates as another shall appoint, or to pay sums of money as another shall appoint, either generally or among children, or under covenants for like purposes. We cannot see why an authority or privilege acquired under a charter, to be exercised for the benefit of another, should not be governed by the same rules." *Maryland Mut.*

*Benev. Soc. of Improved Order of Red Men v. Clendinen*, 44 Md. 429, 433, 434, 22 Am. Rep. 52.

A power is an authority, whether evidenced by letter of attorney or otherwise. It is defined as "technically an authority by which one person enables another to do something for him." Thus a false writing stating that one is authorized to collect for a certain newspaper is within a statute making it forgery to falsely make a letter of attorney or other "power" to receive money. *Leslie v. State*, 69 Pac. 2, 3, 10 Wyo. 10.

The term "power," is defined to be an authority to do some act in relation to real property, or to the creation or revocation of an estate therein or a charge thereon, which the owner granting or reserving such power might himself perform for any purpose. *Rev. Codes N. D. 1899*, § 3404; *Civ. Code S. D. 1903*, § 321; *Rev. St. Wis. 1898*, § 2102; *Comp. Laws Mich. 1897*, § 8857; *Rev. St. Okl. 1903*, § 4100; *Dana v. Murray*, 122 N. Y. 604, 612, 26 N. E. 21; *Dempsey v. Tylee*, 10 N. Y. Super. Ct. (3 Duer) 73, 97; *Carson v. Cochran*, 52 Minn. 67, 72, 53 N. W. 1130; *De-laney v. McCormack*, 88 N. Y. 174, 180; *Ward v. Stanard*, 81 N. Y. Supp. 906, 911, 82 App. Div. 386. It is not an estate or interest in the land, but an authority to create an estate or interest. A power may be given to a person who has an estate in the land or to a mere stranger. Where no person other than the grantee has by the terms of its creation any interest in the execution of the power, it is termed a "beneficial interest." *Root v. Stuyvesant (N. Y.)* 18 Wend. 257, 283. A reservation in a deed reserving to the grantor "the power to devise by last will an undivided one-third part of the said premises unto any hereafter taken wife of him, the said party of the first part for and during the term of her natural life, or at his option to give and grant by deed to said hereafter taken wife, or to any person in trust for her, the same premises for and during the term of her natural life." is not a power. The writing simply retained in the grantor the part of the estate not granted, and became a mere reservation of the estate. *Towler v. Towler*, 36 N. E. 869, 870, 142 N. Y. 371; *Coster v. Lorillard (N. Y.)* 14 Wend. 265, 324.

#### Trust distinguished.

"The distinction between a 'power' and a 'trust' has been clearly defined by the courts. A mere power is not imperative, but leaves the action of the party receiving it to be exercised at his discretion; that is, the donor or grantor, having full confidence in the judgment, disposition, and integrity of the party, empowers him to act according to the dictates of that judgment and the promptings of his own heart. A trust is imperative, and is made with strict reference to its faithful execution. The trustee is not empow-

ered, but is required, to act in accordance with the will of the one creating the trust." *Law Guarantee & Trust Co. v. Jones*, 58 S. W. 219, 220, 103 Tenn. 245.

### POWERS APPENDANT.

Powers appendant are such as the donee is not authorized to exercise out of the estate limited to him, and depend for their validity upon the estate which is in him. He is thereby able to create an estate which will attach on an interest actually vested in him. An illustration is that of a life estate limited to a man with power to grant leases in possession, which must in every case have its operation out of his estate during his life. *Garland v. Smith*, 64 S. W. 188, 190, 164 Mo. 1.

As distinguished from a power in gross, a power appendant is where a person has an estate in land, and the estate to be created by the power is to, or may, take effect in possession during the tenancy of the estate to which the power is annexed. A power in gross is where the person to whom it is given has an estate in the land, but the estate to be created under or by virtue of the power is not to take effect till after the determination of the estate to which it relates. *Wilson v. Troup* (N. Y.) 2 Cow. 195, 236, 14 Am. Dec. 458 (citing *Hargrave & Butler's Notes on Co. Litt.*, 342b, note 298).

### POWERS IN GROSS.

Powers appendant distinguished, see "Powers Appendant."

A power in gross is where the person to whom it is given has an estate in the land, but the estate to be created under or by virtue of the power is not to take effect until after the determination of the estate to which it relates. *Wilson v. Troup* (N. Y.) 2 Cow. 195, 236, 14 Am. Dec. 458 (citing *Hargrave & Butler's Notes on Co. Litt.* 342b, note 298).

Powers in gross are such as one who has an estate in land has to create such estates only as will not attach on the interest limited to him or take effect out of his own interest. The illustration of *Hale, C. B.*, of such a power is where a tenant for life has the power to create an estate which is not to begin until his own ends. It is a power in gross because the estate for life has no concern in it. *Garland v. Smith*, 64 S. W. 188, 190, 164 Mo. 1.

### PRACTICABLE

See, also, "As Near as Practicable"; "As Nearly as Practicable"; "As Soon as Practicable"; "As Speedily as Practicable."

Webster defines "practicable" as admitting of use; passable; and gives as an illustration a practicable road; that is, a passable road. *Mayo v. Thigpen*, 11 S. E. 1052, 107 N. C. 63.

Where something is required to be done at the earliest "practicable" moment, the doing of the act is not required to be done at the very earliest moment; the adjective "practicable" importing a difference according to circumstances, and meaning, ordinarily, that the thing must be done as soon as reasonably can be expected. *Norton v. Gleason*, 18 Atl. 45, 47, 61 Vt. 474.

In a contract providing that a railway company should establish and have a depot as near a courthouse as practicable, and not more than one mile from such courthouse, "practicable" is not synonymous with "possible," but was used and understood by the parties to the contract in its usual and ordinary sense, as binding the railroad company to locate its depot at the nearest point (within a mile of the courthouse) at which it could be done, at a reasonable and ordinary cost, with reference to all the circumstances under which it was to be done, and in view of the object and purpose inducing the contract. *Wooters v. International & G. N. R. Co.*, 54 Tex. 294, 300.

In *Laws 1875, c. 422*, requiring that the iron girders of an elevated railroad should be placed on each side of the streets as near as practicable on a line parallel with the curbstone, the phrase "as near as practicable" means that the line of the columns must be parallel to the curb. In *re Brooklyn El. R. Co.*, 11 N. Y. Supp. 161, 163, 57 Hun, 590.

The incorporation of the words "as near as practicable," in an order of supervisors laying out a road, describing it as following a specified line "as near as practicable," invalidates the location, as such order must definitely fix the location of the road. *Sonnek v. Town of Minnesota Lake*, 52 N. W. 961, 962, 50 Minn. 558.

In an action on a contract to build a dam in the year 1867, or as soon thereafter as "practicable," it was error to instruct that if the jury believe it was practicable, or if it was within the range of human means, defendants were liable, since the word "practicable" did not mean if within human means, and the word could not be understood with regard to the means at the command of defendants. *Reedy v. Smith*, 42 Cal. 245, 251.

### Absolute sameness.

Under a statutory requirement of such uniformity in taxation as is practicable, an absolute uniformity is not required. *State v. Milwaukee County Sup'rs*, 25 Wis. 339, 350.

Const. art. 4, § 23, in providing that the system of town and county government shall be "as nearly uniform as practicable," did



not mean that the system should be absolutely uniform, nor that the same state of things shall exist in all the counties, but rather that the general system should be the same, modified only by differences reasonable according to circumstances. *State v. Milwaukee County Sup'rs*, 25 Wis. 339, 350.

#### **As commercially practicable.**

"Practicable," as used in Rev. St. § 4472 [U. S. Comp. St. 1901, p. 3050], prohibiting the carrying of petroleum and other dangerous articles upon passing vessels, but excepting petroleum of a certain fire test upon routes where there is no other practicable mode of transportation, is used in a commercial, business sense, as distinguished from a physical or mechanical sense. *United States v. Wise* (U. S.) 7 Fed. 190, 192; *The Benton* (U. S.) 51 Fed. 302, 303.

#### **As conditions warrant.**

The phrase "as soon as practicable," in the requirement as to the performance of a contract, is practically synonymous with "speedily." It does not, however, require that the contract should be performed directly, and perhaps not within a reasonable time, but as soon as conditions warranted under all the circumstances. *Duncan v. Topham*, 8 C. B. 225, 230.

The word "practicable" means feasible. An act is practicable of which conditions or circumstances permit the performance. Thus, in an act requiring the city council to call an election to fill a vacancy in the office of mayor as soon as practicable, until legally in session it is, of course, impracticable for it to order the election; but at its first regular meeting after the vacancy occurs there is no reason why it should not proceed to the ordering of an election, and hence it may be compelled to do so. *Rizer v. People* (Colo.) 60 Pac. 315, 316.

#### **As consistently.**

The word "practicable," as used in Gen. St. 1878, c. 118, § 5, providing that, whenever practicable, a term of imprisonment shall be so fixed as to expire between certain specified dates, means whenever it may be done consistently with proper punishment for the offense. *Mims v. State*, 5 N. W. 869, 371, 26 Minn. 494.

#### **As conferring discretion.**

A direction in a will to executors to dispose of certain property "as soon as practicable" after testator's death does not prevent the direction to sell from being imperative, but only gives the executors a certain discretion as to the time or times of such sale. *Ford v. Ford*, 33 N. W. 188, 196, 70 Wis. 19, 5 Am. St. Rep. 117.

## **PRACTICAL**

"Practical," as used in a deed of water power, reserving 100 horse power of water, reckoning from the top of the dam to the lowest practical point the wheel can be set, means practicable; reasonable; feasible. *Moore v. Wilder*, 28 Atl. 320, 321, 66 Vt. 33.

## **PRACTICAL ARCHITECT AND SANITARY ENGINEER.**

The ordinance of the city of St. Paul, Minn., authorizing the appointment of a building inspector, and providing that he shall be a "practical architect and sanitary engineer," means a person having a professional knowledge of architecture and a practical experience in superintending the construction of various kinds of buildings, including plumbing and drainage. "The term 'practical architect and sanitary engineer' should not be given too narrow or technical a construction, but should be considered in connection with the nature of the business and duties required of the officer, which relate, not so much to the styles of the architecture, external finish, or matters of ornamentation, as a knowledge of the principles of architecture as practically applied in determining the strength, quality, and adaptation of materials and the proper foundation for structures, and also in estimating and calculating the proportionate strength of walls, timbers, columns, and supports, and the strain or pressure to which they may be subjected, in conformity with the rules of the department." *State v. Starkey*, 52 N. W. 24, 26, 49 Minn. 503.

## **PRACTICAL CONSTRUCTION.**

By the words "practical construction," in speaking of a practical construction of a constitutional question, is not meant judicial decision, but practice sanctioned by general consent. *Farmers' & Mechanics' Bank v. Smith* (Pa.) 3 Serg. & R. 63, 69.

Besides the judicial construction of statutes, there is known to the law another kind of construction. This kind of construction has especial application to statutes made for the regulation of the different departments of the government, and is the interpretation put upon them by the actual administration of them by such departments. As distinguished from judicial construction, it is called the "practical construction of statutes." While not of such high authority as a judicial interpretation of the act, such practical construction of the class of statutes referred to, when not in conflict with the Constitution or the plain intent of the act, is of great persuasive force and efficacy. *Bloxham v. Consumers' Electric Light & Street R. Co.* 18 South. 444, 446, 36 Fla. 519, 29 L. R. A. 507, 51 Am. St. Rep. 44.

**PRACTICAL DIP.**

In the mining law, the "practical dip" is spoken of "as the portions of the vein successively encountered in going down and away from the apex. The miner follows the dip when he works downward, leaving the apex further from and above him at each advance. He follows the strike when he works lengthwise of the vein on a level; that is, when he is advancing along the vein, neither rising toward the surface of the ground nor descending, but going on a level with the plane of the earth's surface." *King v. Amy & Silversmith Con. Min. Co.*, 24 Pac. 200, 202, 9 Mont. 543.

**PRACTICAL LOCATION.**

The term "practical location," as used in the practical location of a boundary, "is not a term known in legal lexicons. In searching for its origin and introduction, we find it originally derived from a long acquiescence by the parties in a line known and understood between them for such a period of time as to be identical with 'time immemorial' or 'time out of memory,' and, like the rule in easements of title by prescription, rather than disturb such an ancient line, it was the policy of the law that it was better to presume a grant than to incur litigation dependent on the infirmity of memory or loss of muniments of title at a period so far removed from the date of its settlement. Practical location must be an act of the parties, either express or implied. It must be mutual, so that both parties are equally affected by it. It must be definitely and equally known, understood, and settled. If unknown, uncertain, or disputed, it cannot be a line practically located." *Hubbell v. McCulloch* (N. Y.) 47 Barb. 287, 295, 299.

A "practical location" is but an actual designation by the parties upon the ground of the monuments and bounds called for by the deed. *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 253, 90 Am. Dec. 575.

By a "practical location" of a boundary line is meant this: Two adjoining owners are in some dispute about the line between them. They deliberately go together to mark it out, build a fence, or put other monuments on that line; and in old times it was held that that did not pass any title; it only bound them in equity; but modern decisions for the last fifty years have held that such conduct does pass the title, and may be set up at law. *Cressee v. Security Land Improvement Co.* (N. J.) 35 Atl. 451, 454.

A practical location of a boundary line can be established in one of three ways only: (1) The location relied upon must have been acquiesced in for a sufficient length of time to bar a right of action under the statute of limitations; (2) the line must have been ex-

pressly agreed upon by the interested parties, and afterwards acquiesced in; (3) the party whose rights are to be barred must, with knowledge of the true line, have silently looked on while the other party encroached thereon, and subjected himself to expense which he would not have done had the line been in dispute. *Benz v. City of St. Paul*, 93 N. W. 1038, 1039, 89 Minn. 31.

**PRACTICAL MECHANIC.**

A person who has devoted himself for several years to the actual drawing of plans for, and the construction of, buildings of various kinds, is a practical mechanic. *People v. Board of Aldermen*, 42 N. Y. Supp. 545, 547, 18 Misc. Rep. 533.

The charter of a mechanics' bank provided that eight of the directors should be practical mechanics. Held, that it was not necessary, in order to render directors eligible, that they should be in actual practice as practical mechanics at the time of their election, it being sufficient that they were practical mechanics and had been in actual practice. *Gray v. Mechanics' Bank* (U. S.) 10 Fed. Cas. 1032.

**PRACTICAL PLUMBER.**

The words "practical plumber," as used in the chapter relating to the supervision of plumbing, shall mean a person who has learned the business of plumbing by working for at least two years as an apprentice or under a verbal agreement for instruction, and who has then worked for at least one year as a first-class journeyman plumber. *Rev. Laws Mass. 1902, p. 896, c. 103, § 1.*

**PRACTICE.**

To "practice" is to exercise a calling or profession. It is the application of science or knowledge to the wants of man in the recording incidents of life, as in the practice of law or medicine. *People v. Blue Mountain Joe*, 21 N. E. 923, 925, 129 Ill. 370 (quoting *Webst. Dict.*).

A contract by a physician for the sale of his "practice and good will" in a particular town means that the physician will not resume practice in that town. *French v. Parker*, 14 Atl. 870, 872, 16 R. I. 219, 27 Am. St. Rep. 733 (citing *Dwight v. Hamilton*, 113 Mass. 175).

"Practice," as used in an agreement by which a surgeon sold his location to another, stipulating that he would not carry on or exercise the practice or profession of a surgeon within the distance of three miles, was not violated by visits paid to patients within that distance by the seller at the request of the purchaser, as such act was virtually the act of purchaser, and was not a carrying on

of the practice by the seller. *Rawlinson v. Clarke*, 14 Mees. & W. 187, 190.

"Practice," as used in Code, c. 32, § 2, providing that no one shall without a license "practice the business of a broker by buying or selling for others stocks, securities, or other property for commission or reward," means to exercise or follow a profession or calling as one's usual business to gain a livelihood, and there is hardly to be found a word more strongly conveying the idea of a permanent calling for support when making a single sale of land for reward, without anything to show that such person professed to follow the business of a broker, will not make him such a broker as to require a license. *Jackson v. Hough*, 18 S. E. 575, 576, 38 W. Va. 238.

### PRACTICE (In Law).

See "Ordinary Course of Practice."

Bouvier defines the word "practice" as "the form, manner, and order of conducting and carrying on suits or prosecutions in the courts, through their various stages, according to the principles of law and the rules laid down by the respective courts." *Fleischman v. Walker*, 91 Ill. 318, 321; *Bowlus v. Brier*, 87 Ind. 391, 395; *Van Aken v. Coldren*, 80 Iowa, 254, 255, 45 N. W. 873, 874; *People v. Raymond*, 57 N. E. 1066, 1069, 186 Ill. 407; *State v. Frazier*, 59 Pac. 5, 7, 36 Or. 178. According to this definition, the word "practice" means the rules adopted by every court to facilitate the transaction of the business before it in a proper and orderly manner. *Butler v. Young* (U. S.) 4 Fed. Cas. 916, 917.

The word "practice" "means those legal rules which direct courts of procedure to bring parties into court, and the course of the court after they are brought in." *Kring v. Missouri*, 2 Sup. Ct. 443, 452, 107 U. S. 221, 27 L. Ed. 506 (citing *Bish. Cr. Proc.* § 2).

"Practice" is defined by Burrill as "the course of procedure in the courts, which, in a general sense, includes pleadings." *Rapalje and Lawrence* define practice as "the law which regulates the formal steps in an action or other proceeding; which therefore deals with writs, summons, pleadings, affidavits, notices, motions, petitions, orders, trials, judgments, appeals, costs, and executions." *People v. Central Pac. R. Co.*, 23 Pac. 303, 307, 83 Cal. 393.

"Practice," in its larger sense, is defined in *Anderson's Law Dictionary* to be "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or declares the right." The word "practice," as used in Rev. St. c. 45, § 10, providing that the rules of pleading and practice in other actions shall apply to ac-

tions of ejectment so far as they are applicable and except as otherwise provided, means the rules of practice in other actions applicable to actions of ejectment, which are those legal rules which direct the course of proceeding in acquiring jurisdiction of parties, and the course adopted by the courts whereby rights are effectuated by application of the proper remedies, and where it is not otherwise provided in actions of ejectment. Therefore the common-law rule that a writ of possession cannot issue more than a year and a day after rendition of a judgment in ejectment has been abrogated by chapter 77, § 1, which provides that execution may issue on judgments of courts of record at any time within seven years. *Bowar v. Chicago West Division Ry. Co.*, 136 Ill. 101, 106, 26 N. E. 702, 12 L. R. A. 81.

All that relates to the manner and time in which a case shall be conducted and tried, from its inception to final judgment and execution, is generally embraced under the title of "practice." *Wright v. State*, 5 Ind. 290, 294, 61 Am. Dec. 90.

Practice consists in frequent or customary actions; a succession of acts of the same kind. A proceeding that never has been taken cannot be said to be in accordance with existing practice. Practice is the form, manner, and order in which proceedings have been, and are accustomed to be, had. *Fellows v. Heermans* (N. Y.) 13 Abb. Prac. (N. S.) 1, 8.

The word "practice," in Code 1852, § 802, 2 Rev. St. 1876, p. 314, providing that "the laws and usages of this state relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith [the Code], and as far as the same may operate in aid thereof," etc., "are hereby continued in force," was used in its larger sense, i. e., as denoting the mode of proceedings by which a legal right is enforced. *Opp v. Ten Eyck*, 99 Ind. 345, 351.

### Change or conduct of judge.

Whatever may be said of a change from the judge in a particular case, a provision for the appointment of a judge to preside in a court and conduct its business generally, the regular judge being unable to attend, cannot be properly called an enactment on the subject of practice. It relates to the matter with which parties and attorneys in particular actions have nothing to do, and pertains rather to the formation of the court, like the provision for the election of a judge. *Bowlus v. Brier*, 87 Ind. 391, 395.

The practice, pleadings, and forms and modes of proceedings in the uniformity of practice act (17 Stat. 197) do not apply to the personal conduct and administration of the judge in the discharge of his separate functions, and therefore the refusal of the

trial judge to allow the jury to take written instructions with them to the jury room is not erroneous, though permitted by the practice act of Illinois. *Nudd v. Burrows*, 91 U. S. 426, 442, 23 L. Ed. 286.

#### **Evidence.**

The expression, "practice, pleadings and forms and modes of proceeding," in the uniformity of practice act, Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], is well satisfied without including in it the subject of evidence. At all events, it cannot be regarded as covering matters connected with the subject of evidence, which are regulated by specific provisions of law found in the same title of the same statute. *Beardsley v. Littell*, Fed. Cas. No. 1,185. Such expression does not include the mode of examination of witnesses upon the stand in a trial, *Sage v. Tauszky* (U. S.) 21 Fed. Cas. 145, 146; nor is it broad enough to include the mode and manner of taking depositions, *Randall v. Venable* (U. S.) 17 Fed. 162, 164; *Sage v. Tauszky* (U. S.) 21 Fed. Cas. 145, 146.

#### **Execution of process.**

The word "practice," in section 26 of the attachment act, providing that the practice and pleadings in attachment suits, except as otherwise provided, shall conform as near as may be to the practice and pleadings in other suits at law, includes the mode of serving mesne process and the mode of executing final process. It refers to the manner in which an attachment writ is to be levied, and also to the manner in which a writ of *fi. fa.* or an execution is to be levied. *Union Nat. Bank v. Byram*, 22 N. E. 842, 844, 131 Ill. 92; *Wilson v. Trustees of Schools*, 27 N. E. 1103, 1104, 138 Ill. 285. And in Rev. St. c. 45, § 10, providing that the rules of pleading and practice in other actions shall apply to actions of ejectment so far as they are applicable, and except as is otherwise provided, the word "practice" applies to and includes the time and mode of issuing and returning final process in ejectment suits. *Wilson v. Trustees of Schools*, 27 N. E. 1103, 1104, 138 Ill. 285.

#### **Fees.**

A statute requiring, in all counties of more than 50,000 inhabitants, the sheriff and certain other officers to exact, in all civil actions, suits, or proceedings, certain fees and charges for the benefit of the counties, is not in conflict with the provisions of the Constitution that "the Legislative Assembly shall not pass special or local laws in any of the following enumerated cases; that is to say \* \* \* regulating the practice in courts of justice." The act can in no sense be said to regulate the practice in courts of justice, within this rule. It prescribes no new or other or different form of procedure or manner of conducting suits or actions in the class

of counties named than in the other counties of the state. It does not in any way change or affect the practice or procedure in any court. *State v. Frazier*, 59 Pac. 5, 7, 86 Or. 178.

#### **Holding over term time.**

Rev. St. 1843, § 325, p. 733, provides that if, at the expiration of the time fixed by law for the continuance of the term of any court, the trial of a cause shall be progressing, said court may continue its sitting beyond such time, and require the attendance of the jury and witnesses, and do, transact, and enforce all other matters which shall be necessary for the determination of such cause; and in such case the term of said court shall not be deemed to be ended until the cause shall have been fully disposed of by said court. Such section relates to practice. *Wright v. State*, 5 Ind. 290, 294, 61 Am. Dec. 90.

#### **Jurisdiction.**

The jurisdiction of the appellate courts comes within the meaning of the word "practice"; hence an act to amend the practice of courts of record may confer appellate jurisdiction on such courts. *Fleischman v. Walker*, 91 Ill. 318, 321.

#### **Mode of appeal.**

The word "practice," as used in Probate Court Act, § 8 (Laws 1887, p. 81), providing that the practice in the probate court shall be the same as now provided or may be hereafter provided for the probate practice in the county court, includes the mode or manner of removing cases from the county or probate court to the appellate court by appeal or writ of error. *Lynn v. Lynn*, 43 N. E. 482, 484, 160 Ill. 307.

#### **Pleadings, notices, etc.**

Const. art. 4, § 25, subd. 3, forbids the Legislature to pass special laws regulating the practice of courts of justice. Held, that the term "practice in courts of justice" included not only the actual trial of cases therein and the forms of procedure relative thereto, but also included the pleadings, summons, affidavits, notices, writs, orders, etc., and therefore a special statute providing a special form of complaint in a particular action for particular relief was within the prohibition of the Constitution. *People v. Central Pac. R. Co.*, 23 Pac. 303, 307, 83 Cal. 393.

The term "practice," when applied to legal proceedings, "relates particularly to the time and manner in which the pleadings and process are to be served and entered. A declaration or complaint, plea or answer, and the judgment thereon, belong to the class of pleadings, rather than that of practice." *Allen v. Smillie* (N. Y.) 1 Abb. Prac. 354, 356.

Under a provision of the Code giving to the judges power to prescribe uniform rules of practice, a rule that no administrator should be discharged on final settlement until notice of the application shall have been given, as required in the case of original notice to commence a civil action, was held valid, and to authorize the giving of notice by publication. *Van Aken v. Coldern*, 45 N. W. 873, 874, 80 Iowa, 254, 255.

#### **Stenographer.**

Const. 1870, art. 6, § 29, provides that the organization, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, shall be uniform. "Proceedings and practice," as there used, must be construed to mean the form in which actions are brought and the manner of conducting and carrying on suits, so that Laws 1887, p. 159, authorizing the judges of the circuit courts to appoint official stenographers for their respective courts, is not unconstitutional as conferring on judges of the circuit courts judicial powers not granted to other courts of the same class or grade, since the taking of the phonographic notes is no part of the proceedings or practice of the courts. *People v. Raymond*, 57 N. E. 1066, 1069, 186 Ill. 407.

#### **PRACTICE AS APOTHECARY.**

St. 55 Geo. III, c. 194, § 20, relating to penalties on one who has actually "practiced as an apothecary," cannot be construed to apply to one who has not made up the prescriptions of physicians, though he had on many occasions administered medicines to various patients. *Apothecaries' Co. v. Warburton*, 3 Barn. & Ald. 40.

A person who advises patients, and compounds and sells the medicines recommended by himself, but does not and cannot make up physicians' prescriptions, is liable to the penalties of St. 53 Geo. III, c. 194, § 20, for "practicing as an apothecary" without a certificate. *Apothecaries' Co. v. Allen*, 4 Barn. & Adol. 625.

Administering medicines in the service of another person as an apothecary's assistant is not "practicing as an apothecary," within 55 Geo. III, c. 194, § 22, though the person so administering the medicines has himself paid for them. *Brown v. Robinson*, 1 Car. & P. 264.

Practice of dentistry, see "Practicing Dentistry."

#### **PRACTICE OF LAW.**

As a privilege or immunity, see "Privileges and Immunities."

"Practice of law," as the term is generally understood, is the doing or perform-

ing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, as the preparation of legal instruments and contracts by which legal rights are secured, although such matters may not be depending in a court. *Eley v. Miller*, 34 N. E. 836, 837, 7 Ind. App. 529.

"Practiced law," as used in Const. art. 84, relating to the office of district judge, and providing that a person in order to be eligible to that office must have practiced law in the state for two years next preceding his election, means the practice of law with legal permission; hence one who had practiced law without the necessary qualifications prescribed by law would not be entitled to hold such office. *State ex rel. Duffel v. Marks*, 30 La. Ann. 97, 98.

#### **PRACTICE OF MEDICINE.**

See "Allopathic Practice."

"The practice of medicine may be said to consist in three things: First, in judging the nature, character, and symptoms of the disease; second, in determining the proper remedy for the disease; and, third, in giving or prescribing the application of the remedy to the disease." *Underwood v. Scott*, 23 Pac. 942, 943, 43 Kan. 714.

The practice of medicine includes the application of the knowledge of medicine, of disease, and of the loss of health. Thus the act entitled "To regulate the practice of medicine" is sufficiently broad and comprehensive to include within its scope the entire range of practice of the medical profession. *People v. Blue Mountain Joe*, 21 N. E. 923, 925, 129 Ill. 370.

The "practice of medicine," as ordinarily or popularly understood, has relation to the art of preventing, curing, or alleviating disease or pain. It rests largely in the sciences of anatomy, physiology, and hygiene. It requires a knowledge of disease, its origin, its anatomical and physiological features, and its causative relations; and, further, it requires a knowledge of drugs, their preparation and action. Popularly, it consists in the discovery of the cause and nature of disease, and the administration of remedies or the prescribing of treatment therefor. Prayer for those suffering from disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be attained as a result of prayer, or that humanity will be brought into harmony with God by right thinking and the fixed determination to look on the bright side of life, does not constitute the practice of medicine in the popular sense. The term "practice of medicine," as used in Gen. Laws, c. 165, § 2,

making it unlawful for any person to engage in the practice of medicine without registering his authority, should be construed in its popular sense. *State v. Mylod*, 40 Atl. 753, 755, 20 R. I. 632, 41 L. R. A. 428.

The words "practice of medicine," as used in Gen. Laws 1883, c. 125, enacted to regulate the practice of medicine, etc., are used in the broad and popular sense in which they are generally understood and applied, and mean the practice of the profession in all of its branches. *Stewart v. Raab*, 56 N. W. 256, 55 Minn. 20.

Pol. Code, § 1478, declares: "For the purposes of this chapter, the words 'practice of medicine' shall mean to suggest, recommend, prescribe, or direct, for the use of any person, any drug, medicine, appliances, appurtenances or other agency, whether material or not material to the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or other bodily injury, or any deformity, after having received, or with the intent to receive therefor, either directly or indirectly, any bonus, gift or compensation." *Blalock v. State*, 112 Ga. 338, 37 S. E. 361.

Any person shall be regarded as practicing medicine or surgery, within the meaning of the article relating to the medical boards, who shall prescribe for the sick or those in need of medicine or surgical aid, and shall charge or receive therefor money or other compensation or consideration, directly or indirectly; provided, however, that midwives and nurses shall not be regarded as practicing medicine or surgery. Code Ga. 1893, § 1490.

The term "practicing medicine," within the meaning of Rev. St. c. 91, entitled "Medicine and Surgery," applies to any person who treats, operates on, or prescribes for any physical ailment. *Matthel v. Wooley*, 69 Ill. App. 654, 655.

"Practicing medicine" is defined in Act 1891, § 17, regulating the practice of medicine, etc., as follows: "Any person shall be regarded as practicing medicine within the meaning of this act, who shall operate or profess to heal or prescribe for, or otherwise treat the physical or mental ailment of another, but nothing in this act shall be construed to prohibit gratuitous service in case of an emergency." *State v. Buswell*, 58 N. W. 728, 729, 40 Neb. 95, 24 L. R. A. 68; *O'Connor v. State*, 64 N. W. 719-721, 46 Neb. 157.

The "practice of medicine" is defined in Acts 1896, c. 68, as suggesting, recommending, prescribing, or directing for the use of any person any drug, medicine, appliance, or agency, material or immaterial, for the cure of any ill or diseases of the mind or body, and does not apply to an osteopath, treating

diseases by manipulation of the limbs, muscles, and bones. *Hayden v. State*, 33 South. 653, 81 Miss. 291, 95 Am. St. Rep. 471.

Any person shall be regarded as practicing medicine, within the meaning of the title relating to physicians and surgeons, who shall treat, operate upon, or prescribe for any physical ailment of another for a fee, or who shall hold himself out, by means of signs, cards, advertisements, or otherwise, as a physician or surgeon. Rev. St. Utah 1898, § 1735.

Any person shall be regarded as practicing medicine, within the meaning of the board of health act, who shall operate on, profess to heal, or prescribe for or otherwise treat, any physical or mental ailment of another. But nothing in the act shall be construed to prohibit gratuitous services in case of emergency, and the act shall not apply to commissioned surgeons in the United States army or navy, nor to nurses in their legitimate occupations, nor to the administration of ordinary household remedies. *Cobey's Ann. St. Neb.* 1903, § 9431.

The phrase "person practicing medicine," and the words "doctor" and "physician," in an act making it criminal to practice medicine without a certificate, but providing that the act shall not apply to any doctors or physicians now practicing medicine in Alabama who are graduates of a respectable medical college, or to any person who has practiced medicine in the state for the last 10 years, refer to one of the same class of persons, and are used interchangeably. *Bouvier* defines "physician" to be a person who has received the degree of doctor of medicine from an incorporated institution; one lawfully engaged in the practice of medicine. The word in its popular sense means one who professes or practices medicine for the healing art; a doctor. *Harrison v. State*, 15 South. 563, 564, 102 Ala. 170 (citing *Worcester*, Dict.).

#### Christian Science.

The practice of what is known as "Christian Science," by an unauthorized person, is in violation of the act defining the practice of medicine. *State v. Buswell*, 58 N. W. 728, 729, 40 Neb. 158, 24 L. R. A. 68.

#### Dentist.

"Practitioner of medicine," as used in Mo. Rev. St. 1889, § 6062, providing that no person exercising the function of a "practitioner of medicine" shall be compelled to serve on any jury, should be construed to include a dentist. *State ex rel. Flickinger v. Fisher* (Mo.) 21 S. W. 446, 447; *Id.*, 24 S. W. 167, 169, 119 Mo. 344, 22 L. R. A. 799.

#### Holding out as physician.

A "practitioner of medicine and surgery" is a physician and surgeon who habitually

holds himself out for the practice of the profession. *Hart v. Folsom*, 47 Atl. 603, 604, 70 N. H. 213 (citing *State v. Bryan*, 98 N. C. 644, 4 S. E. 522).

"Practice of medicine," as used in Act 1876, relating to the practice of medicine, and imposing a penalty on any person who engages in the practice of medicine without complying with the requirements of this act, includes any acts by which a person holds himself out to the community in which he lives as a physician. Any one act in violation of the provisions of the statute above referred to is sufficient to constitute the offense provided for. *Antle v. State*, 6 Tex. App. 202, 206.

The term "practicing medicine," in a statute prohibiting practicing medicine without first obtaining a certificate of qualification, etc., does not characterize one who does not solicit business, who does not hold himself out as a physician, and who does not pretend to be a physician, but simply advises or gives medicine to a sick person merely as a neighbor and friend, and makes no charge, and does not expect any compensation for his services. *Nelson v. State*, 12 South. 421, 422, 97 Ala. 79.

#### **Magnetic healing.**

Where a person held himself out as a magnetic healer, and in diagnosing the case decided that it was rheumatism, and prescribed medicine therefor, he was "practicing medicine" within the provisions of the statute prohibiting a person from practicing medicine without a license. *Parks v. State*, 64 N. E. 862, 864, 159 Ind. 211, 59 L. R. A. 190.

#### **Massage and osteopathy.**

In reference to the statute passed regulating the practice of medicine and surgery, and prescribing the qualifications of those who might engage therein within the state, the court, in *Smith v. Lane* (N. Y.) 24 Hun, 632, said: "The practice of medicine is a pursuit very generally known and understood; and so also that of surgery. The former includes the application and use of medicine and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the functions of the latter are limited to manual operations, usually performed by surgical instruments or appliances." It was there held that a masseur was not engaged in the practice of medicine. The practice of osteopathy is neither the practice of medicine nor the practice of surgery. *Nelson v. State Board of Health*, 57 S. W. 501, 504, 108 Ky. 769, 50 L. R. A. 383.

"Practitioners of medicine" are not simply those who prescribe drugs or other medicinal substances as remedial agencies, but

the term is broad enough to include, and does include, all persons who diagnose disease, and prescribe and apply any therapeutic agent for its use; and thus one practicing osteopathy, a system of healing by manipulation of limbs and body, practices medicine. *Bragg v. State*, 32 South. 767, 768, 134 Ala. 165, 58 L. R. A. 925.

#### **As practice for compensation.**

The term "practice medicine," as used in Gen. Laws, c. 163, making it unlawful for any person to practice medicine who has not exhibited and registered in the city or town clerk's office of the city or town in which he resides authority for so practicing, and limiting the fine to the practice of medicine for reward or compensation to one who has not exhibited and registered his authority for so practicing, limits the practice of medicine for reward or compensation, and therefore the act is not violated where a medical practitioner receives no compensation for his services. *State v. Pirlot*, 20 R. I. 273, 38 Atl. 656.

"Practicing medicine," within the meaning of a statute prohibiting practicing medicine without a license, imports a practicing of medicine for a compensation. *State v. Hale*, 15 Mo. 606, 607.

#### **As practice as a physician.**

"Practicing medicine," as used in speaking of another person as practicing medicine, is equivalent to saying that he is practicing as a physician, and hence the use of the former words in an indictment is equivalent to the latter phrase. *Whitlock v. Commonwealth*, 15 S. E. 893, 894, 89 Va. 337.

#### **Surgery.**

"Practice of medicine," as used in Comp. St. art. 1, c. 53, requiring those engaged in the practice of medicine to obtain a license, includes those who practice surgery and obstetrics, as well as an ordinary physician. *Little v. State*, 84 N. W. 248, 249, 60 Neb. 749, 51 L. R. A. 717.

One "practicing medicine" practices the art of preventing, curing, or alleviating diseases. Therapy is the treatment of disease, and surgery is therapy of a distinctively operative kind. A certificate to practice medicine under Laws 1883, c. 125, authorizes the holder to practice the profession in all of its branches. *Stewart v. Raab*, 55 Minn. 20, 56 N. W. 256.

#### **Vender of drugs or oxygenor.**

The term "practicing medicine," as defined in the laws of Illinois (Act 1899) regulating the practice of medicine, does not include one who recommends and sells the Oxygenor. *People v. Lehr*, 93 Ill. App. 605, 509.

An itinerant vender, professing to treat and cure diseases or deformity by means of drugs, manipulation, or other expedient, cannot be regarded as a practitioner of medicine in the sense of being a person who, by appending the letters M. D. or M. B. to his name, assumes that character, yet by undertaking to treat diseases he is within the scope and purpose of the act to prevent the practice of medicine by unauthorized persons. *State ex rel. Wynne v. Lee*, 31 South. 14, 16, 106 La. 400.

#### PRACTICE OF PHARMACY.

By Laws 1893, p. 1552, regulating the practice of pharmacy, the phrase "practice of pharmacy" means the compounding of prescriptions or of any United States pharmacopœial preparation, or of any drug or poison to be used as medicines, or the retailing of any drug or poison, save as provided in the statute. *Suffolk County v. Shaw*, 47 N. Y. Supp. 349, 350, 21 App. Div. 146.

#### PRACTICE OF SURGERY.

In reference to the statute passed regulating the practice of medicine and surgery, and prescribing the qualifications of those who might engage therein within the state, the court, in *Smith v. Lane* (N. Y.) 24 Hun, 632, said: "The practice of medicine is a pursuit very generally known and understood; and so also that of surgery. The former includes the application and use of medicine and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the functions of the latter are limited to manual operations, usually performed by surgical instruments or appliances." It was there held that a masseur was engaged in the practice of surgery. The practice of osteopathy is neither the practice of medicine nor the practice of surgery. *Nelson v. State Board of Health*, 57 S. W. 501, 504, 108 Ky. 769, 50 L. R. A. 383.

#### PRACTICES.

"Practices," as used in St. 1863, p. 540, authorizing cities to prohibit and suppress, or exclude from certain limits, or regulate, "all occupations, houses, places, pastimes, amusements, exhibitions, and 'practices' which are against good morals, contrary to public order and decency, or dangerous to the public safety," includes a single utterance of profane language, words, or epithets in the hearing of two or more persons, as well as frequent utterances of such words. *Ex parte Delaney*, 43 Cal. 478, 480.

#### PRACTICING ATTORNEY.

A retired lawyer who tries a single case for a neighbor gratuitously is not a "prac-

ticing lawyer," so as to be liable to the penalty under a Mississippi statute for practicing without having paid the privilege license tax. *McCargo v. State* (Miss.) 1 South. 161.

"Practicing attorney," as used in Code, § 4005, exempting all practicing attorneys from jury service, is to be construed as meaning "a party who follows the business of the profession of the law as his avocation or calling." It does not include a real estate broker, though he is licensed to practice law. *Wheatley v. State*, 79 Tenn. (11 Lea) 262, 263.

#### PRACTICING DENTISTRY.

A dental student who performed dental work without a certificate from the board of dental examiners, and received pay therefor, is "practicing dentistry" within Sand. & H. Dig. § 4973, providing a penalty for practicing dentistry without a certificate from the board of dental examiners, except when no charge is made therefor, though he did the work under the direction of a licensed dentist. *State v. Reed*, 58 S. W. 40, 68 Ark. 331.

Every person shall be understood as "practicing dentistry," within the meaning of the act regulating the practice of dentistry, who shall, for fee, salary, or other reward, either to himself or another person, operate upon human teeth, furnish artificial substitutes, or perform those acts, as assistant or principal, usually understood as and called "dental operations"; provided, that bona fide students of dentistry, under the immediate supervision of a preceptor who is in lawful practice, may assist him in operations during the usual term of pupillage, not to exceed 2½ years from the date of commencement. P. & L. Dig. Laws Pa. 1894, vol. 1, col. 2977, § 50.

All persons shall be said to be "practicing dentistry," within the meaning of the chapter regulating the practice of dentistry, who shall, for a fee or salary, or other reward paid, either to himself or to another person, for operations or parts of operations of any kind, treat diseases or lesions of the human teeth or jaws, or correct malpositions thereof; but nothing in this chapter contained shall be taken to apply to bona fide students of dentistry, or one in pursuit of clinical advantages, under the direct supervision of a preceptor or licensed dentist in this state, during the period of their enrollment in a dental college and attendance upon a regular uninterrupted course in such a college, nor to physicians in the regular discharge of their duties. *Ballinger's Ann. Codes & St. Wash.* 1897, § 3032.

#### PRACTITIONER OF MEDICINE.

See "Practice of Medicine."



**PRÆDIUM DOMINANS.**

The term "prædium dominans" was used in the civil law in reference to services which correspond to our easements, to designate the dominant or ruling estate, or the estate entitled to a servitude over another estate. *Morgan v. Mason*, 20 Ohio, 401, 409, 55 Am. Dec. 464.

**PRÆDIUM SERVIENS.**

The words "prædium serviens," in the civil law, in reference to services which correspond to our easements, were used to designate what was known in our law as the servient estate. *Morgan v. Mason*, 20 Ohio, 401, 409, 55 Am. Dec. 464.

**PRAIRIE.**

The word "prairie," as defined by Webster, means an extensive tract of land destitute of trees, covered with coarse grass, and usually characterized by a deep, fertile soil; a meadow or tract of grass land, especially a so-called "natural meadow." The fact that the land was inclosed and a few furrows plowed around it cannot be said, as a matter of law, to deprive it of its character as prairie; but where the owner has made a beneficial use of it, the court ought not to charge as a matter of law that it is a "prairie," within the statute relating to fires from railroads. *Interstate Galloway Cattle Co. v. Kline*, 32 Pac. 628, 629, 51 Kan. 23.

**Cultivated field.**

"Prairie or timber land," as used in Rev. St. § 4231, providing that if any person willfully, or without using proper caution, shall set fire to or cause to be burnt any prairie or timber land by which the property of another is injured or destroyed, he shall be fined, etc., does not include a cultivated field. The word "prairie" is used to describe the plains of our state, which are without trees, before they are brought into cultivation, and the words "timber land" the forests to be found here. A farm or cultivated field is never indicated by either term. *Brunell v. Hopkins*, 42 Iowa, 429, 431.

**Woodland.**

"Prairie land" is not synonymous with and does not mean one and the same thing with "woodland." *Buxton v. St. Louis & I. M. R. Co.*, 58 Mo. 55, 56.

"Prairie land," as used in Wag. St. 310-11, Railroad Corporation Law, § 43, requiring all railroads to erect and maintain fences on the sides of the road where it passes over land or adjoining uninclosed "prairie land," cannot be construed to include the timber lands, or land from which the timber has been

cut but which is not cultivated. *Tarks v. St. Louis & I. M. R. Co.*, 58 Mo. 45, 49.

**PREACHER.**

The term preachers in 1704 in England meant dissenters from the established church, who considered themselves rather as persons whose mission was to preach the Gospel than to minister the ordinances and lead the devotion of the people, and who are described in the acts of toleration as "preachers and teachers." *Attorney General v. Shore*, 11 Sim. 592, 635.

**PREAMBLE.**

A preamble of a statute is a clause introductory to and explanatory of the reasons of passing the act. *Townsend v. State*, 47 N. E. 19, 23, 147 Ind. 624, 37 L. R. A. 294, 62 Am. St. Rep. 477.

A preamble is said to be the key of the statute, to open the minds of the makers as to the mischiefs which are to be remedied and the objects which are to be accomplished by the provisions of the statute. *Fenner v. Luzerne County*, 31 Atl. 862, 167 Pa. 632.

The recitals in the preamble to a resolution are no part of the resolution. A preamble may be looked to for aid in interpreting an ambiguity in the resolution, but, if the terms of the resolution are clear, a preamble cannot be allowed to cast a doubt upon the meaning. *Coverdale v. Edwards*, 58 N. E. 495, 498, 155 Ind. 374.

The preamble of a statute is no more than a recital of some inconvenience which does not exclude any other, for which a remedy is given by the enacting part, and the generality of the words of an enacting clause must not be restrained by the preamble. *Lloyd v. Urison*, 2 N. J. Law (1 Penning.) 212, 224.

While the preamble of a statute is not strictly a part thereof, it may, when the statute is in itself ambiguous and difficult of interpretation, be resorted to, but not to create a doubt or uncertainty which otherwise does not exist. *James v. Du Bois*, 16 N. J. Law (1 Har.) 285, 294.

**PRECARIOUS.**

The circumstances of an executor are "precarious" only when his conduct and character present such evidence of improvidence or recklessness in the management of the trust estate, or of his own, as, in the opinion of prudent and discreet men, endangers its security. Webster illustrates the meaning of "precarious" by a quotation from Rogers, who says, "Temporal prosperity is precarious." *Shields v. Shields* (N. Y.) 60 Barb. 56, 61.

**PRECARIOUS POSSESSION.**

That possession is called "precarious" which one enjoys by the leave of another and during his pleasure. The title which excludes the ownership, such as a lease, is also called "precarious." Civ. Code La. 1900, art. 3556, subd. 25.

**PRECATORY TRUST.**

The meaning of the word "precatory," according to its ordinary use, does not embrace a command. It means beseeching, suppliant, prayerful. It comes from the Latin word "precare," to pray, and the suffix "ory," meaning containing. *Bohon v. Barrett's Ex'r*, 2 Ky. Law Rep. 371, 374, 79 Ky. 378.

A "precatory trust" arises out of words of entreaty, wish, expectation, request, or recommendation, frequently employed in wills, and a trust has been created by such words as "hope," "wish," "request," etc., if they be not so modified by the context as to amount to no more than mere suggestions, to be acted upon or not, according to the caprice of the interested devisee, or negatived by other expressions indicating a contrary intention, and provided the subject and object be sufficiently certain. *Hunt v. Hunt*, 50 Pac. 578, 579, 18 Wash. 14. See, also, *Bohon v. Barrett's Ex'r*, 2 Ky. Law Rep. 371, 374, 79 Ky. 378.

Words of recommendation or of confidence, entreaty, hope, or desire have been held sufficient under some circumstances to create a trust, but, speaking generally, this is because in such cases such a construction is supposed to carry out the intention of the testator. *Aldrich v. Aldrich*, 51 N. E. 449, 450, 172 Mass. 101.

**PRECATORY WORDS.**

"Precatory words," as defined by Bouvier, are expressions in a will praying or requesting that a thing shall be done. The words in a will, "in maintenance and support of my said wife and infant child," are incapable of being considered as words of prayer or request, and they must be considered as a limitation of the bequest; as a declaration of a purpose for which the bequest was made, and its extent. *Pratt v. Miller*, 37 N. W. 263, 265, 23 Neb. 496.

Words of recommendation and others words precatory in their nature in a will imply a discretion, as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context. *Pratt v. Trustees of Sheppard & Enoch Pratt Hospital*, 42 Atl. 51, 57, 88 Md. 610 (citing *Williams v. Worthington*, 49 Md. 572, 585, 33 Am. Rep. 286).

**PRECAUTION.**

See "Ordinary Precautions"; "Reasonable Precaution"; "Suitable Precautions."

**PRECEDENT.**

Where a certain point of law is not brought to the view of the court in determining a cause, the decision is not a precedent, calling for the same decision in a similar case in which the point is brought before the court. *The Edward*, 14 U. S. (1 Wheat.) 261, 276, 4 L. Ed. 86.

**PRECEDENT CONDITION.**

See "Condition Precedent."

**PRECEDENT SUB SILENTIO.**

"It is not only from decided cases where the point has been raised upon argument, but also from the long-continued practice of the courts, without objection made, that we collect rules of law." Per Lord Ellenborough, *C. J. Calton v. Bragg*, 15 East, 223, 226.

"Though the practice of the courts, or forms of pleadings which pass sub silentio, do not make a law, yet a constant practice of permitting acts of assembly or laws to be read out of printed books, without opposition, is a great evidence of the law." *Thompson v. Musser (Pa.)* 1 Dall. 458, 464, 1 L. Ed. 222.

**PRECEDING.**

The word "preceding," as used in the jury law of 1876, § 26, making it cause for challenge that a petit juror had served for one week in the district court within six months preceding, has reference to a term prior to and other than the one then being held. *Garcia v. State*, 5 Tex. App. 337, 340 (citing *Welsh v. State*, 3 Tex. App. 413); *Tuttle v. State*, 6 Tex. App. 556, 559; *Myers v. State*, 7 Tex. App. 640, 652.

Act March 12, 1896, defines a "public stockyard" as a stockyard which for the preceding 12 months shall have had an average daily receipt of a certain number of live stock. The word "preceding" does not mean anterior to the passage of the act, but that a stockyard to come under the law must have maintained for a period of 12 months a stated volume of business. The act is general in its terms, and the classification is not strained or unnatural. It is uniform in its operation on all yards coming within the designated class. *Cotting v. Kansas City Stockyards Co. (U. S.)* 79 Fed. 679, 681.

The term "preceding census," in Const. 1876, art. 8, § 16, providing that the sheriff in each county, in addition to his other duties, shall be the collector of taxes therefor, but in counties having 1,000 inhabitants, to be determined by the last preceding census of the United States, a collector shall be elected, to hold office for two years and until his successor shall be elected, does not apply to a county from which certain territory has been detached since the last census, as it cannot be said that there has ever been a "preceding census" for such county. *Nelson v. Edwards*, 55 Tex. 389, 393.

#### As next before.

Although the word "preceding" means, generally, next before, yet a different signification will be given to it if required by the context and the facts of the case. *Simpson v. Robert*, 35 Ga. 180.

The words "preceding paragraph," as used in Tariff Act Oct. 1, 1890, par. 104, providing that no article manufactured from glass described in the preceding paragraph shall pay less than a certain rate of duty, do not refer exclusively to paragraph 103, but also apply to paragraph 104. *In re Salomon* (U. S.) 55 Fed. 285, 286.

By statute in many states it is provided that the word "preceding," when used by way of reference to any section of a statute, or title of a code shall mean the section next preceding that in which the reference is made, unless some other section is expressly designated, or unless the context requires a different construction. See *Rev. St. Tex.* 1895, art. 3270; *Pub. St. N. H.* 1901, p. 63, c. 2, § 13; *Horner's Rev. St. Ind.* 1901, § 240, subd. 6; *Pen. Code Ga.* 1895, § 2; *Ky. St.* 1903, § 462; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 15; *Rev. St. Wyo.* 1899, § 2724; *Code N. C.* 1883, § 3765, subd. 7; *Rev. St. Wis.* 1898, § 4971; *Code W. Va.* 1899, p. 133, c. 13, § 17; *Pub. St. R. I.* 1882, p. 78, c. 24, § 20; *Rev. Laws Mass.* 1902, p. 89, c. 9, § 5, subd. 18; *Gen. St. Minn.* 1894, § 255, subd. 12; *Rev. St. Mo.* 1899, § 4156; *V. S.* 1894, 15; *Code Va.* 1887, § 5; *Gen. St. Conn.* 1902, § 1; *Civ. Code Ala.* 1896, § 5; *Comp. Laws Mich.* 1897, § 50, subd. 13; *Laws N. Y.* 1892, c. 677, § 10; *Pen. Code Tex.* 1895, art. 29; *Wilkinson v. State*, 10 Ind. 372, 373.

#### PRECEPT.

The word "precepts," as used in *St.* 1783, c. 43, providing that every coroner within the county for which he is appointed shall serve all writs and precepts when the sheriff shall be a party, includes warrants and processes in criminal cases, the word "precepts" being synonymous with the word "processes." *Adams v. Vose*, 67 Mass. (1 Gray) 51, 58.

#### PRECINCT.

See "Magisterial Precinct"; "Voting Precinct."

A precinct, or parish, is a corporation established solely for the purpose of maintaining public worship. *Milford v. Godfrey*, 18 Mass. (1 Pick.) 91, 97.

The term "precinct," in its general sense, indicates any district marked out and defined. *Union Pac. Ry. Co. v. Ryan*, 5 Sup. Ct. 601, 604, 113 U. S. 516, 28 L. Ed. 1098.

The word "precinct," in Const. art. 4, § 4, in reference to the organization of assembly districts consisting of contiguous territory and bounded by county, precinct, town, or ward lines, has reference only to certain districts having similar functions to those of towns, as in Brant county, and perhaps other places in territorial times, and which passed away upon the formation of the first legislative districts and after the admission of the state, and the term is no longer used, except, perhaps, occasionally interchangeably with "election districts." *Chicago & N. W. Ry. Co. v. Town of Oconto*, 6 N. W. 607, 609, 50 Wis. 189, 36 Am. Rep. 840.

"Precinct," as used in *Rev. St.* 1889, § 7261, providing for the punishment of a person voting in more than one election precinct, can mean nothing more or less than the place of voting. *State v. Anslinger*, 71 S. W. 1041, 1044, 171 Mo. 600.

#### City, town, or village.

*Cr. Code*, §§ 181, 182, provide for the punishment of a person who shall vote in any precinct or in any ward of a city in which he has not actually resided 10 days, etc. Village elections are not specially mentioned in the section. The words "village" and "precincts" are unlike in their meaning. A village is a municipal corporation, created for the purpose of local government, and may sue and be sued; while a precinct is a political subdivision of a county, possessing no corporate powers. We conclude, therefore, that the word "precinct" as used in the section does not include a village, and illegally voting at a village election is not punishable under the provisions thereof. *State v. Chichester*, 47 N. W. 934, 31 Neb. 325, 11 L. R. A. 104.

A "precinct," in general, means any district marked out and defined, but as used in *Wyoming Railroad Assessment Act* Dec. 13, 1879, providing that the county commissioners shall divide and adjust the number of miles of road and the amounts falling within each "precinct," township, or school district in their respective counties, and cause such amounts to be entered and placed on the lists of taxable property returned by the several assessors, it refers to incorporated

cities and towns. *Union Pac. Ry. Co. v. Ryan*, 5 Sup. Ct. 601, 604, 113 U. S. 516, 28 L. Ed. 1098.

The term "precinct," as used in the election act, shall be construed to mean and include any precinct, ward, or other division of territory in any city governed by the act, created, designed, and made by ordinances for election purposes. *Cobbey's Ann. St. Neb.* 1903, § 5750.

The words "precinct," "township," and "school district," in an act relative to taxation, are held not to include municipal corporations. *Union Pac. Ry. Co. v. Ryan*, 2 Wyo. 408, 418.

The words "township" and "precinct" shall each include the other, and shall also include towns in counties under township organization. *Cobbey's Ann. St. Neb.* 1903, § 10,408.

#### School district.

Act April 3, 1878, relative to the taxing of railroads, provides for a return to the state auditor for taxation of the length of the road in each county, city, or incorporate town, and that the rolling stock and real estate shall be taxed for the purposes of each county, city, town, or precinct in which any portion of any railroad is located. Held, that a common school district is not a "precinct" within the meaning of the act. *Louisville & N. R. Co. v. Johnson (Ky.)* 11 S. W. 666, 667.

#### State.

The word "precinct," in Gen. St. c. 103, § 24, requiring notice of a taking under execution to be given to the debtor by the officer if the debtor is found within his precinct, means the territory within which the officer may legally discharge the duties of his office, and cannot fairly be interpreted as meaning the whole state. The word has the same meaning in the return of an officer reciting that the debtor cannot be found in the officer's precinct. *Brooks v. Norris*, 124 Mass. 172, 173.

#### PRECINCTS OF PRISON.

The "precincts of the prison," within the meaning of a statutory provision that the warden and deputy warden of the state prison may serve legal processes within the precincts of the prison, embraces not only the prison building, but the grounds connected therewith. *Hix v. Sumner*, 50 Me. 290, 291.

#### PRECIOUS STONES.

"Precious stones of all kinds, cut but not set," as used in Tariff Act Aug. 27, 1894, c. 849, par. 338, 28 Stat. 509, includes dia-

monds cut but not set. *United States v. Frankel (U. S.)* 68 Fed. 186, 188.

Articles such as paper cutters, paper weights, knife handles, and pen or pencil holders, made wholly or chiefly of agate or onyx, are dutiable by similitude to precious stones, under Act Oct. 1, 1890, § 5. *Hahn v. United States (U. S.)* 121 Fed. 152.

#### PRECISE.

The word "precise," as used in Rev. St. 1881, § 5314, declaring that the notice for a liquor license shall state the precise location of the premises in which the applicant desires to sell, means the exact locality of such place. *Barnard v. Graham*, 22 N. E. 112, 113, 120 Ind. 135.

The law that an oral agreement to vary a written instrument must be established by "clear, precise, and indubitable proof" means that it must be found that the witnesses are credible, that they distinctly remember the facts to which they testify, that they narrate the details exactly, and that their statements are true. *Ferguson v. Rafferty*, 18 Atl. 484, 485, 128 Pa. 337, 6 L. R. A. 33.

"Clear, precise, and indubitable evidence," within the meaning of the rule that a parol exchange of land must be established by clear proof and indubitable evidence, means no more than that there must be precision in the terms of the agreement set up, and that the evidence to support it must be of a high order, carrying conviction, to a moral certainty, of its truth. *Jermyn v. McClure*, 45 Atl. 938, 942, 195 Pa. 245.

#### PRECLUDE.

The use of the word "precluded," in a judgment that a party be precluded from a certain office, is not improper, though the statute provides that whoever is adjudged guilty of usurping or intruding into or unlawfully holding any office, franchise, or privilege shall be excluded from the office, franchise, or privilege, as the word "excluded," used in the act, does not mean ouster from or dispossession of an office, but that if a party is guilty he shall be debarred or precluded or hindered from entering into and holding it. *Lindsay v. People*, 1 Idaho, 438, 456.

#### PRECONCEIVED MALICE.

"Malice aforethought" or "preconceived malice," in the statutory definition of "murder in the first degree," as any murder committed with "malice aforethought," is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved,

and malignant heart. *State v. Reddell* (Del.) 14 Atl. 550, 9 Houst. 470.

## PREDECESSOR.

In the common acceptation, "predecessor" means one who goes before or precedes another in a given state, position, or office, and does not necessarily express any relation of legal privity. As to who is a "predecessor" within a legal signification of that word, it is a question of law and fact, which no witness is competent to determine. One may be a predecessor of another without the relation of contractual succession. *P. Lorillard Co. v. Peper* (U. S.) 65 Fed. 597, 598.

## PREDICATE.

The "predicate" of a sentence is the word or words which assert something concerning the subject and the object, which is that on which the act expressed by the predicate terminates. *Bourland v. Hildreth*, 26 Cal. 161, 232.

## PREDOMINANT.

The term "predominant," in its natural and ordinary signification, is understood to be something greater or superior in power and influence to others with which it is connected or compared. So understood, a predominant motive, when several motives may have operated, is one of greater force and effect in producing the given result than any other notice, and, in an action for damages for inducing plaintiff to sell his interest in a vessel by false representations as to the value of the vessel, an instruction that it was not necessary that such false representations should be the sole and only motive inducing the sale, but it must have been the predominant one, was error. *Matthews v. Bliss*, 39 Mass. (22 Pick.) 48, 53.

## PRE-EMPTION.

Pre-emption right as an interest in land, see "Interest (In Property)."

The word "pre-emption" is derived from "præ emptio," and is defined as the act of buying before another. *Imperial Dictionary*. And by Webster, the act or right of purchasing before others. The right of pre-emption, therefore, would be the right to purchase before or in preference to others. *Garcia v. Callender*, 5 N. Y. Supp. 934, 936, 53 Hun, 12.

The term "pre-emption," at common law, was used to express the right of the King, through his purveyors, to buy provisions and other necessities for the use of

his household, at an appraised value, in preference to all others, and even without the consent of the owner; and also of forcibly impressing the carriages and horses of the subject to do the King's business on the public roads in the conveyance of timber, baggage, and the like, however inconvenient to the owner, upon paying him a settled price. 1 Shars. Bl. Comm. 287; 1 Steph. Comm. (8th Ed.) 539; *Webst. Dict.* "Pre-emption." In international and commercial law the term is used as expressive of the right of a nation or country to detain the goods of strangers passing through its territories or seas, in order to afford its own subjects or citizens a preference of purchase. A covenant by the grantee of land that the grantor "shall at any time have the right of pre-emption of the premises conveyed," at the price of \$12,000, does not entitle the grantor to a reconveyance at any time on tendering \$12,000, but merely gives him the right to buy it, in preference to any one else, whenever the grantee is willing to sell at that price. *Garcia v. Callender*, 26 N. E. 283, 125 N. Y. 307 (affirming 5 N. Y. Supp. 934, 53 Hun, 12).

A covenant in the nature of a pre-emption right is where the seller is to repurchase the property conveyed in the event of its abandonment by the vendees for the purpose of fowage. That is, the parties who were, at the time of making the sale, riparian owners along the pond or river, wanted to preserve to themselves the advantages of riparian owners, and retain a right to repurchase should the time ever come when the waters should be permitted to recede to the old level. *In re Brookfield*, 79 N. Y. Supp. 1022, 1024, 78 App. Div. 520 (see, also, 2 *Bouv. Law Dict.* 350, tit. "Pre-emption").

The right of pre-emption is the right to enter lands at the minimum price, in preference to any other person, if all the requirements of the law are complied with. *Nix v. Allen*, 5 Sup. Ct. 70, 74, 112 U. S. 129, 28 L. Ed. 675.

Pre-emption is nothing more than an offer by a government to an individual settled upon public lands, which the individual may or may not accept. The person or individual so settling upon the land gets no title until he has complied with the conditions of the law, and until the time arrives when he signifies his acceptance of the offer he is not seised, either in law or equity, of any interest or title in the land. Until he fulfills the prescribed conditions of the law the title remains in the government. *Bray v. Ragsdale*, 53 Mo. 170, 171.

In an answer in an application for insurance as to the nature of the title, the insured stated "pre-emption." By this answer he said that the government had the title; that while it might be true that others might claim or were claiming this land by pre-

emption, yet he had a pre-emption title or interest in the land for whatever that was worth. There may have been a contest of that title or interest, yet in no manner could that make his answer untrue. *McNamara v. Dakota Fire & Marine Ins. Co.*, 47 N. W. 288, 290, 1 S. D. 342.

The term "pre-emption," as used and defined in the provisions of Rev. St. §§ 2257, 2288 [U. S. Comp. St. 1901, pp. 1379, 1385], does not cover a grant to a railroad company to aid in the construction of its road. *Northern Pac. R. Co. v. Sanders* (U. S.) 47 Fed. 604, 606.

#### Of public land laws.

See "Privilege of Pre-emption."

### PRE-EMPTION CLAIM.

A pre-emption claim, until perfected, is not a title defeasible upon the nonperformance of conditions subsequent, but is a mere inchoate right which may ripen into a perfect title upon the performance of certain conditions precedent. Neither is it an already existing and certain demand for land issued by the government upon an executed consideration, as a certificate of headright, land warrant, or land scrip, but a mere privilege or right of possession, sufficient, under the statute, as against all but those holding under a superior right or title, to maintain trespass to try title, but not sufficient to defeat the superior right or title by limitation. A pre-emption claim is not such title or color of title as will support the three-years statute of limitations of Texas. *Besson v. Richards*, 58 S. W. 611, 613, 24 Tex. Civ. App. 64 (citing *Buford v. Bostick*, 58 Tex. 63, 70).

### PRE-EMPTION ENTRY.

The expression "pre-emption entry" has an accepted and well-recognized significance in the acts of Congress, in the decisions of the courts, and in common parlance. The term ordinarily refers to an entry under the act of Congress entitled "An act to appropriate the proceeds of the sale of the public lands, and to grant pre-emptive rights," approved September 4, 1841 (5 Stat. 453, c. 16, § 15), and the various amendments and additions thereto. Rev. St. p. 414, c. 4 [U. S. Comp. St. 1901, pp. 1379-1386]. The distinguishing characteristic of a pre-emption entry is that, where such entry is made, a preferred right to acquire the land has been secured by virtue of its occupation or improvement by the entryman. *Hartman v. Warren* (U. S.) 76 Fed. 157, 161, 22 C. C. A. 30.

The phrase "pre-emption entry" has a particular meaning in land office practice, and, when used in a statute relating to public land, it is to be understood in a restricted sense, rather than comprehensively as being

applicable to all cases in which a particular person may have a right to be preferred to all others in the purchase or acquisition of public lands. *McFadden v. Mountain View Min. & Mill Co.* (U. S.) 87 Fed. 154, 156.

The words "all pre-emption entries," as used in the third section of the act of April 21, 1871, providing that all such pre-emption entries which have been made by permission of the Land Department within the limits of any land grant shall be deemed valid, means only entries prior to the receipt at the local land office of notice of withdrawal, or after the restoration to market. *St. Paul, M. & M. R. Co. v. Greenhalgh* (U. S.) 26 Fed. 563, 567, 568.

### PRE-EMPTOR.

A pre-emptor is one who, by settlement upon and improvement of public land, acquires a right to purchase the particular land to the extent of 160 acres, in preference to others, by paying the minimum price thereof, providing it is, or when it becomes, open to sale. *Doe v. Beck*, 19 South. 802, 803, 108 Ala. 71.

### PRE-EXISTING DEBT.

The words "pre-existing debt," in their natural meaning, include all debts previously contracted, whether they have become payable or not. The term has such meaning in Gen. St. c. 118, § 78, which provides that an insolvent shall forfeit his right to a discharge in insolvency by the payment of pre-existing debts. In *re Fletcher*, 136 Mass. 340, 342.

### PREFECT.

Prefects were functionaries well known in the Roman law, and under the Empire were clothed with extensive powers, both judicial and administrative. With the decline of the Empire they seem to have lost their importance, and to have finally disappeared; but, after remaining in abeyance for some hundreds of years after its fall, the office was revived in the eighth year of the French Republic (1800), and bestowed upon the heads of the departments into which the country had been divided by the National Assembly in 1790. In the performance of their duties they were aided by a council of prefecture. The prefect was charged with the administration of local affairs, and was practically the representative of the central government in public matters. The title was carried into several states, whose legislation was framed upon the model of the Code Napoleon, but until the establishment of the republic was apparently unknown in Mexico. It seems to have been recognized,

however, prior to 1836, since by the constitutional law or decree of December 29th of that year, defining the powers of the President and governors, there was given to the latter the authority "to appoint the prefects, to approve the appointment of the subprefects of the department, to confirm that of the justices of the peace, and to remove any of these officials." *Crespin v. United States*, 18 Sup. Ct. 53, 55, 168 U. S. 208, 42 L. Ed. 438 (citing Reynolds' Land Laws, 205).

#### As judge of probate.

In all cases where the word "prefect" is used, it shall be taken and construed to mean and intend judge of probate. Comp. Laws N. M. 1897, § 3803.

#### PREFECT'S COURT.

In all cases where the words "prefect's court" are used, they shall be taken and construed to mean and intend probate court. Comp. Laws N. M. 1897, § 3803.

### PREFERENCE.

See "Undue Preference."

"Preference" means the act of preferring one thing above another; estimation of one thing more than another; choice of one thing rather than another. *Keller v. State*, 102 Ga. 506, 514, 31 S. E. 92, 95.

The word "preference," as used in a contract of a dealer in natural gas at wholesale to supply to a retail dealer who should have a preference in the former's supply, means that favorable consideration which a bidder on equal terms with others is entitled to over his competitors. It merely gives the retail dealer the first opportunity to buy. *Conemaugh Gas Co. v. Jackson Farm Gas Co.*, 40 Atl. 1000, 1003, 186 Pa. 443, 65 Am. St. Rep. 865.

Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], forbidding certain preferences by railroads in the transportation of property, does not render one liable for issuing a free pass when the same is not shown to have been used in transportation. *In re Huntington* (U. S.) 68 Fed. 881, 882.

While a preference in right is in all cases founded on an apprehension of a deficiency of assets, it is not established thereby; it must be expressed in the will. Where a testator, after directing the payment of his debts, devised his town house and furniture to his sister, and directed that the incumbrances on it should be paid off by his executors, and then devised to his brother his country seat, "provided nevertheless that the property bequeathed shall be subject to sale in whole or in part \* \* \* to enable the

executors to carry out fully the previous provisions of this will, it being my intention that each bequest shall be fully carried out in the order in which it appears, etc., as the funds derived from my estate may permit," and then gave several general legacies, it was held, there being a deficiency of assets, that no preference among such latter bequests was intended, and that they must abate proportionately. *In re Wain's Estate*, 109 Pa. 479, 488.

#### In bankruptcy and insolvency laws.

"Preference" is the expression of a motive or desire on the part of the directors of a corporation to favor some creditors over others; to put them, as the word implies, ahead in the race for assets. This the Legislature may forbid, but this court may not. *Savage v. Miller*, 39 Atl. 665, 666, 56 N. J. Eq. 432.

A debtor has a right to prefer one creditor to another, but it must be a preference which secures no benefit or advantage to himself, as a price or consideration, or reserves to himself an interest to which of right his other creditors may be entitled. *Pringle v. Sizer*, 2 S. O. (2 Rich.) 59, 65.

The preference of a creditor is not the payment of one in the ordinary course of business, or under threats or suits, but selecting one, as a relation or friend, or settling with him before due, or on the eve of bankruptcy, when not pushed by him. *Ashby v. Steere* (U. S.) 2 Fed. Cas. 15, 17.

The common definition of "preference," as found in law dictionaries, is the paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claims, to the exclusion of the rest. Where a note against an insolvent firm was exchanged for the note of the individual members of the firm, within four months of the commencement of insolvency proceedings, by the debtors, the result of which would give the creditor a larger dividend on his death than he would otherwise obtain, this constituted a preference, and the substitute note could not be legally allowed against the estates of the debtors. *Chadbourne v. Harding*, 80 Me. 580, 584, 16 Atl. 248, 250.

A preference is an advantage, in the payment of a debt, acquired by one creditor over other creditors. Under Bankr. Act 1898, prohibiting an insolvent from transferring his property to one of his creditors with intent to give a preference, such intent will be conclusively presumed where an insolvent pays one of his creditors when he knows that he is insolvent. *Chism v. Citizens' Bank*, 27 South. 637, 77 Miss. 599.

A pledge or payment, for a consideration given in the present or to be given in the

future, whether in money or goods or services, is not a "preference" within the meaning of bankruptcy statutes. *Furth v. Stahl*, 55 Atl. 29, 30, 205 Pa. 439.

The word "preference," as used in Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], providing that the claims of creditors of a bankrupt who have received preferences shall not be allowed unless they surrender their preferences, includes the payment of a debt in money. In *re Ft. Wayne Electric Corp.* (U. S.) 99 Fed. 400, 403.

Under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], providing that the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences, it is immaterial that the creditor did not know or have cause to believe that the debtor was insolvent, or that he was receiving a preference, if such was actually the fact. In *re Conhaim* (U. S.) 97 Fed. 923, 925.

The word "preference," as used in Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], prohibiting preferred creditors from proving their claims without surrendering their preference, does not include a payment made to creditors by a bankrupt in good faith in the regular course of business, when he was unaware of his insolvency and did not intend to cause a preference, and it was likewise received by the creditor, who was also ignorant of the insolvency. In *re Ratliff* (U. S.) 107 Fed. 80, 82.

The word "preference," in a statute authorizing the appointment of a receiver when an alleged insolvent debtor has done any act to give certain of his creditors a preference over other creditors, has a well-defined meaning in law, and is the paying or securing of one or more debtors, in whole or in part, to the exclusion of the rest; a payment to one creditor which will give or may possibly give him an advantage over others. In *re Stevens*, 38 N. W. 111, 112, 38 Minn. 432.

The use of "preference" in Bankr. Act, July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], means a preference in the full sense of that term; that is, all the elements of a preference must attach to the use of the word in that connection, to wit, the intent of the creditor, as well as that of the debtor. "That a preference, as applied to the creditor, includes the elements of intent, or reasonable cause to believe that the debtor is insolvent, is further evidenced by section 60c, providing: 'If a creditor has been preferred and afterwards in good faith gives the debtor further credit without security \* \* \* it may be set off against

the amount which otherwise would be recoverable from him.'" In *re Piper* (U. S.) 5 Am. Bankr. R. 144, note.

The test of preference under the bankruptcy act is the payment out of the bankrupt's property of a larger percentage of the creditor's claim than other creditors of the same class, and not the benefit or injury to the creditor preferred. *Swarts v. Fourth Nat. Bank* (U. S.) 117 Fed. 1, 4, 54 C. C. A. 387.

The word "preference," while not defined in set terms in the bankruptcy act, includes everything in the nature of property which has capacity for being taken and appropriated to the satisfaction of debts provable under the act, and may be either of a legal or equitable character, and that, however devious the method of a creditor who acquires property which is subject to the payment of the debtor's obligation, there is a preference within the meaning of the act. *Goldberg v. Harlan* (Ind.) 67 N. E. 707, 711 (citing *Stern v. Louisville Trust Co.* [U. S.] 112 Fed. 501, 50 C. C. A. 367).

A transfer of property to a creditor by a debtor within four months prior to his adjudication as a bankrupt does not constitute a "preference" under the bankruptcy law, in the absence of fraud, where the transfer was made pursuant to the terms of a prior contract under which the transferee advanced the money with which the property was acquired, reserving a lien thereon, and the option, in case of default in payment, to purchase the property at a fixed price, deducting therefrom his advances. *Sabin v. Camp* (U. S.) 98 Fed. 974, 975, 3 Am. Bankr. R. 578, 975.

Bankr. Act July 1, 1898, c. 541, § 60, subd. "a," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], provides that a person shall be deemed to have given a "preference," if, being insolvent, he has procured or suffered a judgment to be entered against him in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Carson, Pirie, Scott & Co. v. Chicago Title & Trust Co.* (U. S.) 5 Am. Bankr. R. 814, 818; *Pirie v. Same*, 21 Sup. Ct. 906, 908, 182 U. S. 438, 45 L. Ed. 1171.

## PREFERENTIAL DEBTS.

"Preferential debts," which in railroad foreclosure proceedings may be given priority on the appointment of a receiver, "are in general those which have aided to conserve the property, and which have been contracted within a reasonable time; and there is no fixed rule barring claims contracted more



than six months before the appointment, nor is the authority to give priority limited to cases in which there has been a diversion of income." *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.* (U. S.) 53 Fed. 182.

### PREFERRED.

"Preferred," in St. 5 & 6 Wm. IV, c. 50, § 98, giving the court before whom any indictment shall be preferred power to certify that the offense was frivolous, and to award costs, means "carried on." *Reg. v. Inhabitants of Pembridge*, 3 Q. B. 901, 906.

The word "preferred" is relative. It refers to something else, and it means that the thing to which it is attached, whatever that may be, has some advantage over another thing of the same character, which but for this advantage would be like the other. *State v. Cheraw & C. R. Co.*, 16 S. C. 524, 528.

### PREFERRED DIVIDEND.

A preferred dividend is the fund paid to one class of shareholders in priority to that to be paid to another class. *Chaffee v. Rutland R. Co.*, 55 Vt. 110, 129.

The term "preferred dividend," when used in reference to a corporation, means a dividend "which is paid to one class of shareholders in priority to that paid to another." *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 310, 333, 5 Am. Rep. 575.

A certificate for shares of stock in a railroad corporation, declaring that such stock is entitled to preferred dividends out of the net earnings, means that such dividends shall be paid on such stock before the payment of dividends on the common stock, but does not entitle the holder of such preferred stock to dividends thereon before payment of interest on a subsequent mortgage debt of the company. *St. John v. Erie Ry. Co.* (U. S.) 21 Fed. Cas. 167, 170.

### PREFERRED STOCK.

Common stock distinguished, see "Common Stock."

"Preferred stock" is stock having a preference. "The issue of preferred stock," says *Pierce, R. R.* 124, "is a mode by which a corporation obtains funds for its enterprise without borrowing money or contracting a debt. Its holders are a privileged class, who are entitled to dividends of a certain per cent., payable out of the net earnings, in priority to any dividends upon ordinary stock." It seems to be admitted in all the cases that the holders of preferred stock are the share-

holders or stockholders in the stock of the company. As used in a statute authorizing the issuance of preferred stock of a railroad company to counties, it was construed to mean capital stock differing from other capital stock only in preference given as to dividends. *State v. Cheraw & C. R. Co.*, 16 S. C. 524, 528.

"Preferred stock" is understood to designate such stock as is entitled to dividends from the income or earnings of the corporation before any other dividends can be paid. Preferred stock takes a multiplicity of forms, according to the desire and ingenuity of the stockholders and the necessity of the corporation. It represents pro tanto the capital of the company, and has about it no elements or rights other than those that are conferred on it by the statute or contract to the authority of which it owes its existence. In all other respects the preferred stockholder is upon the same footing as the common stockholder. He is not a creditor of the company. *Scott v. Baltimore & O. R. Co.*, 49 Atl. 327, 93 Md. 475.

By preferred stock is understood stock which gives the holders a priority of dividends, and no priority of assets or capital, unless expressly stipulated for. As to those, they rank with ordinary holders. *Green's Brice, Ultra Vires*, 172. They have the right to vote and to exercise the various rights of shareholders. *Cook, Stock & S.* § 269. The assets, upon the dissolution of a corporation, are distributed equitably among all classes. *Jones v. Concord & M. R. R.*, 30 Atl. 614, 616, 67 N. H. 234, 68 Am. St. Rep. 650.

A statute which authorized a county to issue bonds in subscription for preferred stock of a railroad company meant capital stock different from other capital stock only in the preference given it in the matter of dividends. *State v. Cheraw & C. R. Co.*, 16 S. C. 524, 529.

The preferred stock of a corporation is the stock entitled to a preference over other stock in the payment of dividends, but such stock cannot be preferred to a greater extent, and therefore a condition requiring the payment of dividends on preferred stock, without regard to the earnings of the corporation, is invalid. *Lockhart v. Van Alstyne*, 31 Mich. 76, 79, 18 Am. Rep. 156.

"Preferred stock," issued under 67 Ohio Laws, p. 26, whereby stock is issued under a guaranty of a corporation for semiannual dividends of a certain amount, does not create additional stockholders, but is in law and in fact a loaning of money upon mortgage security; the holders of such preferred stock having no right to vote on any question and not being liable for the debts of the corporation. *Burt v. Rattle*, 31 Ohio St. 116, 123.

**PREGNANT.**

See "Affirmative Pregnant"; "Negative Pregnant."

"Pregnant" is defined by Webster as "being with young, as a female great with child." Hence an indictment may use the words "a woman with child," under a statute using the words "pregnant woman." *Echardt v. People* (N. Y.) 22 Hun, 525, 526.

"Pregnant with child," as used in *Laws* 1881, p. 240, making it unlawful to procure the miscarriage of a woman "pregnant with child," does not mean a condition when the unborn offspring has passed the embryonic and foetal stage and become in the common-law sense "quick." *Powe v. State*, 2 Atl. 662, 48 N. J. Law (19 Vroom) 34.

"Pregnant with child," as used in *Comp. St.* p. 560, c. 180, providing for the punishment of any one attempting to procure the miscarriage of a woman "pregnant with child," applies to every stage of pregnancy from the earliest conception, and extends through its entire term until the actual expulsion of the foetus. Strictly speaking, the pregnancy does not cease until that event, though the foetus may be dead. *State v. Howard*, 32 Vt. 380, 400, 78 Am. Dec. 605.

The distinction between a woman being "pregnant" and being "quick with child" is applicable mainly, if not exclusively, to criminal cases; and it does not apply to cases of descents, devises, and other gifts. *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 257, 26 Am. Dec. 598.

**PREGNANT WITH QUICK CHILD.**

A woman is "pregnant with a quick child" when it has been "quickened," or in other words so moved in the mother's womb that she has felt the movement. *Evans v. People*, 49 N. Y. 86, 89 (citing *Reg. v. Wycherley*, 8 C. & P. 262).

**PREJUDICE.**

See "Great Prejudice"; "Undue Prejudice"; "Without Prejudice."  
Bias distinguished, see "Bias."

Prejudice is prepossession; judgment formed beforehand without examination. *Hudgins v. State*, 2 Ga. (2 Kelly) 173, 176.

Webster defines "prejudice" in this wise: "An opinion or decision of mind formed without due examination; prejudgment; a bias or leaning toward one side or another of a question, from other considerations than those belonging to it; an unreasonable predilection or prepossession for or against anything; especially an opinion or leaning adverse to anything, formed without proper

grounds or before sufficient knowledge." *Mitchell v. State*, 36 S. W. 456, 464, 36 Tex. Cr. R. 278; *In re Breckinridge*, 48 N. W. 142, 143, 31 Neb. 489.

"Prejudice," as the meaning of the roots of the word indicate, signifies a prejudgment, strictly speaking, but as generally understood imports some ill will, as well as a preconceived opinion. *Willis v. State*, 12 Ga. 444, 449.

Within the provisions of the law authorizing the removal of causes to federal courts for prejudice or local influence, the local judge's fitness, and his uprightness and firmness or ability, or the reverse, is not an element of prejudice. *Montgomery County v. Cochran* (U. S.) 116 Fed. 985-993.

Act Cong. Feb. 4, 1887, prohibiting a carrier from exercising prejudice in transportation of property, does not render a railroad liable for the mere issuance of a free pass, where the same is not shown to have been used in transportation. *In re Huntington* (U. S.) 68 Fed. 881, 882.

**Of judge.**

Under a statute providing for a change of venue on the ground of the prejudice of the judge trying the cause, the term "prejudice" does not mean an opinion formed beforehand upon the questions of law involved in the case, but an opinion or judgment in regard to the case, formed beforehand without examination, or a prepossession. *Hungerford v. Cushing*, 2 Wis. 397, 405; *Western Bank v. Tallman*, 15 Wis. 92, 94. The statute refers to prejudice either for or against the parties. *Western Bank v. Tallman*, 15 Wis. 92, 94.

**Of juror.**

Prejudice means prejudgment, judgment beforehand; and such is its meaning when applied to a juror. *State v. Anderson*, 14 Mont. 541, 545, 37 Pac. 1.

Prejudice means a prejudging of a case from any cause. It means a settled and fixed opinion, either as to the guilt or innocence of an accused, no matter from what cause that opinion is derived or upon what it is based, whether from rumor, hearsay, newspaper report, or evidence upon a former trial, or from anything else, if it is fixed and settled. *Hinkle v. State*, 21 S. E. 595, 600, 94 Ga. 595.

The word "prejudice," as used in *Code Cr. Proc.* art. 578, providing for a change of venue when there exists so great a prejudice against the accused as to preclude a fair trial, refers to a prejudice which may exist, either as against the accused himself, or by reason of a prejudgment of his cause. *Randle v. State*, 28 S. W. 953, 954, 34 Tex. Cr. R. 43.

"Prejudice," as used with respect to veniremen, means the same as prejudgment; that is, one who has prejudged a person's guilt of the accusation charged against him has a prejudice against such person. *Randle v. State*, 34 Tex. Cr. R. 43, 28 S. W. 953 (cited approvingly in *Faulkner v. State*, 65 S. W. 1003, 1095, 43 Tex. Cr. R. 311).

Where it appears from the testimony that the great majority of those liable to jury service in a criminal case must have formed an opinion as to the guilt or innocence of the defendant, then, notwithstanding the conclusion drawn by some of the witnesses that no prejudice existed against him, the court will be constrained to believe that what the law terms "prejudice" did exist, for prejudgment and prejudice amount to the same thing. *Cortez v. State*, 69 S. W. 536, 538, 44 Tex. Cr. R. 169.

The word "prejudice," in a statute making the prejudice of a juror a ground of challenge, "seems to imply nearly the same thing as 'opinion,' a prejudgment of the case, and not necessarily an enmity or ill will against either party. The statute intended to exclude any person who had made up his mind or formed the judgment in advance in favor of either side; yet the opinion or judgment must be something more than a vague impression, formed from casual conversations with others or from reading imperfect, abbreviated newspaper reports. It must be such an opinion upon the merits of the questions as would be likely to bias or prevent a candid judgment upon a full hearing of the evidence. If one had formed what in some sense might be called an opinion, but which yet fell far short of exciting any bias or prejudice, he might conscientiously discharge his duty as a juror." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 297, 52 Am. Dec. 711.

"Prejudice" means prejudgment, judgment beforehand; and hence expressions by a juror, after a trial and verdict, as to the guilt of defendant, do not show prejudice on the part of the juror. *State v. Anderson*, 37 Pac. 1, 14 Mont. 541.

## PRELIMINARY.

Introductory; initiatory; preceding; temporary and provisional—as preliminary examination, injunction, articles of peace, etc. *Black, Law Dict.*

### PRELIMINARY EXAMINATION.

As proceeding, see "Proceedings."

The object of a preliminary examination is twofold: (1) To inquire touching the commission of crime and the accused's connection with it; (2) to perpetuate testimony.

The state has an interest in both. The right to a preliminary examination is not confined to the person accused, but it exists in the state as well. *State ex rel. Attorney General v. Brunot*, 28 South. 996, 997, 104 La. 237.

"The proceeding known as a 'preliminary examination' under the laws of this state is well understood. It is a proceeding before a regularly constituted court, or judicial magistrate, in which the accused has the right to be present and hear all the witnesses, participate in their examination, and be heard also in his own behalf." *In re Dolph*, 28 Pac. 470, 471, 17 Colo. 35.

A preliminary hearing is in no sense a trial, in which defendant's rights in respect to his guilt or innocence are adjudged, determined, or prejudiced, whether a hearing results in a discharge of the accused person or in holding him for appearance at the district court to answer the accusations made against him. The examination is to ascertain whether the crime charged has been committed, and, if such is found to be the case, to enforce his presence at the district court to answer the charge. *Van Buren v. State*, 91 N. W. 201, 202, 65 Neb. 223.

### PRELIMINARY INJUNCTION.

A "preliminary injunction," or, as it is sometimes called, "injunction pendente lite," is a provisional remedy, granted before the hearing on the merits for the purpose of preventing the perpetration of wrong or the doing of any act whereby the rights in controversy may be materially injured or endangered before the final decree; and its purpose is to preserve the subject of controversy until an opportunity is afforded for a full and deliberate investigation. *Darlington Oil Co. v. Pee Dee Oil & Ice Co.*, 40 S. E. 169, 177, 62 S. C. 196; *Helm v. Gilroy*, 23 Pac. 851, 852, 20 Or. 517.

A preliminary injunction is a preventive remedy only. *Moosic Mountain & C. R. Co. v. Delaware, L. & W. R. Co. (Pa.)* 4 O. P. Rep. 189, 192.

The sole object of a preliminary injunction is to preserve the subject of the controversy in a condition in which it is when the order is made. It cannot be used to take property from the possession of one and put it in the possession of another. *Fredericks v. Huber*, 37 Atl. 90, 180 Pa. 572.

A "preliminary injunction" merely preserves matters in statu quo, and cannot direct the restoration of property to its condition before being disturbed. *Southern Pac. R. Co. v. City of Oakland (U. S.)* 58 Fed. 50, 54.

A "preliminary injunction" is in its operation somewhat like judgment and execu-

tion before trial. It is only to be resorted to from a pressing necessity, to avoid injurious consequences, which cannot be repaired under any standard of compensation, and is therefore a preventative remedy only. It is a restrictive or prohibitory process to compel the party to maintain his status merely until the matters in dispute shall be determined. Appeal of Mammoth Vein Consol. Coal Co., 54 Pa. (4 P. F. Smith) 183, 188.

A preliminary injunction maintaining the status quo may properly issue whenever the question of law or fact to be ultimately determined in a suit are grave and difficult, and an injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted. Allison v. Corson (U. S.) 88 Fed. 581, 584, 32 C. C. A. 12.

A preliminary injunction is commonly spoken of as a temporary injunction, and is granted pending a hearing on the merits, and only upon complainant's entering into bond, with surety, conditioned and payable as required by law. The writ is obtained upon an ex parte hearing, and the bond is required as a protection against the abuse of this extraordinary process and to prevent oppressions by its use. It is different from a permanent injunction, in that it is preliminary to a hearing on the merits and by no means dependent on such hearing. Jesse French Piano & Organ Co. v. Forbes, 32 South. 678, 679, 121 Ala. 302, 92 Am. St. Rep. 31.

## PREMATURE LABOR.

Premature labor is, technically speaking, the delivery of the ovum or embryo by a female within a short time after six months has elapsed from the date of conception. Smith v. State, 33 Me. 48, 59, 54 Am. Dec. 607.

## PREMEDITATE—PREMEDITATION.

"Premeditated, willful, malicious, and deliberate" denote the intent with which killing must be done to make it murder in the first degree. Moreover, they denote, not only the moral impulse, but peculiarly the mental process through which the crime is conceived and the act resolved upon. Cannon v. State, 31 S. W. 150, 151, 60 Ark. 564.

By "premeditation" is meant thinking out beforehand; and when one thinks over doing an act, and then determines or concludes to do it, he has premeditated the act. State v. Splvey, 43 S. E. 475, 478, 132 N. C. 889.

"With premeditation" means with previous design formed. State v. Fiske, 63 Conn. 388, 390, 28 Atl. 572.

Premeditation implies meditation beforehand or previous deliberation. People v. Kiernan, 3 N. Y. Cr. R. 247, 250.

To premeditate is to think of a matter beforehand. It is to conceive of a thing before it is executed. The word "premeditated" would seem to imply something more than deliberate, and may mean that the party had not only deliberated, but had framed in his mind the plan of destruction. Commonwealth v. Smith (N. Y.) 2 Wheeler, Cr. Cas. 79, 86.

"Premeditated," as used in the definition of murder, means contrived beforehand or designed previously. Martin v. State, 25 South. 255, 257, 119 Ala. 1; Mitchell v. State, 60 Ala. 26, 28; Hawes v. State, 7 South. 302, 304, 88 Ala. 37.

"Premeditated" means thought out, considered, or revolved in the mind beforehand; deliberated; to have formed in the mind by previous thought or meditation; previously contrived, designed, or intended. Fahnestock v. State, 23 Ind. 231, 261; Brannigan v. People, 24 Pac. 787, 789, 3 Utah, 488.

The word "premeditate" means to think of beforehand; as, where a man thinks about the commission of an act, and concludes or determines in his mind to commit the act, he has thus premeditated the commission of the act. State v. Dowden, 24 S. E. 722, 723, 118 N. O. 1145.

If a person had time to think, and did think, and after having thought he struck the blow as the result of a determination produced by the operation of the mind, then that would be a sufficient deliberation and premeditation. This was held to be a correct definition of the terms "deliberate" and "premeditate," one of the definitions of "premeditate" being "deliberate." Cleveland v. State, 5 South. 428, 431, 86 Ala. 1.

"Premeditation" means, according to Webster, the act of meditating before; previous deliberation; previous contrivance or design to perform. Bouvier says premeditation differs essentially from will, because it supposes, besides an actual will, a deliberation and continued persistence, which indicate more perversity. Simmerman v. The State, 17 N. W. 115, 14 Neb. 568.

Premeditation is the mental operation of thinking upon an act before doing it, or upon an inclination before carrying it out. State v. Straub, 47 Pac. 227, 230, 16 Wash. 111.

"Premeditation," means thinking beforehand. An act, to be premeditated, must have been the object of thought before it was carried into effect; thought about before it was done, as contradistinguishing it from an act which the mind has not conceived and matured, and which has not received the assent

of the will and sanction of the judgment to its accomplishment. *Commonwealth v. Perrier* (Pa.) 3 Phila. 229, 232.

By the term "premeditation," or "premeditated" is meant thought of beforehand for any length of time, however short. *State v. Howell*, 23 S. W. 263, 267, 117 Mo. 307; *State v. Brooks*, 5 S. W. 257, 261, 92 Mo. 542; *State v. Snell*, 78 Mo. 240, 243; *State v. Kotovsky*, 74 Mo. 247, 249; *State v. Lewis*, 69 Mo. 92, 93; *State v. Harris*, 76 Mo. 361, 363; *State v. Marsh*, 71 S. W. 1003, 1004, 171 Mo. 523; *State v. Gatlin*, 70 S. W. 885, 888, 170 Mo. 354; *State v. Privitt*, 75 S. W. 457, 459, 175 Mo. 207; *State v. McMullin*, 71 S. W. 221, 224, 170 Mo. 608; *State v. Talbott*, 73 Mo. 347, 350; *State v. Ashcraft*, 70 S. W. 898, 900, 170 Mo. 409; *State v. Kilgore*, 70 Mo. 546, 555; *State v. Kale*, 32 S. E. 892, 895, 124 N. C. 816; *Territory v. Scott*, 17 Pac. 627, 630, 7 Mont. 407; *People v. Callaghan*, 6 Pac. 49, 53, 4 Utah, 49; *Republic of Hawaii v. Yamane Nenchiro*, 12 Hawaii, 189, 202.

The ordinary meaning of the word "premeditated" is "previously considered, or meditated on," and when prefixed to the act of killing, in a statute defining murder, necessarily refers to the state of mind of the slayer at the time of the killing, and in conjunction with the word "deliberate" it implies that the killing is designed before the act, and that such design is not the sudden, rash conception of an enraged mind, but that the mind is sufficiently cool and self-possessed to consider of and contemplate the nature of the act then about to be done. *Atkinson v. State*, 20 Tex. 522, 531.

"Premeditation," as used with reference to homicide, means that the killing was the result of a design to kill formed before the act. *Anthony v. State*, 19 Tenn. (Meigs) 265, 277, 33 Am. Dec. 143; *State v. Coella*, 28 Pac. 28, 33, 3 Wash. St. 99.

"Premeditation," when used with reference to the element necessary to constitute murder in the first degree, exists when the intention to do the criminal act has been formed before the attempt to execute it. *United States v. Kie* (U. S.) 26 Fed. Cas. 781, 782.

"Premeditated killing," as used in a statute defining murder in the first degree as the premeditated killing, etc., of a human being, means "a killing in which the deliberation or consideration precedes the purpose formed, and it need not precede the purpose formed for any particular period of time." *People v. Pool*, 27 Cal. 572, 583.

To kill a person with premeditated design the mind must have acted in regard to the killing before the act was committed, and the mind must have settled down re-

solved to kill and murder, and the killing done with a deliberate mind and formed design of so doing. *State v. Coella*, 28 Pac. 28, 33, 3 Wash. St. 99.

The words "deliberate" and "premeditated" are peculiarly and solely descriptive of murder in the first degree. *Cannon v. State*, 31 S. W. 150, 151, 60 Ark. 564.

The expressions "premeditation," "deliberation," "design," and "determination distinctly formed in the mind," used in the charge of a prosecution for murder, all imply the absence of overpowering passion. *State v. Ah Mook*, 12 Nev. 369, 381.

"Premeditated," as employed in the Revised Statutes, declaring the killing of a human being to be murder when done from a premeditated design to effect the death of the person, does not include an intent formed at the very instant of striking the fatal blow. *Sullivan v. People* (N. Y.) 1 Parker, Cr. R. 347, 351.

#### Deliberation.

"Premeditated," as used in a statutory definition of murder, requiring the killing to be deliberate and premeditated, is synonymous with "deliberate" as there used. *State v. Lopez*, 15 Nev. 407, 414; *People v. Ah Choy*, 1 Idaho, 317, 319; *Bower v. State*, 5 Mo. 364, 379, 32 Am. Dec. 324; *State v. Dale*, 18 S. W. 976, 108 Mo. 205; *State v. Reed*, 23 S. W. 886, 889, 117 Mo. 604. Contra, see *People v. Mongano*, 1 N. Y. Cr. R. 411, 413.

The terms "deliberation" and "premeditation," as used in an indictment for murder, are synonymous. *Cannon v. State*, 32 S. W. 128, 129, 60 Ark. 564.

Deliberation is also premeditation, but it is something more. Deliberation is only exercised in a natural state of the blood, while premeditation may be either in that state of the blood or in heat of passion. *State v. Kotovsky*, 74 Mo. 247, 249.

Where the killing is the deliberate act of the person who commits the offense, and the act was performed with an intent to take life, there is a premeditated killing, within the meaning of the statutory definition, which makes a premeditated killing murder in the first degree. *McCabe v. Commonwealth* (Pa.) 8 Atl. 45, 52.

"If a person had time to think, and did think, and after having thought he struck the blow as the result of a determination produced by the operation of the mind, then that would be a sufficient deliberation and premeditation." This was held to be a correct definition of the terms "deliberate" and "premeditate"; one of the definitions of "premeditate" being "deliberate." *Cleveland v. State*, 5 South. 426, 431, 86 Ala. 1.

**Intent or purpose.**

In an indictment charging murder, both the words "deliberation" and "premeditation" involve a prior purpose to do the act charged. *Aubrey v. State*, 35 S. W. 792, 62 Ark. 368.

Premeditation means that there was design or intent before the act; that is, that the accused planned, contrived, and schemed beforehand. *State v. McGaffin*, 13 Pac. 560, 562, 36 Kan. 315.

Premeditation means any preconceived intention to effect the death of deceased. *Carter v. State*, 22 Fla. 553, 558.

"Premeditation," as applied to a homicide, is defined as meaning intent before the act, but not necessarily an intent existing any extended time before the act. *Ernest v. State*, 20 Fla. 383, 388; *Killins v. State*, 9 South. 711, 714, 28 Fla. 313.

"Premeditated," as used with relation to homicide, implies that the act is done in pursuance of a prior intention; a predetermination. *State v. Wells*, 1 N. J. Law (Coxe) 424, 429, 1 Am. Dec. 211.

The presence of a specific intent to take life is not, standing alone, conclusive that the homicidal act was done with deliberation and premeditation. *State v. Bonofiglio*, 52 Atl. 712, 713, 67 N. J. Law, 239, 91 Am. St. Rep. 423.

**Malice aforethought, or express malice.**

"Premeditated" is synonymous with "aforethought." *People v. Ah Choy*, 1 Idaho, 317, 319; *Edwards v. State*, 25 Ark. 444, 446.

The terms "malice aforethought" and "premeditation," as used in an indictment for murder in the first degree, are synonymous. *Cannon v. State*, 32 S. W. 128, 129, 60 Ark. 564.

In the statute relating to murder, premeditation is precisely the same as express malice and malice aforethought at common law. *Clifford v. State*, 17 N. W. 304, 307, 58 Wis. 477.

In order to constitute premeditation, something more must appear than the prior existence of actual malice, or than the presumption of malice which arises from the use of a deadly weapon. *State v. Thomas*, 24 S. E. 431, 434, 118 N. O. 1113.

Premeditation, necessary to constitute murder in the first degree, draws with it the necessity of express malice toward the victim on the part of the appellant, because it would be impossible in the nature of things for premeditation to exist toward an individual without at the same time having toward that individual the express evil intent con-

stituting malice. *King v. State*, 20 S. W. 169, 175, 91 Tenn. (7 Pickle) 617.

The word "premeditated" as used in 2 Rev. St. p. 657, § 5, defining murder to be the killing of a person with a premeditated design to effect his death, is synonymous with "aforethought" and "prepenae." The three terms possessing etymologically the same meaning, being the Latin and Saxon synonyms, expressing a single idea, and possessing in law precisely the same force; and therefore the statute, so far as the term "premeditated" is concerned, did not alter the common law. *People v. Clark*, 7 N. Y. (3 Seld.) 385, 393; *Id.*, 11 N. Y. Leg. Obs. 4, 22.

"Premeditated" is held to be sufficiently synonymous with "malice aforethought," so that under a statute providing that all deliberate and premeditated killing, etc., is murder in the first degree, an allegation in an indictment that the killing was with malice aforethought was sufficient; "aforethought" being defined as being "premeditated," "prepenae," or in other words that "aforethought" includes "premeditated," and malice aforethought being malice premeditated, and vice versa. *Brannigan v. People*, 24 Pac. 767, 769, 3 Utah, 488.

**Time as element of.**

2 Rev. St. p. 657, § 51, declaring the killing of a human being to be murder, when perpetrated from a premeditated design to effect the death of the person killed, requires not only the design to kill, but that the design must have been the subject of meditation or reflection before, as the prefix "pre" clearly requires. Before what is this premeditated design of killing to be, except before the act that was meditated, viz., the fatal blow by which the killing was accomplished. The very requirement that the design shall be thought of and meditated before the act shall be committed which is the cause of death admits that there is an interval between the design or intention and the commission of the act. *People v. Clark*, 11 N. Y. Leg. Obs. 4, 22.

The word "premeditated," as used in a definition of murder in the first degree, requiring the homicide to be premeditated, does not "require any particular length of time that such premeditation should have been going on prior to the fatal act; but if, in fact, it did precede the act, it gave character to the crime. It was meant to distinguish between an act done with murderous intent, with the purpose of mind to kill, and an act done upon sudden impulse, without meditation or murderous intent." *State v. Carr*, 53 Vt. 37, 46.

In discussing a statute naming several modes of killing that would make the killing murder in the first degree, and then saying, "or by any other kind of willful, deliberate,

or premeditated killing," etc., but not defining any mode or means of doing it, the court said: "If it was premeditated, it would be murder in the first degree; that is to say, if the killing was murder, and done with premeditation, it would be murder in the first degree. The term 'premeditated' was not meant to require any particular length of time that such premeditation should have been going on prior to the fatal act, and if in fact it did precede the act, it gave character to the crime. It was meant to distinguish between an act done with murderous intent, with a purpose of mind to kill, and an act done upon sudden impulse, without preparation or murderous intent." *State v. Carr*, 53 Vt. 37, 47.

"Premeditation" has been defined in Rev. St. § 2384, as meaning intent before the act, but not necessarily existing any extended time before the act. *Olds v. State (Fla.)* 33 South. 296, 299.

By "deliberately and with premeditation," in instructions defining murder, is not meant that any particular length of time need intervene between the formation of the purpose to kill and its execution. It is not necessary that the deliberation and premeditation should continue for a day, an hour, or a minute; but it is enough that the design to kill is fully and clearly received in the mind, and purposely and deliberately executed. *State v. Zdanowicz*, 55 Atl. 743, 746, 69 N. J. Law, 619.

The law does not lay down any rule as to the time which must elapse between the moment when a person premeditates and comes to a determination in his own mind to kill another person and the moment he does the killing, as a test. It is not a question of time. It is merely a question whether the accused formed in his own mind the determination to kill the deceased, and then at some subsequent period, either immediate or remote, carried his previously formed determination into effect by killing the deceased. If there be an intent to kill, and a simultaneous killing, then there is no premeditation. *State v. Dowden*, 24 S. E. 722, 723, 118 N. C. 1145.

There may be no appreciable space of time between the intent to kill and the act of killing. That must be instantaneous, as the successive thoughts of the mind. *People v. Callaghan*, 6 Pac. 49, 53, 4 Utah, 49.

There must be time and opportunity for deliberate thought, and that, after the mind conceives the thought of taking the life, the conception is meditated upon, and a deliberate determination formed to do the act, which, being done, makes the killing murder in the first degree, no matter how soon thereafter the fatal resolve is carried into execution. *Fahnestock v. State*, 23 Ind. 231, 261.

An intent to kill, formed in the instant of the killing, is within the meaning of the word "premeditation," under Act 1862, amending the laws of murder. *Lanergan v. People (N. Y.)* 6 Parker, Cr. R. 209, 218.

The law fixes no particular length of time these elements shall be shown to have existed in the mind. If they coexist but a moment before, and prompt the fatal act, it is sufficient. There must have been a previously formed purpose to take the life of the person slain, and death must be the result of the voluntary, intentional employment of means calculated to produce it. *Hawes v. State*, 7 South. 302, 304, 88 Ala. 37.

The law does not prescribe what length of time should intervene between the formation of the design and the execution thereof. All it requires is that there be such an interval of time between the intent and the act as will repel the presumption that it was done upon a sudden impulse, conceived and executed almost instantaneously, or that its execution followed so quickly after the design as to show that the mind was not fully conscious of its own intention. If there is an intent to kill, an interval of time after it sufficiently long for the prisoner to be fully conscious of what he intends, and then an execution of such intent, there is premeditation. *Savage v. State*, 18 Fla. 909, 905; *Carter v. State*, 22 Fla. 553, 558; *Killins v. State*, 9 South. 711, 714, 28 Fla. 313.

"Judge Rush, in *Commonwealth v. Smith*, has said: 'It is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind his scheme of murder and to contrive the means of accomplishing it.' But this expression must be qualified, lest it mislead. It is true that such is the swiftness of human thought that no time is so short in which a wicked man may not form a design to kill and frame the means of executing his purpose; yet this suddenness is opposed to 'premeditation,' and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find, the actual intent; that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind, fully and consciously, the intention to kill, and to select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, there is time to deliberate and to premeditate." *Commonwealth v. Drum*, 58 Pa. (8 P. F. Smith) 9, 16.

Premeditation must be as quick as thought, for any conviction or intention that

enters into the mind of man enters with the rapidity of thought. It has to enter there at some particular moment. But an instruction that no appreciable space of time need elapse between the forming of an intent and the infliction of the fatal wound, and that the forming of the deliberate and premeditated intent and the infliction of the mortal blow may follow each other as rapidly "as successive thoughts of the mind," is error, as it obliterates the distinction between murder in the first and second degrees. *State v. Moody*, 51 Pac. 356, 359, 18 Wash. 165.

Though the mental process may require but a moment of thought, it must be shown, so as to satisfy the jury beyond a reasonable doubt, that the prisoner weighed and balanced the subject of killing in his mind long enough to consider the reason or motive which impelled him to the act, and to form a fixed design to kill in furtherance of such purpose or motive. *State v. Thomas*, 24 S. E. 431, 434, 118 N. C. 1113.

While the law requires, in order to constitute murder in the first degree, that the killing shall be willful, deliberate, and premeditated, it does not require that the willful intent, premeditation, or deliberation shall exist for any particular length of time before the crime is committed. It is sufficient if there was a design and determination to kill, distinctly formed in the defendant's mind before he struck the fatal blow which caused the death of decedent. *Miller v. State*, 81 N. W. 1020, 1021, 106 Wis. 156.

The law fixes no time in which a design to kill may be formed. It may be the conception of a moment, as well as the plan of hours. *Anderson v. Territory*, 13 Pac. 21, 25, 4 N. M. 108.

### PREMEDITATED DESIGN.

"Premeditated design," employed in the Florida statutes in regard to murder, means an intent to kill, and both words imply premeditation. *Olds v. State* (Fla.) 83 South. 296, 299.

"A premeditated design to effect the death" means that there was a design to kill deceased fully formed in the mind of the slayer before the killing was done, and that such design had been thought over and meditated on, before the fatal act was committed, any length of time, no matter how short. *Anderson v. Territory*, 13 Pac. 21, 25, 4 N. M. 108.

#### Intent to kill.

"Premeditated design," as used in the statute declaring murder to be killing with premeditated design, imports an intention. *Bonfanti v. State*, 2 Minn. 123, 128 (Gil. 99).

"Premeditated design," as used in a statute relating to homicide, means an intent to kill; "intended design" means intent; and both words mean premeditation. *Ernest v. State*, 20 Fla. 383, 388.

#### Intentionally distinguished.

The expressions "intentionally" and "with premeditated design," in Gen. St. 1866, c. 94, relating to homicide, are not used as synonymous expressions; the latter involving a greater degree of deliberation and forethought than the former. If the intention to kill is formed and executed in the heat of passion, upon sudden provocation, it falls within the meaning of the statutes speaking of a killing intentionally without premeditation; but if the intention is formed before the heat of passion, upon sudden provocation, or in sudden combat, or, though formed in the heat of passion, is executed after sufficient cooling time, or after the heat of passion has subsided, the case then comes within the meaning of the killing with a premeditated design to effect the death of the person killed. *State v. Brown*, 12 Minn. 538 (Gil. 448, 455); *State v. Hoyt*, 13 Minn. 182 (Gil. 125, 134).

#### Malice aforethought.

"Premeditated design," as used in a statutory definition of murder, means the same as "malice aforethought" in the common-law definition. *McDaniel v. State*, 16 Miss. (8 Smedes & M.) 401, 402, 47 Am. Dec. 93.

A premeditated design to kill is sufficiently expressed in the term "malice aforethought." *People v. Enoch* (N. Y.) 13 Wend. 159, 167, 27 Am. Dec. 197.

The terms "malice aforethought," "deliberate design," and "premeditated design" are synonymous. *Hawthorne v. State*, 58 Miss. 778, 783.

The words "premeditated design," in an indictment for murder, are held to be equivalent to "with malice aforethought." *State v. Holong*, 38 Minn. 368, 370, 37 N. W. 587.

#### Time.

"Premeditated design," as used in '2 Rev. St. p. 657, § 5, defining murder as killing, perpetrated on a person with a premeditated design to effect his death, is not an intention formed on the instant. The words "premeditated" and "design" both import forethought, careful reflection, and deliberately arranged purpose; ideas all involving in their structure essential elements of time—that is, a reasonable time, time for reflection, time to survey the contemplated deed in all its bearings and probable results, and to contrive and arrange, if so decided, the means and method and occasion of its deadly accomplishment. Hence an intention to kill, formed on the instant of striking the



fatal blow, is not a "premeditated design" to commit murder. *People v. Clark*, 11 N. Y. Leg. Obs. 4, 13.

"Premeditated design," as used in the statute defining murder in the first degree, means a previously formed intention to kill. But while the law requires, in order to constitute murder in the first degree, that the killing should be willful, deliberate, and premeditated, still it does not require that the willful intent, premeditation, or deliberation shall exist for any particular length of time before the crime is committed. It is not necessary that the killing should be considered, brooded over, or reflected on for a week, day, or an hour. It is sufficient if there was a design and a determination to kill, distinctly formed in the slayer's mind at any moment before or at the time the shot was fired which caused the death of the person killed. There may be no appreciable space of time between the intent to kill and the act of killing; and if sufficient deliberation was had to form a design or purpose to take life, and to put that design into execution by destroying life, then there was in law sufficient deliberation to constitute murder in the first degree. No matter whether the design to take life had been for a long time contemplated by the slayer, or whether the design to kill was formed by him at the instant of the fatal shot, it is enough that the intent to kill preceded the fatal act, although the act followed instantly. *Perugi v. State*, 80 N. W. 593, 597, 104 Wis. 230, 76 Am. St. Rep. 865.

#### PREMEDITATED KILLING

A premeditated killing is murder in the first degree, and can be nothing else, because it implies the lying in wait and malice aforethought and settled design. It is willful, deliberate, and expressly malicious, and of course these elements exclude all extenuating circumstances to reduce it below the first degree. *Clifford v. State*, 17 N. W. 304, 307, 58 Wis. 477.

#### PREMEDITATED MALICE.

The words "premeditated malice," in an information for assault and battery, as descriptive of the manner in which the alleged assault and battery was perpetrated, carry with them and import that it was done in either a rude manner, or in an insolent manner, or in an angry manner, and, if not, that it was done in all of them. If it was done with premeditated malice, it was done in an angry manner, and more, because malice is defined to mean enmity of heart, malevolence, ill will, a spirit desiring harm or misfortune to another, a disposition to injure others, unprovoked malignity of spirit. Such an allegation sufficiently describes the offense created by Rev. St. 1894, §§ 1983, 1984,

providing that whoever in a rude, insolent, or angry manner unlawfully touches another is guilty of assault and battery. *Chandler v. State*, 39 N. E. 444, 447, 141 Ind. 106.

Premeditated malice is found where the intention to unlawfully take life is deliberately formed in the mind, and there is determination meditated upon before the fatal stroke is given. *State v. Straub*, 47 Pac. 227, 230, 16 Wash. 111; *State v. Gin Pon*, 47 Pac. 961, 963, 16 Wash. 425.

There is premeditated malice where the intention to unlawfully take life, or to unlawfully commit such an assault upon another that from it the taking of life would result as a natural and plainly probable consequence, is deliberately formed in the mind, and that determination meditated upon before the fatal deed is done. There need be no appreciable space of time between the formation of such intention and the killing. They may be as instantaneous as successive thoughts. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation. *Republic of Hawaii v. Yamane*, 12 Hawaii, 189, 202.

A charge that "there must be a fixed design to kill, and that the premeditation may take place but a moment before the doing of the act, but both states of mind must be actually in existence to make the offense murder in the first degree," is not objectionable as providing that no appreciable space of time need elapse between the intent to kill and the act of killing. *State v. Gin Pon*, 47 Pac. 961, 963, 16 Wash. 425.

The words "deliberate and premeditated malice," as used in Gen. St. Neb. § 720, defining murder in the first degree, were evidently designed to restrict murder in that degree to cases where at least some degree of deliberation was shown to have taken place before the consummation of the crime. *Milton v. State*, 6 Neb. 136, 143.

An instruction that premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given, and that there need not be any appreciable space of time between the formation of intention to kill and the killing, that they may be as instantaneous as successive thoughts, and it is only necessary that the act of killing be preceded by the concurrence of will, deliberation, and premeditation on the part of the slayer, is erroneous, because it wipes out the distinction made in the statute between murder in the first and second degrees. While no great amount of time necessarily intervenes between the intention to kill and the act of killing, yet under a statute declaring that every person who shall purposely and of deliberate and premeditated malice kill another shall

be deemed guilty of murder in the first degree, there must be time enough to deliberate, and no deliberation can be instantaneous. In fact, the idea of deliberation is the distinguishing idea between murder in the first and second degrees; the latter being defined as follows: Every person who shall purposely and maliciously, and with deliberation and premeditation, kill another, shall be deemed guilty of murder in the second degree. *State v. Rutten*, 13 Wash. 203, 211, 43 Pac. 30.

### PREMEDITATEDLY.

Premeditatedly means thought of beforehand, for any length of time, however short. *State v. Seaton*, 17 S. W. 169, 171, 106 Mo. 198; *State v. Fitzgerald*, 32 S. W. 1113, 1115, 130 Mo. 407; *State v. Dickson*, 78 Mo. 438, 441; *State v. Schafer*, 22 S. W. 447, 450, 118 Mo. 96; *State v. Avery*, 21 S. W. 193, 197, 113 Mo. 475; *State v. McKenzie*, 45 S. W. 1117, 144 Mo. 40; *State v. Harper*, 51 S. W. 89, 91, 149 Mo. 514.

"Premeditatedly," as used in Comp. Laws, p. 287, defining the various degrees of murder, means planned, contrived, or schemed beforehand. *Craft v. State*, 3 Kan. 450, 481.

"Premeditatedly," as used in connection with the crime of murder, means "with fixed and preconceived intention formed before the act. The lapse of time, however, between the formation and execution of such intention, need not be long. It is sufficient if such intention be sufficiently formed before the fatal act." *State v. Yarborough*, 18 Pac. 474, 478, 39 Kan. 581.

When a man kills another premeditatedly, he thinks of killing beforehand. When a man deliberately kills another, he does it in cold blood, with a formed design to take life, uninfluenced by any passion or excitement of mind recognized by law. Hence it is manifest that "deliberately" logically contains all that is meant by "premeditatedly," and more. *State v. Dale*, 18 S. W. 976, 108 Mo. 205.

### PREMISES.

See "About the Premises"; "Adjacent Premises."

Other premises, see "Other."

"Premises," in an instrument of writing, implies a reference to previous matter contained therein and concerning which something is proposed. *Teutonia Fire Ins. Co. v. Mund*, 102 Pa. 89, 93.

"Premises" means that which is before; introduction; statements previously made. As used in a bond providing that "in consideration of the premises and of the issuing of said restraining order," etc., it will be held to

mean that the issuing of the restraining order was not the only consideration for the bond; and where it appears in the bond that a preliminary restraining order has been issued the bond will be held to cover damages caused by such order, *Alaska Imp. Co. v. Hirsch*, 47 Pac. 124, 126, 119 Cal. 249; but will not include the continuance of the restraining order, *Id.*, 51 Pac. 340, 119 Cal. 249.

A plea alleged that the submission of a certain controversy was of all matters in variance between the parties, and there was no averment that the writing obligatory in suit was the matter in variance or formed any part of it; but it was stated in the plea that the arbitrators made their award of and concerning the premises, and of and concerning the said writing obligatory. Held, that the word "premises," as there used, should be construed to mean all matters in variance between the parties. *Young v. Shook (Pa.)* 4 Rawle, 299, 304.

### In conveyancing.

The premises of a deed is that part of a deed that sets forth the numbers and names of the parties, recitals necessary to explain the transaction, the consideration, and the certainty of the grantor and the grantee in the grant. *Miller v. Graham*, 25 S. E. 165, 168, 47 S. C. 288 (citing 2 Bl. Comm. 241; *McCleod v. Tarrant*, 39 S. O. 271, 17 S. E. 773, 20 L. R. A. 846).

"Premises," in its legal use, originally described the first of the eight parts of a deed, to wit, all which preceded the habendum. The object of this part of the deed was to rightly name the feoffer and the feoffee, and to comprehend the certainty of the lands to be conveyed by the feoffment. It is very easy to see how, from this meaning of the word, it came to designate the lands themselves; and so the word has come into general use with the meaning "lands," affording an instance, among many others, of the tendency to use a general and indefinite word, rather than one having a definite meaning. *Rouse v. Catskill & N. Y. Steamboat Co.*, 35 N. Y. St. Rep. 491, 493, 13 N. Y. Supp. 126.

"The technical meaning of the word 'premises' in a deed is all that precedes the habendum." *Brown v. Manter*, 21 N. H. (1 Fost.) 528, 533, 53 Am. Dec. 223 (citing *Shep. Touch.* 75; *Co. Litt.* § 7); *Sumner v. Williams*, 8 Mass. 162, 174, 5 Am. Dec. 83; *Berry v. Billings*, 44 Me. 416, 423, 69 Am. Dec. 107; *Budd v. Brooke (Md.)* 3 Gill, 198, 235, 43 Am. Dec. 321; *Farquharson v. Eichelberger*, 15 Md. 63, 72.

When the word "premises" is used in the habendum of a deed, it has a fixed meaning, and means the thing granted as described in what precedes the habendum. *New Jersey Zinc Co. v. Boston Franklinite Co.*, 15 N. J.

Eq. (2 McCart.) 418, 462; Id., 13 N. J. Eq. (2 Beasl.) 322, 344; Steinhardt v. Burt, 57 N. Y. Supp. 751, 27 Misc. Rep. 782.

In popular phrase "premises" is sometimes used for land; but, where the habendum of a deed is of the "above-described premises," it means what the deed purports to convey. *Holbrook v. Debo*, 99 Ill. 372, 381.

"Premises," as applied to a deed, signifies that part thereof, the office of which it is to rightly name the grantor and grantee and to describe the land to be conveyed. *Horn v. Broyles* (Tenn.) 62 S. W. 297, 306.

A tenant who leased a front building, and agreed to pay water tax against said premises, cannot be charged with the water tax imposed on a rear building, since such premises embrace only the building leased. *Steinhardt v. Burt*, 57 N. Y. Supp. 751, 27 Misc. Rep. 782.

#### Same—Estate or interest.

In the habendum of a deed the word "premises" may refer to the title and interest conveyed, as well as to the land itself. *Cummings v. Dearborn*, 56 Vt. 441, 443 (citing *Smith v. Pollard*, 19 Vt. 277).

Where a release was made of "all the right, title, or interest" which the releasor "has or may have in or unto the estate of his father, whether the same may fall to him by will or heirship," a covenant never to make claim to the premises is a covenant never to make claim to the estate of the father. *Trull v. Eastman*, 44 Mass. (3 Metc.) 121, 37 Am. Dec. 126.

When the word "premises" is used in the portion of a deed technically known as the premises, which shows that the subject of the deed is an equity of redemption, and which states that it is an interest of which the grantor's testator died seised in the premises, the word "premises" will be construed to mean the equity of redemption which is the subject of the conveyance. *Sumner v. Williams*, 8 Mass. 162-174, 5 Am. Dec. 83.

The word "premises," as used in a trust deed which reserved to the mortgagor the right to lease any of the mortgaged lots, and provided, when the lease should be approved by the trustee, then the same and the premises shall no longer be subject to the lien of the mortgage, except that the mortgage, during the life thereof, should be a lien on the rents reserved in the lease, referred to the lots leased, and not to the estate granted by the trust deed. *Sands v. Kaukauna Water Power Co.*, 91 N. W. 679, 680, 115 Wis. 229.

The word "premises," used in the habendum of a deed, may apply to the easement, as well as the land conveyed. *Deavitt v. Washington County*, 53 Atl. 563, 564, 75 Vt. 156 (citing *Cummings v. Dearborn*, 56 Vt. 441).

#### As estate in lands.

A partnership agreement provided that upon the death of either of the partners the other should have the option to purchase the business for a certain sum, and if any incumbrances then existing against the partnership lands should be paid, or any other premises should be purchased, the sum agreed upon should be increased in the amount paid out for the purchase of such other premises. It was held that the word "premises" was used to denote a thing which might be purchased or sold or incumbered. Its natural and ordinary use in this connection would seem to be to denote an estate in lands purchased, sold, or incumbered. In *re Rohrbacher's Estate*, 32 Atl. 30, 31, 168 Pa. 158.

The word "premises," in Rev. St. c. 76, § 8, providing that under a levy estates tail are to be taken, appraised, and held as estates in fee simple, and that all the debtor's interest in the premises will pass by a levy, unless it is larger than the estate mentioned in the appraiser's return, applies to the estate taken, whatever may be its nature. *Swanton v. Crooker*, 49 Me. 455, 459.

#### House or building.

The word "premises" is more comprehensive in its meaning than the words "house," "outhouse," or "other building," and includes such latter words; and an indictment under the act prohibiting gaming on one's premises, which charges the person with permitting gaming to be exhibited "in his house," is sufficient. *Covy v. State* (Ala.) 4 Port. 186, 190.

The word "premises" has varied meanings. It is a word frequently used in conveyances, and, unless there is something to qualify the meaning, generally refers to real estate. In a contract to sell the "premises No. 2 P. street," it would include the land on which the buildings were located. *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654. On the other hand, if an insurance company were to insure such premises, it would only mean the buildings thereon. The word rarely includes personal property, and yet in a policy on a ship it was held to refer to the vessel. 1 May, Ins. § 243. Where, in a lease contract, the word "premises" simply refers to whatever was leased, without defining the property or estate, the other descriptive terms in the lease must be examined to determine what was leased; and where the property was described as "all those premises No. 2 P. street, including the second and third stories over the same, with the building in the rear," the word "premises" refers to the buildings, and no estate in the land is created. *P. H. Snook & Austin Furniture Co. v. Steiner & Emery*, 43 S. E. 775, 776, 117 Ga. 363.

#### As indicating conveyance of fee.

In a deed reciting that the grantee conveyed a piece of timber on a certain described

lot containing five acres, giving the metes and bounds, and concluding with a covenant to warrant said premises, the word "premises" indicates that a fee was intended to be conveyed, and not merely a transfer of the timber. *Godden v. Coonan*, 77 N. W. 852, 107 Iowa, 209.

#### Insured building.

The word "premises," as contained in a fire insurance policy, prohibiting the keeping of gasoline on the insured premises, means the building, and does not prevent the insured from storing gasoline in a shed on his lot outside the insured building, and a recovery may be had on such policy in case of fire. *Fireman's Fund Ins. Co. v. Shearman*, 50 S. W. 598, 599, 20 Tex. Civ. App. 343. See, also, *Rau v. Westchester Fire Ins. Co.*, 55 N. Y. Supp. 459, 460, 36 App. Div. 179; *Northwestern Mut. Life Ins. Co. v. Germania Fire Ins. Co.*, 40 Wis. 446, 452; *Allemania Fire Ins. Co. v. Pitts Exposition Soc. (Pa.)* 11 Atl. 572, 573.

In an insurance policy, providing that if the insured premises should become vacant the policy should become void, "premises" refers to the house insured, and not to the land upon which the house is located. *Sexton v. Hawkeye Ins. Co.*, 28 N. W. 462, 464, 69 Iowa, 99.

Where a policy insuring a building occupied as a dwelling house provided that it should be void if the premises described should be unoccupied for more than 10 days, the premises referred to were not the various buildings on the tract of land on which the insured dwelling house was located, but the dwelling house itself. *Thomas v. Hartford Fire Ins. Co. (Ky.)* 53 S. W. 297, 298.

The term "premises," both in law and in common parlance, is used to indicate lands or buildings; and in an insurance policy on a printing press in a building, providing that "if the above-mentioned premises," etc., it means the building. *Robinson v. Mercer County Mut. Fire Ins. Co.*, 27 N. J. Law (3 Dutch.) 134, 141.

#### Land and tenements.

"Premises" often means the land. This is in fact the popular and ordinary acceptance, when the subject requires such a meaning to be attached to it. *Smith v. Pollard*, 19 Vt. 272, 277; *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142, 148. The term "premises," in common parlance, is used to signify the land with its appurtenances. *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. (2 Beasl.) 322, 344; *Steinhardt v. Burt*, 57 N. Y. Supp. 751, 27 Misc. Rep. 782.

The word "premises," as applied to realty, means lands and tenements. *Appeal of Hilton*, 9 Atl. 342, 344, 116 Pa. 351.

Premises includes land and everything appurtenant thereto. *Winlock v. State*, 121 Ind. 531, 533, 23 N. E. 514.

"Premises" is commonly used as comprising land, houses, and other matter. Either "tenements" or "premises" will be sufficient to include land. *Hemming v. Willetts*, 7 C. B. 709, 715.

The word "premises" is now commonly used to mean lands and tenements. An allegation that defendant unlawfully entered on the "premises" of another sufficiently charges that the entry was on the "land." *State v. French*, 22 N. E. 108, 120 Ind. 229.

The word "premises," as used in Act May 1, 1854, amended April 18, 1870, entitled "An act to provide against the evils resulting from the sale of intoxicating liquors," and granting personal actions against persons sustaining certain relations to the building or premises where the liquor was sold, is synonymous with "lands and tenements." *Bowers v. Pomeroy*, 21 Ohio St. 184, 190.

A policy of insurance on a stock of goods and groceries prohibited the keeping of gunpowder for sale or storage on or in the premises insured. Held, that the word "premises," as used in the policy, means "lands and tenements," and does not include "goods and groceries," and therefore, if gunpowder was kept on premises not insured, it would not vitiate the policy. *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142, 148.

A warrant commanding an officer to search for liquor in a "dwelling house, being the same premises occupied by said Jones," does not include in the description any premises in the occupation of said Jones, other than the dwelling house. *Jones v. Fletcher*, 41 Me. 254, 256.

The use of the word "premises" in a complaint for a search warrant, which states that stolen goods are on certain premises, is not a sufficient compliance with the statute, requiring such information to state that they are in some certain described house or place. *Humes v. Taber*, 1 R. I. 464, 470.

"Premises" means a piece of real estate, or a building with its adjuncts, when used with respect to property, and does not necessarily mean a dwelling house, or the yard or curtilage thereof. *State v. Moore*, 24 South. 308.

The words "land," "real estate," and "premises," when used in the chapter relating to conveyances of real estate, or in any instrument relating to real property, are synonyms, and shall be deemed to mean the same thing, and, unless otherwise qualified, to include lands, tenements, and hereditaments. *Rev. St. Okl.* 1903, § 887.

In the construction of the statutes, "real property," or "premises," or "real estate."

or "lands," shall be deemed to be coextensive with "lands, tenements and hereditaments." Rev. St. Mo. 1899, § 4160.

#### In liquor laws.

"Premises," as used in 1 Wag. St. (Ed. 1872) p. 554, § 29, requiring a person selling beer, cider, and native wine in less quantities than one gallon to have a license, except any wine grower selling wine of his own production in any quantity on his own premises, means the place where the wine is produced or manufactured. The premises for the production or manufacture need not necessarily be in or upon the vineyard where the grapes are grown. A man may well have his vineyard at one place, and his wine cellar and appliances for making and producing wine at another, and this last place, where the wine is actually made and stored, would be the premises contemplated by the law. *State v. Wyl*, 55 Mo. 67, 68.

The word "premises," as used in Laws 1896, c. 112, § 37, providing that officers authorized to make arrest may enter on any premises where liquors are sold at any time when they are open, refers to any and all places connected with the building over which the seller of liquor has the right and does exercise authority and control. *Downman v. State*, 14 Ala. 242; *Daly v. State*, 33 Ala. 431. Practically the same broad definition of the word "premises" is given in the following cases: *Stockwell v. State*, 85 Ind. 522; *Shields v. State*, 95 Ind. 299; *People v. Higgins*, 56 Mich. 159, 22 N. W. 309; *People v. Miller*, 79 N. Y. Supp. 1122, 1123.

As used in Rev. St. c. 34, § 69, making it a misdemeanor to game at cards in a house where spirituous liquors are retailed, or in any outhouse or any part of the premises occupied with such house, means those places only which are occupied by the retailer with the house in which he retails as one whole. They cannot include a place not occupied by him, nor even let by him. *State v. Black*, 31 N. C. 378, 379.

#### Personal property.

"Premises" does not include, and is never used to designate, personal property. It is used both in law and in common speech to indicate lands and tenements. *Robinson v. Mercer County Mut. Fire Ins. Co.*, 27 N. J. Law (3 Dutch.) 134, 141 (citing *Howard Fire & Marine Ins. Co. v. Cornick*, 24 Ill. [14 Peck] 455; *Carr v. Roger Williams Ins. Co.*, 60 N. H. 513, 520).

The word "premises," as used in 2 Starr & C. Ann. St. c. 95, § 14, providing that the sales of real estate under mortgage shall be noticed publicly in the county or counties where the premises are situated, is synonymous with "real estate," and does not apply to a sale of a line of railroad, with its

equipment, fixtures, etc. *Craft v. Indiana, D. & W. Ry. Co.*, 46 N. E. 1132, 1133, 166 Ill. 580.

In a policy of insurance on a vessel while plying in the bay and harbor, or while lying at anchor, or at any bulkhead, dock, or pier, and providing that, if the premises should be vacated in whole or in part for the space of 20 days, the policy should be avoided, the word "premises" meant the vessel insured. *Reid v. Lancaster Fire Ins. Co.* (N. Y.) 19 Hun, 284, 286.

The word "premises," as used in a marine insurance policy, providing that, if the insured shall have made any other insurance on the premises prior in date to this policy, then the company shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the premises hereby assured, means the cargo belonging to the insured. *American Ins. Co. v. Griswold* (N. Y.) 14 Wend. 399, 500.

"Premises," as used in Clay's Dig. p. 554, § 4, relating to illegal sale of spirituous liquors to be drunk on the premises, meant some place over which the shopkeeper had the legal right to exercise authority and control. *Downman v. State*, 14 Ala. 242, 243.

#### Any real estate.

The word "premises," in Code 1896, § 5606, providing for the punishment of any person who, without legal cause or good excuse, enters into the dwelling house or on the premises of another after having been warned within six months preceding not to do so, or who, having so entered within such time, fails or refuses, without legal cause or good excuse, to immediately leave on being ordered or requested to do so by the person in possession, means any real estate, and is not confined to the curtilage of the dwelling. *Wright v. State*, 34 South. 233, 235, 136 Ala. 139. And, as used in the same provision, in Code 1876, § 4419, includes an inclosed pasture situated more than a mile from the dwelling house. *Sandy v. State*, 60 Ala. 18, 19.

#### Separate lots or places.

"Premises," in its ordinary sense, means land, with its appurtenances, including buildings, and as used in Comp. Laws, § 5418, providing that, if the mortgaged premises consisted of district farms, tracts, or lots, they must be sold separately, where the premises consists of two lots, which are covered by one building, a separate sale will not be required of each lot. *Thompson v. Browne*, 73 N. W. 194, 195, 10 S. D. 344.

Where a person was a proprietor of a store and of farming lands adjoining, across which a well-used path lay, and the owner of the store in a dispute with defendant or

dered him to leave the premises, and notified him not again to put his foot on his place, it will be presumed that the defendant understood the word premises as relating to the store and its surrounding ground rather than to the farm land across which the path went, so as not to render such warning one not to cross the land along the path. *Murphy v. State*, 41 S. E. 685, 686, 115 Ga. 201.

#### As service.

The word "premises," as used in an affidavit charging that defendant is about to persuade and trying to persuade two of affiant's negroes to leave his premises, though not technically of the same meaning as "service," as one may leave the employer's premises and still remain in his service, yet, as the expression is understood in common parlance, its use in such connection is to be understood as being an attempt to persuade the slave to throw off the master's dominion and authority by abandoning his premises, thus departing from his services. Such an affidavit is sufficient to charge the violation of an offense specified in Clay's Dig. p. 419, § 15, making it criminal for any person to knowingly aid any negro or other slave to run away or depart from his master's service. *Crosby v. Hawthorn*, 25 Ala. 221, 223.

#### Several buildings.

As used in a policy of insurance covering several buildings and their contents, and providing that, if the above-mentioned premises shall become and remain vacant or unoccupied for more than thirty days, the policy shall be void, the word "premises" covered the whole of the insured property—dwellings, outhouses, and appurtenances, together forming one establishment; and the policy was not broken by allowing one of the buildings, which had been used as a dwelling house, to remain unoccupied, while another, used as such, remained occupied. *Herrman v. Adriatic Fire Ins. Co.*, 45 N. Y. Super. Ct. (13 Jones & S.) 394, 402.

Where insurance was effected upon certain portable machinery in a building, and the keeping of certain burning fluids on the "said premises" was prohibited by the policy, an engine room attached to the main building, although undoubtedly a part of the mill establishment, was not embraced in the description of the property with reference to which the words "said premises" were used. *Carlin v. Western Assur. Co.*, 57 Md. 515, 529, 40 Am. Rep. 440.

#### Street and sidewalk adjacent to lot.

The word "premises" is synonymous with "lot," and does not necessarily include the adjacent street and sidewalk, as used in *Fond du Lac City Charter*, c. 13, § 11, providing that nothing in the preceding sections should be construed to relieve the own-

ers or occupants of any real estate from the duty of keeping their respective premises at all times in a safe condition. *Amos v. City of Fond du Lac*, 1 N. W. 346, 349, 46 Wis. 695.

#### As whole tract.

The word "premises," as used in Rev. St. c. 18, §§ 12, 13, providing that a jury shall view the premises and assess the damage done to land by the location over it of a railroad, embraces the tract of land belonging to the petitioner, over which the railroad passes, both without and within the location. *Wakefield v. Boston & M. R. R. Co.*, 63 Me. 385, 387.

### PREMIUM.

See "Net Premium"; "Participating Premiums."

The premium on a United States bond is not something apart and distinct from the bond, but is something inherent and which goes with it. The premium is a part of the entire value of the bond, within the meaning of 16 Stat. 272, and Gen. Laws, c. 44, § 2, exempting government bonds from taxation, and therefore the premiums cannot be separately taxed. "A conception of the premium upon a bond as a distinct entity for the purpose of taxation is too transcendental and metaphysical for common comprehension and judicial cognizance." *Rhode Island Hospital Trust Co. v. Armington (R. L.)* 41 Atl. 570, 571.

#### Bet or wager distinguished.

See "Bet."

#### Building and loan associations.

"Premium," as used in Code, art. 23, §§ 94-99, providing that a building association may advance to a member the par value of his shares therein for such premium as may be agreed on, or may purchase a number of his shares at an agreed price, and on payments therefor receive security for payment of unpaid installments thereon, together with 6 per cent. interest, means a sum of money to be paid for the loan in advance, and rendered fixed and agreed by the parties. It is true that the word "premium" in itself may mean a fixed sum to be paid or a percentage. Webster's Dictionary gives as one definition of the word "something offered or given for the loan of money; sometimes synonymous with 'interest,' but generally signifying a sum in advance of the capital or sum lent." To the ordinary apprehension this would be the meaning. *White v. Williams*, 45 Atl. 1000, 1002, 90 Md. 719.

The word "premium," as used in the law of building and loan associations, "as understood by text writers, is a bonus char-

ged to a stockholder wishing to borrow for the privilege of anticipating the ultimate value of his stock, by obtaining the immediate use of the money his stock will be worth at the winding up." Wrigley, *Workingman's Way to Wealth*, 67. After quoting Wrigley's definition, Mr. Endlich observes that in effect it is the conventional difference between the par value of the share advanced and the amount actually received by the borrower. *End. Bldg. Ass'n*, § 388. Messrs. Thornton and Blackledge define it as the amount which a stockholder desiring to borrow is willing to pay for the privilege of anticipating the ultimate value of his stock by obtaining at once the use of the amount of the money his money will be worth when the association is wound up. *Thornt. & Bl. Bldg. & Loan Ass'n*, § 222. "It is the difference," says Wood, J., in *Sullivan v. Jackson Bldg. & Loan Ass'n*, 70 Miss. 94, 12 South. 590, "estimated by the association and its borrowing member, between the par value of the member's shares of stock and their present real value. It is the bonus which appellant might lawfully agree to pay for a present advancement in case of a sum certain for the virtual transfer to the association of his shares of stock, which, in the final winding up of its affairs, may realize the sum actually received by the member, together with the premium bid, or which may not." Building association loans, where upheld as not usurious, when the premium, added to the redemption money or interest, exceeds the lawful rate of interest, are supported upon the ground that the transaction is not, in all of its essentials, a loan, but an anticipatory advancement, by way of discount, of the share the member would otherwise be entitled to claim payment of on the termination of the society, coupled with the idea that it is dealing with what is virtually a copartnership fund, or one in which all the members, including the borrower, are mutually interested. *Washington Nat. Building, Loan & Investment Ass'n v. Stanley*, 63 Pac. 489, 492, 38 Or. 319, 84 Am. St. Rep. 793, 58 L. R. A. 816.

"Premium," as used in *Hurd's Rev. St.* 1899, p. 454, par. 88, §§ 8, 11, requiring all loans by a building and loan association to be made to the person bidding the highest premium therefor, and providing that no interest or premium accruing according to the provisions of the act shall be deemed usury, means a bonus paid by a stockholder for the privilege of being preferred as a borrower over other stockholders. *Borrowers' & Investors' Bldg. Ass'n v. Eklund*, 60 N. E. 521, 524, 190 Ill. 257, 52 L. R. A. 637.

The word "premium," as used in *Code*, art. 23, § 98, providing that a building association may advance money to a member for such "premium" as may be agreed upon, means a sum of money rendered fixed and

definite by agreement of the parties. *Washington Nat. Building & Loan Ass'n v. Andrews*, 53 Atl. 573, 575, 95 Md. 696.

#### In insurance.

The definition of "premium," as used in law and the business of insurance, is "the consideration for a contract of insurance." *Bouv. Law Dict.*; *Webst. Dict.* Whether called an initiation fee, an admission fee, or by any other name, this consideration is none the less strictly a premium. *Northwestern Life Ass'n v. Stout*, 32 Ill. App. 31, 38 (quoting *Bouv. Law Dict.*; *Webst. Dict.*).

The consideration paid for a policy of insurance is called the "premium." *State v. Pittsburgh, O. C. & St. L. Ry. Co.*, 67 N. E. 93, 96, 68 Ohio St. 9, 64 L. R. A. 405, 96 Am. St. Rep. 635.

In construing the charter of a mutual fire insurance company, which declared that no insurance should be considered as binding until the payment of a premium, and that in default of a payment of assessments the insurance should be suspended, and that the insured should have no claim for losses until his assessment was paid, the court said "that 'assessment' and 'premium' are interchangeable words and mean the same thing. They are the consideration for the contract. In stock companies an annual premium is required. In mutual companies the premiums consist of the assessments made from time to time to pay losses and expenses." *Hill v. Farmers' Mut. Fire Ins. Co.*, 88 N. W. 392, 394, 129 Mich. 141.

Where a life insurance policy for the term of only one year provides for a renewal for successive years on the payment of specified premiums and expense charges at the end of each year, a notice seasonably mailed, and stating the date when the premium will become due, and that, in order to continue and extend the insurance, it will be necessary that the payments required for that purpose shall be made on or before the date specified, sufficiently complies with *Laws* 1877, c. 321, which requires the notice to state that the policy will become void if the premiums are not paid as agreed, since the essential information required by the statute is given, and the use of the word "payments," instead of "premiums," is rendered necessary by the special character of the policy, which requires something more than the payment of the premium for its extension. *McDougall v. Provident Sav. Life Assur. Soc.*, 32 N. E. 251, 135 N. Y. 551 (distinguishing *Phelan v. Northwestern Mut. Life Ins. Co.*, 20 N. E. 827, 113 N. Y. 147, 10 Am. St. Rep. 441, and reversing 19 N. Y. Supp. 481, 64 Hun, 515).

As used in *P. L.* 61, relative to foreign insurance companies, and providing that any person receiving or forwarding any "pre-

miums, applications, or contracts" of or for insurance shall be guilty of a misdemeanor, etc., means such premiums, applications, and contracts as are made and forwarded by agents, brokers, and others doing an insurance business in the regular course of their business, and does not mean a single application or premium forwarded by the owner of property for the purpose of insuring his own property only. *Commonwealth v. Bidle*, 21 Atl. 134, 135, 139 Pa. 605, 11 L. R. A. 561.

Where a notice, received with a certificate of membership in an accident insurance company, stated, "First premium payable Feb. 1, 1892, and quarterly, semiannually, or annually thereafter," but there were no payments that could with propriety or accuracy be called "premiums," aside, perhaps, from the membership fee, the word "premium" was mistakenly used, instead of "assessments." *Ball v. Northwestern Mut. Acc. Ass'n*, 56 Minn. 414, 418, 57 N. W. 1063, 1064.

The term "premium," within the meaning of sections 4501, 4502, 4514, includes policy fees in excess of \$2 on any one policy, and all other sums of money paid or agreed to be paid in consideration of the policy of insurance. *Rev. Codes N. D. 1899, § 4515.*

#### PREMIUM PLAN.

See "Cash Premium Plan."

#### PREMIUM RESERVE.

"A premium reserve" represents what an insurance company must have in hand to meet its ultimate liabilities upon its policies. The premium reserve is no test of the company's actual solvency. *Bankers' Life Ins. Co. v. Howland*, 48 Atl. 435, 436, 73 Vt. 1, 57 L. R. A. 374.

"Premium reserve" means the liability of an insurance company upon its insurance contracts, other than accrued claims, computed by the established rules of valuation. *Rev. Laws Mass. 1902, p. 1120, c. 118, § 1; Shannon's Code Tenn. 1896, § 3274; Civ. Code Ala. 1896, § 2575.*

#### PREPAID STOCK.

"Prepaid stock" is equivalent to the phrase "paid-up stock." *Johnson v. National Bldg. & Loan Ass'n*, 28 South. 2, 5, 125 Ala. 465, 82 Am. St. Rep. 257.

#### PREPARATION.

Proprietary preparation, see "Proprietary."

"Preparation of ardent, vinous, malt, or fermented liquor," as used in Act March 8, 6 Wds. & P.—41

1879, § 1, providing that it shall not hereafter be lawful for any person to sell any "ardent, vinous, malt, or fermented liquor" in this state, or "any compound or preparation" thereof, commonly called "tonics, bitters, or medicated liquors," without first procuring a license, would include a sale of cologne spirits, which were distilled, and were 74 per cent. of proof spirits, though manufactured as a medicine, and the drugs from which the extracts are made are known to materia medica and in common use by physicians. *Foster v. State*, 36 Ark. 258, 260.

#### PREPARE.

"Prepared," as used on the label to a jar representing its contents to be dandelion and to have been prepared by a certain person, must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands which would give him personal knowledge of its true name and quality. *Thomas v. Winchester*, 6 N. Y. (2 Seld.) 397, 411, 57 Am. Dec. 455.

The United States neutrality laws, making it a misdemeanor to "provide or prepare the means for" any military expedition or enterprise, include the contribution of money, clothing for troops, provisions, arms, or any other contributions which shall tend to forward the expedition or add to the comfort or maintenance of those in it. Charge to the Grand Jury (U. S.) 30 Fed. Cas. 1023 (citing *Id.*, 1018).

The term "prepared and excavated," in a contract to furnish materials and build an electric railway complete and ready for operation on a roadbed excavated and prepared, may properly be explained by expert testimony, to determine whether such term includes ballasting the road. *Miller v. McKeesport & W. Ry. Co.*, 36 Atl. 287, 288, 179 Pa. 350.

#### PREPARED COAL.

The term "prepared coal," as commonly understood in Pennsylvania in all coal transactions, embraces five sizes of screened coal, to wit, broken, egg, stove of both sizes, and chestnut, but no other kind of coal. Lump and steamboat, on the other hand, were coal not prepared. Coal which passed through small meshes, constituting the first screen, went to the dirt or culm bank, as it is called, and was not marketed, because there was no sale or demand for such small sizes. Coal that passed over the meshes of the first screen, and through those of larger size in a succeeding screen, was chestnut coal, the smallest size marketable. Similarly that which passed over the meshes of the screen last referred to, and through larger ones in



in further screen, was stove coal No. 4; and in like manner, by succeeding screens of larger graduated meshes, larger sizes of screened coal, up to and including so-called broken coal, having a cubical diameter of about four inches, were produced. Lump and steamboat coal were the larger pieces separated from the coal strata by the miners' blast. *Wright v. Warrior Run Coal Co.*, 38 Atl. 491, 493, 182 Pa. 514.

## PREPAY STATION.

The expression "prepay station," as used with respect to common carriers, is one at which the carrier delivers freight to the consignee directly and without the intervention of a local agent, and to which consignments are accepted alone upon the condition that all charges for transportation be prepaid by the shippers. *Bird v. Southern R. Co.*, 42 S. W. 451, 453, 99 Tenn. 719, 63 Am. St. Rep. 856.

## PREPENSE.

In the case of *People v. Clark*, 7 N. Y. 385, Johnson, J., holds that the words "premeditated," "aforethought" and "prepenae" possess etymologically the same meaning. They are in truth the Latin and Saxon synonyms expressing a single idea, and possess in law precisely the same force. *Territory v. Bannigan*, 46 N. W. 597, 1 Dak. 451.

## PREPONDERANCE.

See "Clear Preponderance"; "Clearly Preponderating Evidence"; "Fair Preponderance."

By "preponderance of proof" is meant such proof as satisfies the jury that a certain fact is true, rather than the reverse. *State v. School Dist.*, 75 N. W. 855, 857, 55 Neb. 817. See, also, *McCarthy v. Birmingham*, 89 N. W. 1003, 2 Neb. (Unof.) 724.

The term "preponderance of evidence" generally signifies that which satisfies the conscience and carries conviction to an intelligent mind. *Foulke v. Thalmessinger*, 28 N. Y. Supp. 684, 685, 8 Misc. Rep. 445; *North Chicago St. R. Co. v. Fitzgibbons*, 54 N. E. 483, 484, 180 Ill. 466.

A preponderance of evidence means that the testimony adduced by one side is more credible and conclusive than that of the other. *Clayton v. Keeler*, 42 N. Y. Supp. 1051, 1056, 18 Misc. Rep. 488; *Button v. Metcalf*, 49 N. W. 800, 811, 80 Wis. 193.

In civil cases it is necessary that plaintiff's case be established by a "preponderance of proof," a term which means that plaintiff must produce evidence which car-

ries conviction to the human mind; a process which in its own peculiar manner dispels doubt. *Warren v. Warren*, 29 N. Y. Supp. 313, 315, 8 Misc. Rep. 189.

A charge that the jury must be satisfied by the preponderance of the evidence to a reasonable certainty that a fact exists, before they can find such fact, is not erroneous. *Pelletier v. Chicago, St. P., M. & O. Ry. Co.*, 60 N. W. 250, 251, 88 Wis. 521.

By a preponderance of evidence which is required to establish a disputed fact is simply meant that the evidence which the party produces in favor of the fact which the affirmative avers, and which is denied by his opponent, is more weighty, convincing, and satisfactory than the proof adduced by the other party by way of answer or to overcome such affirmative proof. *Parker v. Hull*, 87 N. W. 351, 352, 71 Wis. 368, 5 Am. St. Rep. 224.

The preponderance of testimony means the weight, credit, and value of the aggregate evidence on either side upon the issues joined; not upon the particular facts. *Hills v. Goodyear*, 72 Tenn. (4 Lea) 233, 243, 40 Am. Rep. 5 (citing *Coles v. Wrecker*, 2 Leg. Rep. 14).

Preponderance of evidence means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests. Proof to a demonstration is not required, and it is usually unfortunate to employ qualifying words when defining the necessity for a preponderance of evidence. *Hoffman v. Loud*, 69 N. W. 231, 232, 111 Mich. 158.

The preponderance of evidence merely means that the testimony which points to a certain conclusion appears to the trier of facts to be more credible than the testimony to the contrary. *Short v. Bohle*, 64 Mo. App. 242. It does not necessarily depend on the number of witnesses. The capacity of the submitted testimony to enforce belief on the arbiter to whom it is submitted is the touchstone of preponderance as applied to the testimony of witnesses. *McKee v. Verdin*, 70 S. W. 154, 155, 96 Mo. App. 268.

That a preponderance of evidence must be adduced by the party having the burden of proof, to justify a recovery by him, does not mean that a presumption arises in favor of the adverse party that no cause of action exists. In such a case there is no presumption either way. *Blough v. Parry*, 144 Ind. 463, 494, 40 N. E. 70, 75, 43 N. E. 560, 564.

### As clear or fair preponderance.

"It is not error to instruct that a party on whom the burden rests is required to establish his cause of action or defense by a

fair preponderance of the evidence. There can be no preponderance while the evidence is evenly balanced, and when the scale inclines toward one side or the other we know the weight or superiority of evidence is with that party. Manifestly there can be no such outweighing, unless there is a clear preponderance, or a fair preponderance." *Altshuler v. Coburn*, 57 N. W. 836, 838, 38 Neb. 881.

**Preponderance of evidence** means to outweigh; to weigh more. A clear preponderance may mean that which may be seen, is discernible, and may be appreciated and understood; but it may also convey the idea of certainty, beyond doubt. Therefore an instruction in an action of trespass, where the defendant justified the trespass, that it was incumbent on the defendant to show by clear preponderance of evidence his right to the same, was erroneous. *French v. Day*, 36 Atl. 909, 89 Me. 441.

#### **Number of witnesses.**

In determining the value and credibility of evidence, the witnesses are to be weighed, not numbered. *Foulke v. Thalmessinger*, 28 N. Y. Supp. 684, 685, 8 Misc. Rep. 445.

By preponderance of evidence is not necessarily meant the greatest number of witnesses. *Union Pac. Ry. Co. v. Estes*, 16 Pac. 131, 134, 37 Kan. 715; *Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan. 245, 251; *McCarthy v. Birmingham*, 89 N. W. 1003, 2 Neb. (Unof.) 724; *San Antonio & A. P. Ry. Co. v. Manning*, 50 S. W. 177, 179, 20 Tex. Civ. App. 504; *Pelletier v. Chicago, St. P., M. & O. R. Co.*, 60 N. W. 250, 251, 88 Wis. 521; *North Chicago St. Ry. Co. v. Fitzgibbons*, 54 N. E. 483, 484, 180 Ill. 466; *Turner v. Overall*, 72 S. W. 644, 649, 172 Mo. 271.

A preponderance of evidence is not alone determined by the number of witnesses testifying to particular facts or state of facts. *Clayton v. Keeler*, 42 N. Y. Supp. 1051, 1056, 18 Misc. Rep. 488; *Northern Pac. R. Co. v. Holmes*, 18 Pac. 76, 81, 3 Wash. T. 543; *West Chicago St. R. Co. v. Lieserowitz*, 64 N. E. 718, 720, 197 Ill. 607; *Harris v. Perkins* (Miss.) 25 South. 154; *Story v. Maclay*, 13 Pac. 198, 200, 6 Mont. 492.

By preponderance of evidence is not meant a preponderance in point of numbers of witnesses, but a preponderance of facts and circumstances that are convincing to the jury. *People v. Barberi*, 47 N. Y. Supp. 168, 170.

It frequently happens that there are more witnesses on one side of a controversy than on the other, yet the greatest weight of evidence is on the side of the lesser number of witnesses; and in all such cases it is the weight of evidence that counts and should govern the finding of the jury. *Pelletier v.*

*Chicago, St. P., M. & O. Ry. Co.*, 60 N. W. 250, 251, 88 Wis. 521.

But the jury should take into consideration the opportunities for seeing or knowing the particular things about which they testify, their conduct and demeanor, their interest or lack of interest in the result, and the probability or improbability of the truth of their statements. *Northern Pac. R. Co. v. Holmes*, 18 Pac. 76, 81, 3 Wash. T. 543.

"It is well settled that by the term 'preponderance of evidence,' is not meant the mere numerical array of witnesses, but it means the weight, credit, and value of the aggregate evidence on either side. *Coles v. Anderson*, 2 Tenn. Leg. Rep. 14; *Hills v. Goodyear*, 72 Tenn. (4 Lea) 233, 243, 40 Am. Rep. 5." A requested instruction that the jury should be governed in their findings by the preponderance of the evidence, and that this does not mean the number of the witnesses, but the greater weight of the testimony, everything being considered which it was proper to consider, is not strictly accurate on its face, since the preponderance of evidence may be determined, under certain conditions, by the number of witnesses testifying to a particular fact or state of facts. For instance, one or two witnesses may testify to a given state of facts, and six or seven witnesses, of equal candor, fairness, intelligence, and truthfulness, and equally well corroborated by all the remaining evidence, who have no greater interest in the result of the suit, testify against such state of facts. Then the preponderance of the evidence is determined by the number of witnesses. *Willcox v. Hines*, 45 S. W. 781, 784, 100 Tenn. 524, 66 Am. St. Rep. 761.

#### **Reasonable doubt.**

"Preponderance" and "reasonable doubt" are not synonymous terms, so that an instruction that if the jury believe, from the preponderance of the evidence, that defendant took certain cattle under the honest belief that he was the owner, they should acquit, is erroneous, as the state is bound to show guilt beyond a reasonable doubt. *Richardson v. Harrell*, 36 S. W. 573, 576, 62 Ark. 469.

#### **As technical term.**

The phrase "preponderance of evidence" is not one having an exclusive or technical definition, making it error to apply it in instructions without defining it. *Jones v. Durham*, 67 S. W. 976, 977, 94 Mo. App. 51.

In answer to an objection that the trial court cannot explain to the jury what was meant by the preponderance of evidence, the court said that the terms "preponderance of evidence" and "reasonable doubt" are so plain that an attempt to explain either would lead to confusion; that they are expressions

that the most common, as well as the most critical, mind can equally understand, and no explanation can make them plainer. *Endowment Rank K. P. v. Steele*, 69 S. W. 336, 337, 108 Tenn. 624.

#### Weight of evidence.

Preponderate means to outweigh; to weigh more. *French v. Day*, 36 Atl. 909, 89 Me. 441.

Bouvier says that "preponderance" is used to signify that the proof on one side of a cause outweighs the proof on the other. *Cleveland, C. & St. L. R. Co. v. Trimmell*, 75 Ill. App. 585, 591.

Preponderance of evidence means the greater weight of evidence. *Mortimer v. McMullen*, 67 N. E. 20, 21, 202 Ill. 413.

The term "preponderance of the evidence" refers to the greater weight of credible evidence. *San Antonio & A. P. Ry. Co. v. Manning*, 50 S. W. 177, 179, 20 Tex. Civ. App. 504; *Haskins v. Haskins*, 75 Mass. (9 Gray) 390, 393; *Button v. Metcalf*, 49 N. W. 809, 811, 80 Wis. 193.

By a preponderance of the evidence is meant that evidence which, after a consideration of all the evidence, is in the judgment of the jurors entitled to the greatest weight. *Union Pac. Ry. Co. v. Estes*, 16 Pac. 131, 134, 37 Kan. 715.

The word "preponderance," means superiority in weight, influence, or force. The evidence may be preponderate, and yet leave the mind in doubt as to the very truth. In such cases the evidence does not fairly set at rest, but merely preponderates in favor of that side whereon the doubts have less weight. *Ball v. Marquis* (Iowa) 92 N. W. 691, 692.

The word "preponderance," as used in the phrase "preponderance of evidence," means superiority of weight, outweighing; and an instruction that by preponderance of evidence is meant evidence which, in the judgment of the jury, is entitled to the greater weight in respect of its credibility, is not error. *Hill v. Scott*, 38 Mo. App. 370, 376.

A fair preponderance of evidence means such evidence as, when weighed with that which is offered to oppose it, has more convincing power in the minds of the jury. It is not a technical term at all, but means simply that evidence which outweighs that which is offered to oppose it. It does not mean that a greater number of witnesses shall be produced on the one side or the other, but that, upon the whole evidence, the jury believe the greater probability of the truth to be upon the side of the party having the affirmative of the issue. *Strand v. Chicago & W. M. Ry. Co.*, 34 N. W. 712, 715, 67 Mich.

Preponderance of proof is synonymous with weight of proof, and is sufficient in a civil case to authorize a verdict in favor of the party producing such proof. *Haskins v. Haskins*, 75 Mass. (9 Gray) 390, 393.

It is not an accurate definition of the word "preponderance" to say that a preponderance of evidence means the greater weight and degree of credible evidence. The word "preponderance" has its ordinary meaning, as used and understood in common language, and such meaning, as given by Webster, is "superiority of weight, power, or influence." *Martin v. St. Louis S. W. Ry. Co. of Texas* (Tex.) 56 S. W. 1011, 1012; *Shinn v. Tucker*, 37 Ark. 580, 588.

The term "preponderance of evidence" means a greater weight of evidence, and not testimony of such superior weight and convincing force as satisfies the mind of its truth. "When a jury are informed that their verdict should accord with the preponderance of evidence, they are simply directed that they should find for the party on any issue in the case who adduces thereon the greatest quantity of credible evidence, as weighed in their own minds." *Bryan v. Chicago, R. L. & P. Ry. Co.*, 19 N. W. 295, 296, 63 Iowa, 464.

#### PREROGATIVE.

The word "prerogative" properly implies sovereign right. Jacob defines it as that power, pre-eminence, or privilege which the king hath and claimeth over and beyond other persons and above the ordinary course of the common law in right of his crown. And so we find the object of the prerogative jurisdiction of the Supreme Court of Wisconsin declared in *Attorney General v. Blossom*, 1 Wis. 317: "Contingencies might arise wherein the prerogatives and franchises of the state in its sovereign character might require the interposition of the highest judicial tribunal to preserve them." The state lends the aid of its prerogative writs to public and private corporations and to citizens in all proper cases, but it would be restraining and distorting the notion of prerogative jurisdiction to apply it to every case of personal, corporate, or local right, where a prerogative writ happens to afford an appropriate remedy. To warrant the assertion of original jurisdiction in the Supreme Court, the interest of the state should be primary and proximate, not indirect or remote, peculiar, perhaps, to some subdivision of the state, but affecting the state at large in some of its prerogatives, raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state in its sovereign character; the court judging of the contingency in each case for itself. For all else, though raising questions publici juris, ordinary remedies and ordinary jurisdic-

tion are adequate. *Attorney General v. City of Eau Claire*, 37 Wis. 400, 443.

### PREROGATIVE COURTS.

The court of the royal governor of the American provinces, prior to the Revolution, was termed the "prerogative court"; an appellation applied in England to the archbishop's court. In *re Coursen's Will*, 4 N. J. Eq. (3 H. W. Green) 408, 413.

A prerogative court is not, and never has been, from its constitution, a court of the last resort. In the English system the decrees of the prerogative court are subject to review in the court of delegates. This has been the case since the time of Henry VIII. *Flanigan v. Guggenheim Smelting Co.*, 44 Atl. 762, 765, 63 N. J. Law, 647.

Distinct tribunals for the establishment of wills and administration of the assets of men dying either with or without wills are variously called "prerogative courts," "probate courts," "surrogate courts," and "orphans' courts." *Robinson v. Fair*, 9 Sup. Ct. 30, 35, 128 U. S. 53, 32 L. Ed. 415.

### PREROGATIVE WRITS.

See "Certiorari"; "Mandamus"; "Prohibition (Writ of)."

Prerogative writs are privileges of an extraordinary kind granted by the court in certain cases, but never as a matter of right; they being a direct intervention of the government with the liberty or property of the subject. The principal writs of this nature are: First, the writ of procedendo; second, the writ of mandamus; third, the writ of prohibition; fourth, the writ of quo warranto; fifth, the writ of habeas corpus; sixth, the writ of certiorari. *Territory v. Ashenfelter*, 12 Pac. 879, 884, 4 N. M. 85 (citing 2 Rap. & L. Law Dict. 697).

In construing the provision of the state Constitution providing that the Supreme Court shall have jurisdiction to issue certain enumerated writs, the court stated that such writs would be issued only in case they were prerogative writs; that the phrase "prerogative writs" has been defined and reiterated in several cases; and that the governing rule is, when the information makes out a prima facie case, the writ will issue only in cases *publici juris* and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people (citing *State v. Nelson Co.*, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609). This definition was approved in the case of *State v. Archibald*, 5 N. D. 359, 66 N. W. 234, which discussed the subject exhaustively and quoted with approval the decision in the case of *Attorney General v. City of Eau Claire*, 37 Wis. 400, that it is not enough to put in motion the original jurisdiction of the court

that the question is *publici juris*, but it should be a question *quod ad statum reipublice pertinet*, which affected the sovereignty of the state, its franchises or prerogatives, or the liberties of its people. A writ of certiorari to determine the validity of a tax is not a prerogative writ. *Duluth Elevator Co. v. White*, 90 N. W. 12, 14, 11 N. D. 534.

### PRESBYTERIANS.

Presbyterians usually worship by themselves, and form a distinct society from the other sects. They are as old as the Reformation. With the Lutherans, they separated from the Church of Rome, but they soon separated from each other. The descendants of Calvin established the Presbyterian form of church government, and it has existed ever since on the continent. It was afterwards established in Scotland, and carried by the Scotch, who immigrated in great numbers to Ireland and planted there. It was brought both from Scotland and Ireland to this country, and churches have been formed here on the model of the Church of Scotland, and professing to be governed by the same directory. Presbyterians, as Bishop Warburton justly observes, did not spring from fanaticism, as many wild sects have done. Presbyterians and Congregationalists are different sects in religion, within the meaning of the constitutional provision that "no subordination of any one sect or denomination to another shall ever be established by law," and a Presbyterian cannot be taxed for the support of a Congregational minister. *Muzzy v. Wilkins* (N. H.) *Smith*, 1, 22.

### PRESCRIBE.

"To prescribe is to lay down authoritatively for direction; to give as a guide, direction, or rule of action; to impose as a peremptory order; to direct." *City of New York v. Hexamer*, 69 N. Y. Supp. 198, 203, 59 App. Div. 4; *Mansfield v. People*, 45 N. E. 976, 977, 164 Ill. 611.

"Prescribe" and "establish" are often used to express the same thing, and Webster classes them as synonymous. Thus a ruling under an act in reference to establishing courts is authority as to an act relating to courts to be prescribed by law. *Ex parte Lothrop*, 6 Sup. Ct. 984, 987, 118 U. S. 113, 30 L. Ed. 108.

#### As determine.

The distinction between the words "determine" and "prescribe" is far from clear. Mr. Webster defines "prescribe" thus: "To set down authoritatively; to order; to direct; to dictate; to appoint." He defines "determine" thus: "To fix permanently; to settle; to adjust." "To set down authoritatively" and "to fix permanently," or "to settle," do not admit of a wide distinction. Const. art.

6, § 8, provides that the Attorney General shall receive such compensation as may be prescribed by law. Article 4, § 12, provides that the salary of the Secretary, Treasurer, and Auditor of the state shall be determined by law. It was held, in construing the statutes, that the words "determine" and "prescribe" do not admit of a wide distinction, and the word "prescribe" will not be held to mean "settle beforehand," as implying that the salary of the Attorney General could not be reduced during the term of office. If the framers of our Constitution had intended to provide that the salary of the Attorney General should not be diminished during his term of office, it may be reasonably argued that they would have so provided in that instrument in plain terms; for by the twenty-second section of the same article it is provided, as to the salary of the judges, that the judges shall receive such salary and allowances as may be determined by law, the amount of which shall not be diminished during their term of office. Here they intended that the salary shall be fixed beforehand, and it cannot be construed to mean "settled beforehand," in such sense as not to leave in the General Assembly the power to change the compensation during the term. *Field v. Marye*, 3 S. E. 707, 710, 83 Va. 882.

#### As direct as a remedy.

"Prescribe," as used in Act Feb. 10, 1887, providing that such act shall not be considered to prevent regularly licensed and practicing physicians from administering certain prohibited liquors whenever they deem it necessary, and requiring such physicians to make and subscribe an oath that they will not prescribe any of said intoxicating beverages, except in cases of absolute necessity, means to "direct as a remedy." *Brinson v. State*, 8 South. 527, 528, 89 Ala. 105 (citing *Worcester Dict.*).

"Prescribed," when used as applicable to physicians, embodies the purpose of cure, remedy, or alleviation. It means to advise upon or designate as a remedy for disease, and has a broader meaning than merely prescribing medicines, as, for instance, after the physician has apparently examined the patient, he may find that the patient does not need a medicine, but that he needs different food, different air, or different employment, or must keep away from bad company, etc., and advises him what to do so as to regain his health, and is so used in *Rev. St. 1898*, § 4075, excluding testimony of physicians as to information necessary to enable him to prescribe for such patient as a physician. In *re Bruendl's Will*, 78 N. W. 169, 170, 102 Wis. 45.

#### As fix definitely.

The word "prescribe," as used in a statute relative to sidewalks, and providing that

the ordinance shall prescribe the width of the proposed walk, means that the ordinance should fix definitely the width of the walk. *Shannon v. Village of Hinsdale*, 54 N. E. 181, 183, 180 Ill. 202; *Mansfield v. People*, 45 N. E. 976, 977, 164 Ill. 611.

To prescribe a penalty is to fix a penalty. *City of New York v. Hexamer*, 69 N. Y. Supp. 198, 203, 59 App. Div. 4.

#### As order.

"Prescribed," as used in Const. art. 2, § 11, providing that the Governor shall nominate, and by and with the advice and consent of the Senate appoint, all civil and military officers of the state, whose appointment or election is not herein provided for, unless a definite mode of appointment be prescribed by the law creating the office, means "ordered." *City of Baltimore v. State*, 15 Md. 376, 477, 74 Am. Dec. 572.

#### PRESCRIBED BY LAW.

The term "prescribed by law," as used in the Constitution, declaring that "the duties of clerks of district courts shall be as prescribed by law," includes both statutory and common law. *Walter v. Greenwood*, 12 N. W. 145, 29 Minn. 87.

When the term "prescribed by law" is used in a statute, it is to be construed as meaning prescribed by the statute law, and not as prescribed by the general law. *Brinckerhoff v. Bostwick*, 1 N. E. 663, 665, 99 N. Y. 185.

The Constitution provides that the Attorney General shall perform such duties as may be prescribed by law. Webster defines "prescribe" as "to give law; to direct; to dictate; to give as a guide; direction or rule of action." Such constitutional provision means that the Attorney General shall perform such duties as shall be prescribed by any law, statutory or otherwise, by which the duties of the attorney are imposed and defined. The assertion that the word "prescribe" can properly be held to refer only to the statutory law is plainly too narrow an interpretation of the word. *Hunt v. Chicago & D. Ry. Co.*, 20 Ill. App. (20 Bradw.) 282, 288.

Act Cong. Sept. 9, 1850, § 9, organized the territory of Utah, etc., and enacted that "the territory shall be divided into three judicial districts, and a district court shall be held in each of such districts," etc., "at such time and place as may be prescribed by law." Held, that the term "prescribed by law" means the law passed by the territorial Legislature. *Winters v. Hughes*, 24 Pac. 759, 761, 8 Utah, 443.

Under a statute relating to the duties of a court, the phrase "business prescribed by law" includes such duties pertaining to judi-

cial business as the Legislature may deem it necessary for the judges to perform, with a view to the efficient administration of justice, or for the protection of the rights of litigants and others who are to be affected by legal proceedings. *State ex rel. Lionberger v. Tolle*, 71 Mo. 645, 650.

Const. art. 1, providing that a jury trial may be waived by the parties in all civil actions in the manner to be prescribed by law, means actual legislation on the subject, and in no sense can it be extended to a permission of the exercise of this power by others. *Ex-line v. Smith*, 5 Cal. 112, 113.

The use of the words "prescribed by law" in a bill of sale of a slave, in which the seller warrants the slave free from all vices and diseases "prescribed by law," is to be regarded, and the warranty considered, as a contract against all vices and diseases. "One rule which may be applied to this paper is that, if there be some words which are dark and mysterious, so that the court cannot find out the meaning thereof, those words must be set aside, and then, if there be anything left which will make sense and create a duty, it shall be done." *Sloan v. Gibson*, 4 Mo. 32, 33.

## PRESCRIPTION.

A prescription is a written medical recipe. *Mayer v. State*, 42 Atl. 772, 63 N. J. Law, 35.

The word "prescription" means, in medicine, a statement, usually written, of the medicines or remedies to be used by a patient, and the manner of using them. *Caldwell v. State*, 46 N. E. 697, 698, 18 Ind. App. 48.

"Prescription," as defined by Webster, is a direction of a remedy or of remedies for a disease, and the manner of using them; a medical recipe; also a prescribed remedy; and an order to a druggist for two pints of "spirits fermenti," which was absolutely necessary as a medicine for the person named in the order, and was not to be used as a beverage, was a "prescription," within Code, c. 32, § 6, providing that spirituous liquors shall not be sold by any druggist, "except upon the written prescription of a practicing physician in good standing in his profession." *State v. Bluefield Drug Co.*, 27 S. E. 350, 352, 43 W. Va. 144.

"Prescription," as used in Act March 6, 1877, as amended by Act March 5, 1879, prohibiting the sale of vinous or alcoholic liquors, except for medical, chemical, or sacramental purposes, on a prescription or recommendation of a graduated physician, or a regular practitioner of medicine, who has taken the oath prescribed, is substantially the same

as "recommendation." *Thompson v. State*, 37 Ark. 408, 410.

### Prescriptions for animals.

Prescriptions are medical directions for the cure of illness. The term refers to directions for animals as well as human beings, and includes a recipe or formula for the treatment of horses, whether it proceeds from a professional source, or only from a common person. *Ray v. Burbank*, 61 Ga. 505, 512, 34 Am. Rep. 108.

### PRESCRIPTION (In Law).

See "Right by Prescription"; "Title by Prescription"; "Way by Prescription."

The definition of "prescription" is "a title acquired by use and time, and allowed by law." Three things are necessary to establish a right by prescription: (1) Use and occupation or enjoyment; (2) the identity of the thing enjoyed; and (3) that it should be adverse to the rights of some other person. A title by prescription differs from a title by grant in this: That use and occupation are substituted in the place of a grant, for prescription always supposes a grant to have existed, and to be lost or destroyed by time or accident. *Lawton v. Rivers* (S. C.) 2 McCord, 445, 449, 13 Am. Dec. 741.

Distinguished from the three kinds of public ways in England, to wit, "iter," over which the public pass on foot, "actus," over which they pass on foot and on horseback, and "via," over which they pass on foot and on horseback, and in vehicles on wheels, was the incorporeal hereditament, easement, or right of way which one acquired over the land of another, in which the public had no interest whatever. This right of way was acquired either by prescription—being used for a time whereof the memory of man runneth not to the contrary—or by grant. If by grant, the grant itself was the proof, or, the grant being lost, 20 years' user raised a presumption that it once existed. *Boyden v. Achenbach*, 79 N. C. 539, 541.

Prescription properly applies only to incorporeal rights. *Wooldridge v. Coughlin*, 33 S. E. 233, 235, 46 W. Va. 345; *Johnson v. Lewis*, 14 S. W. 466, 467, 47 Ark. 66; *Oregon Const. Co. v. Allen Ditch Co.*, 69 Pac. 455, 458, 41 Or. 209, 93 Am. St. Rep. 701.

Prescription is defined to be a title acquired by possession had during the time and in the manner fixed by law. *Appelgate v. Morse* (N. Y.) 7 Lans. 59, 61; *Stevens v. Dennett*, 51 N. H. 324, 329; *Pittsburgh, C. & St. L. Ry. Co. v. Town of Crown Point*, 50 N. E. 741, 745, 150 Ind. 536.

Prescription is a manner of acquiring the ownership of property, or discharging

debts, by the effect of time, and under the conditions regulated by law. Civ. Code La. 1900, art. 3457.

Prescription is of two kinds; that is, it is either an instrument for the acquisition of property, or an instrument of exemption from the servitude of judicial process. *Campbell v. Holt*, 6 Sup. Ct. 209, 210, 115 U. S. 620, 29 L. Ed. 483; *Bushby v. Florida Cent. & P. R. Co.*, 23 S. E. 50, 51, 45 S. C. 312.

"Prescription" is defined by civilians to be a right by which a mere possessor acquires the property of a thing which he possesses, by the continuance of his possession during the time fixed by law. *Alhambra Addition Water Co. v. Richardson*, 14 Pac. 379, 381, 72 Cal. 598.

Under the word "prescription," Webster, in giving the legal meaning, quotes from Bacon as follows: "A prescribing for title; the claim of title to a thing by virtue of immemorial use and enjoyment; the right or title acquired by possession had during the time and in the manner fixed by law." And Goddard on the Law of Easements (page 132) says: "Prescription is described by Mr. Justice Blackstone as meaning at common law a mode of acquiring real property, when a man could show no other title to what he claimed than that he and those under whom he claimed had immemorially used to enjoy it. The reason why the law allows a title to be thus acquired is that if a man had, to use an old and familiar phrase, enjoyed an easement from time whereof the memory of man runneth not to the contrary, uninterruptedly—that is, without dispute—a presumption would naturally arise that he had a right to that easement, which the owner of the servient tenement could not legally dispute, for no man would suffer another to enjoy an easement in his land if he could help it; an easement being a burden necessarily detrimental to the estate." *Lucas v. Smithfield, C. & H. F. Turnpike Co.*, 15 S. E. 182, 185, 36 W. Va. 427.

"A prescription," says Lord Coke (6 Coke, 60b), "always is alleged in the person." 2 Bl. Comm. p. 262, says that prescription "is merely a personal usage." *Albright v. Cortright*, 45 Atl. 634, 636, 64 N. J. Law, 330, 48 L. R. A. 616, 81 Am. St. Rep. 504.

Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a "title by prescription," which is sufficient against all. Civ. Code Mont. 1895, § 1391; Civ. Code Cal. 1903, § 1007.

#### Adverse use.

"Prescription," in the ancient sense of the word, is founded upon the supposition of a grant; and therefore it is that the use or

possession on which it is founded must be adverse, or of a nature to indicate that it is claimed as a right, and not the effect of indulgence, or of any contract short of a grant. *Gayetty v. Bethune*, 14 Mass. 49, 52, 7 Am. Dec. 188.

The right of prescription depends on an appropriation and use in a manner adverse to the rights of others. *Tolman v. Casey*, 13 Pac. 669, 672, 15 Or. 83.

The manner fixed by law for the establishment of a prescriptive right to an easement is by open, adverse enjoyment of the right as an easement. *Stevens v. Dennett*, 51 N. H. 324, 329.

A wrongful entry on land, with continued possession, without any pretense of paper title, but under a claim of right inconsistent with the title of the true owner, and the exercise of acts of possession hostile to his rights in the land, may ripen into title by prescription. *Village of Glencoe v. Wadsworth*, 48 Minn. 402, 51 N. W. 377. Such use or adverse possession must be enjoyed by actual entry, and under such circumstances as to indicate that it is claimed as a matter of right. The true owner's right must be invaded by such hostile acts as would constitute grounds for action against the adverse claimant or intruder, and so as to make the possession appear to be for the benefit of the claimant. *Swan v. Munch*, 67 N. W. 1022, 1023, 65 Minn. 500, 45 L. R. A. 743, 60 Am. St. Rep. 491.

#### Claim of right.

A vested right to a right of way may be acquired by use for a sufficient length of time. It must be occupied and used as a right, and not merely as a favor or privilege granted by the owner of the servient lands. *Johnson v. Lewis*, 14 S. W. 466, 467, 47 Ark. 66. See, also, *Clarke v. Clarke*, 66 Pac. 10, 11, 133 Cal. 607; *Louisville & N. R. Co. v. Hays*, 79 Tenn. (11 Lea) 382, 388, 47 Am. Rep. 291; *Stevens v. Dennett*, 51 N. H. 324, 329.

#### Continuous, uninterrupted possession.

"Prescription" is defined to be the manner of acquiring property by long, honest, and uninterrupted possession or use during the time required by law. The possession must be long, continued, peaceable, and without interruption. *Louisville & N. R. Co. v. Hays*, 79 Tenn. (11 Lea) 382, 388, 47 Am. Rep. 291.

A prescription is a title, the validity of which depends upon continual and peaceable usage from time whereof the memory of man is not to the contrary. *Simpson v. Coe*, 4 N. H. 301, 302.

Prescription requires a continued enjoyment of an incorporeal hereditament for a time without memory to the contrary. *Standiford v. Goudy*, 6 W. Va. 364, 366.

To constitute a highway by prescription, the use for the requisite time must be uninterrupted, adverse, and under a claim of right. *Illinois Cent. R. Co. v. City of Bloomington*, 47 N. E. 318, 319, 167 Ill. 9.

A prescriptive right of way over another's land cannot be acquired without showing the definite line of travel. *Bushey v. Santiff*, 33 N. Y. Supp. 473, 474, 86 Hun, 384.

#### Dedication distinguished.

The distinction between dedication and prescription is this: The first is established by proof of an act of dedication and of the *animus dedicandi*, without reference to the period of use; in the second, longer user is an essential ingredient. A prescription for a highway is based upon the dedication of the land, as a prescription for a private way is founded upon a grant. *State v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 139, 142.

#### Equivalent to a deed.

Prescription is equivalent to a deed, in creating an easement in land. *Pitzman v. Boyce*, 19 S. W. 1104, 1106, 111 Mo. 387. 33 Am. St. Rep. 536.

#### Grant or right presumed.

Technically, "prescription" presupposes a grant. There cannot, in fact, be a grant without some person in existence to take as the grantee. Therefore, generally, when the term "prescriptive right" is used by the courts, it refers to the personal right to the use of real property which has been acquired by the claimant, or some one under whom he holds, and which has been created by operation of law. *Riley v. Buchanan*, 76 S. W. 527, 528, 25 Ky. Law Rep. 863, 63 L. R. A. 642.

"Prescription" implies an original grant. *City of Ft. Smith v. McKibbin*, 41 Ark. 45, 50, 48 Am. Rep. 19; *Wooldridge v. Coughlin*, 33 S. E. 233, 235, 46 W. Va. 345.

"Prescription" means that at one time a deed or grant of right is presumed to have been given to do a certain thing—for instance, to take fish from another man's land—but by lapse of time that grant or deed has been lost. *Benscoter v. Long*, 27 Atl. 674, 679, 157 Pa. 208.

It is also said that a prescription by immemorial usage can, in general, only be for things which may be created by grant, for the law allows prescription only to supply the loss of a grant. *Pittsburgh, C., C. & St. L. Ry. Co. v. Town of Crown Point*, 50 N. E. 741, 745, 150 Ind. 536.

Prescription, at common law, was a mode of acquiring title to incorporeal hereditaments by immemorial or long-continued enjoyment. It had its origin in a grant evi-

denced by usage, and was allowed on account of its loss, either actual or supposed. *Clarke v. Clarke*, 66 Pac. 10, 11, 133 Cal. 667.

Prescription is set up in favor of individuals who, because they have been in the enjoyment of a right or interest claimed during the period of legal memory, which is, in England, fixed at the reign of Richard I, the law presumes that the party claiming had originally a grant or conveyance of the right claimed. *Post v. Pearsall* (N. Y.) 22 Wend. 425, 441.

The theory of prescription is grounded upon the presumption of a grant having been made, so that if it can be shown that no grant was made, or if it can be shown to be very improbable that a grant was made, the presumption cannot arise, and the title by prescription falls. *Thompson v. Louisville & N. R. Co.* (Ky.) 63 S. W. 42, 43 (citing *Bowman v. Wickliffe*, 54 Ky. [15 B. Mon.] 84; *Hall v. McLeod*, 59 Ky. [2 Metc.] 98, 74 Am. Dec. 400; *Beall v. Clore*, 69 Ky. [6 Bush] 676; *Conyers v. Scott*, 94 Ky. 125, 21 S. W. 530).

A prescription can only be for things which may be created by grant. It is allowed only to supply the loss of a grant. 2 Greenl. Cruise, p. 224. There can be no grant to the public. Therefore the public can hold no right by prescription. Prescription is a personal usage securing a right to one or more persons. *State v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 139, 142.

Every species of prescription by which property is acquired or lost is founded on the presumption that he who has had the quiet and uninterrupted possession of anything for a long period of years is supposed to have a right thereto, without which he would not have been able to continue so long in the enjoyment of it. Where an easement, for instance, as a way, is enjoyed by an owner of land over the land of another without interruption, with all the incidents of ownership, the fact of such use is accepted as conclusive proof of the right. The extent of the right is determined by the nature and extent of the use. *Pavey v. Vance*, 48 N. E. 898, 899, 56 Ohio St. 162.

#### As limitation or adverse user.

The analogy between prescription and limitation is so exact and perfect, both in England and in this country, that the courts have, in the absence of any special statute on the subject, uniformly held that the provisions of the statutes of limitations with regard to the time of entry by the owner of lands of which he is disseised apply equally to easements adversely used. Mere delay in commencing a suit, or even acquiescence in the act of defendant, unless under circumstances that would create an equitable estoppel short of a period of 20 years, neces-



sary to give defendant a right by prescription to flow plaintiff's land, bars his right of action to abate a dam causing overflow as an existing nuisance. *Mueller v. Fruen*, 36 Minn. 273, 274, 30 N. W. 886.

The term "prescription" covers both senses in which the word "limitation" has been used; that is to say, as conferring a right, and as taking away a remedy, merely. Possession of property, of the requisite character and time, confers a title to the property. So far as the title to property is concerned, "prescription" and "limitation" are convertible terms, and a plea of the proper statute of limitations is a good plea of a prescriptive right. *Alhambra Addition Water Co. v. Richardson*, 14 Pac. 379, 381, 72 Cal. 598 (followed in *Churchill v. Louie*, 67 Pac. 1052, 1053, 135 Cal. 608).

The terms "prescribe" and "prescription," in French, seem to be synonymous with the English words "to limit" and "limitation." "Prescription" is the term used in the Louisiana Reports for "limitation," and in the translation of Pothier on Obligations, vol. 1, p. 350, in the chapter on limitations, "prescription" is always used for "limitation." *Chenot v. Lefevre*, 8 Ill. (3 Gilman) 637, 642.

Speaking of the defense of limitation, the court says it is quite immaterial whether this defense is called "limitation," "prescription," or "adverse user." These terms may be used interchangeably, and they mean substantially the same thing. Prescription properly applies to incorporeal easements, and is of the same length of time as limitation by statute, and adverse user is the same. It is not worth while to spend time in distinctions which do not exist. *Murray v. Scribner*, 43 N. W. 549, 74 Wis. 602.

#### **As applicable to private right of way.**

That a private right of way over land is an easement, and an interest in the land, which may be acquired by limitation—in such cases ordinarily called "prescription"—is a question which does not admit of debate. *Patchett v. Pacific Coast Ry. Co.*, 35 Pac. 73, 75, 100 Cal. 505.

#### **As right or title.**

Prescription, as known to the common law, applied to the manner of acquiring or losing a right by the effect of the lapse of time, as contradistinguished from the mode of acquiring title to a thing itself by the effect given to a long possession or enjoyment of it. The former applied to intangible rights, capable of enjoyment without title to the thing out of which they flowed, or to which they attached, while the latter related to the thing itself. *Thomas v. England*, 12 Pac. 491, 492, 71 Cal. 456. After the lapse of the requisite period the law adds the right

of property to that which before was possession, or, in the case of things incorporeal, a quasi possession only. *Stevens v. Dennett*, 51 N. H. 324, 329.

#### **Time.**

The mode of acquisition denominated "prescription" is founded on uninterrupted use and enjoyment time out of mind, or for such a length of time that the memory of man runneth not to the contrary. *Butt v. Napier*, 77 Ky. (14 Bush) 39, 42; *Johnson v. Lewis*, 14 S. W. 466, 467, 47 Ark. 66; *Simpson v. Coe*, 4 N. H. 301, 302; *Standiford v. Goudy*, 6 W. Va. 364, 366.

Anciently, in order to support a title by prescription, the use of the incorporeal right must have continued immemorially—that is, have had a commencement before the reign of Richard I—but latterly it came to be held that a continuous use in a particular manner for 20 years, corresponding to the period usually prescribed by statutes of limitations for entry upon lands, was sufficient for the purpose. In analogy to this principle, the acquirement of a prescriptive right has come to be measured by the statute of limitations for the recovery of real property, and such is the rule in this state. *Oregon Const. Co. v. Allen Ditch Co.*, 69 Pac. 453, 458, 41 Or. 209, 93 Am. St. Rep. 701. However, between the old and the new rules of prescription there is an important distinction. The flight of long time requisite to vest the right under the old law afforded a conclusive presumption that there had been an express grant of the easement, its evidence lost by the tooth of time, and no proof that it never existed could be heard, whereas, under the new rule, user for the statutory period raises only a prima facie presumption of a grant, which may be repelled. *Woodridge v. Coughlin*, 33 S. E. 233, 235, 46 W. Va. 345. See, also, *Lanier v. Booth*, 50 Miss. 410, 413; *Thomas v. England*, 12 Pac. 491, 492, 71 Cal. 456.

In analogy to the statute of limitations, the law authorizes a grant from the real owner to be presumed, without other proof than such actual and undisturbed enjoyment. In *Bealey v. Shaw*, 6 East, 208, Lord Ellenborough says: "I take it that twenty years' exclusive enjoyment of water in any particular manner affords conclusive presumption of right in the party so enjoying it, derived from grant or act of Parliament." The open, notorious, and exclusive use of water in a particular manner for over 30 years is evidence of a grant from the real owner. *Hoyt v. Carter* (N. Y.) 16 Barb. 212.

A way by prescription is established on evidence of user by the public, adverse and continuous, of ten years or more, from which use arises a prescription of a reservation or grant, and acceptance thereof, or that it has

been laid out by the proper authorities, of which no record exists. *State v. Mitchell*, 12 N. W. 598, 58 Iowa, 567.

The uninterrupted use and enjoyment for time out of mind does not merely create a presumption of a right, but is conclusive evidence of its existence. *Butt v. Napier*, 77 Ky. (14 Bush) 39, 42.

**As applicable to use of highway.**

"Prescription" is not a term strictly applicable to a right acquired by the public, by the use of a way for any period of time. The law allows prescription only to supply the place of grants, and, inasmuch as the public cannot take by grant, the term "prescription," in its strict sense, has no application to highways. The true doctrine would seem to be that immemorial use by the public is evidence of a dedication, just as such use by an individual is evidence of a grant. *Bolger v. Foss*, 3 Pac. 871, 65 Cal. 250; *Pittsburgh, C. & St. L. Ry. Co. v. Town of Crown Point*, 50 N. E. 741, 745, 150 Ind. 536.

The term "prescription," and probably the rules and doctrines applicable to estates held by prescription, have been applied to the tenure of the right of the public in a highway, which rests wholly upon long use and occupation. That the term is now generally so used must be admitted, and it may be true that such general use has made it proper. *State v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 139, 142.

**PRESCRIPTION IN A QUE ESTATE.**

Where, in an action of trespass *quare clausum fregit*, defendant justified the act charged as a trespass by setting up two rights by prescription—the one, a right to depasture the beach, embracing that which adjoined the plaintiff's land; the other, that the plaintiff should fence his land against the defendant's horses and cattle running upon and depasturing the beach; the second right of prescription being dependent upon and ancillary to the first—the right upon which defendant relied was what the law denominates a "prescription in a que estate." If a man prescribes in a que estate, nothing is claimable by its prescription but such things as are incident, appendant, or appurtenant to lands. *Donnell v. Clark*, 19 Me. (1 App.) 174, 182.

**PRESENCE.**

See "Immediate View and Presence."

The rule authorizing the arrest of a person by an officer without a warrant for a misdemeanor committed in his presence does not require that the person committing the misdemeanor shall be distinctly seen or dis-

cerned by the officer, and hence a misdemeanor committed by the firing of a revolver in the nighttime on a city street, and across the street from an officer who sees the flash thereof, and afterward keeps the offender in sight, is committed in the presence of the officer. *People v. Bartz*, 19 N. W. 161, 53 Mich. 493.

The phrase "in his presence," in the statute providing that a peace officer may make an arrest without a warrant when a public offense is committed in his presence, means in the sight of, or that the act is done in such a manner that the officer can detect it, by sight or hearing, as the act of the accused. It does not apply to a case when he cannot detect the act, but has merely a suspicion. *Hughes v. Commonwealth (Ky.)* 41 S. W. 294, 296.

A statute requiring wills to be signed in the presence of the witnesses is satisfied if the subscribing witnesses were so situated that they could and would naturally see the signing. *Compton v. Mitton*, 12 N. J. Law (7 Halst.) 70, 71.

**Constructive presence.**

"Presence," within the meaning of the rule that principals to a crime in the second degree are those who do not with their own hands commit the act, but are present, aiding and abetting it, does not mean actual and immediate presence, so as to make the person an eye or ear witness of what passes. "It may be a constructive presence. Thus, if several persons set out in concert, whether together or apart, upon a common design which is unlawful, each taking the part assigned to him—some to commit the act, and others to watch at a proper distance to prevent a surprise, or to favor the escape of the immediate actors—here, if the act be committed, all are, in the eye of the law, present and principals." *Mitchell v. Commonwealth (Va.)* 33 Grat. 845, 808; *Grimsinger v. State*, 69 S. W. 583, 587, 44 Tex. Cr. R. 1; *State v. Town (Ohio) Wright*, 75, 76.

**As within hearing.**

Code, § 4306, making it criminal to use obscene and vulgar language "in the presence of a female," etc., should be construed to mean in the hearing of a female, and not limited to the literal meaning, as in her actual presence. *Brady v. State*, 48 Ga. 311, 312.

Obscene, insulting, or vulgar language uttered in a public highway, near enough to the premises of the prosecutor to be distinctly heard, and actually heard, by his family, or any member thereof, must be regarded as uttered in their presence, within the meaning of the statute punishing the utterance of such language in the presence of females. *Henderson v. State*, 63 Ala. 193. So, also,

where defendant used such language while riding on a public road, and it was heard by ladies traveling a short distance behind. *Laney v. State*, 105 Ala. 105, 17 South. 107.

Shouting in the streets of a village is not in the presence of an officer, so as to justify an arrest without a warrant when the officer was 150 feet away, on another street, and did not see the offender, and had no direct knowledge that it was he who committed the offense. *People v. Johnson*, 48 N. W. 870, 871, 86 Mich. 175, 18 L. R. A. 163, 24 Am. St. Rep. 116.

### PRESENCE OF THE COURT.

The phrase "presence of the court," as used in Rev. St. U. S. § 725 [U. S. Comp. St. 1901, p. 583], giving the federal courts power to punish as contempts misbehavior of any person in the presence of the court, means in the place set apart for the use of the court, its officers, jurors, and witnesses. *Ex parte Cuddy*, 9 Sup. Ct. 703, 704, 131 U. S. 280, 33 L. Ed. 154. It includes any attempts by persuasion or offers of money to deter a witness duly subpoenaed from testifying in behalf of the government, when such attempts are made in the witness room, immediately adjacent to, and in the hallway of, the courtroom, while the court is in session. *Ex parte Savin*, 9 Sup. Ct. 699, 702, 131 U. S. 267, 33 L. Ed. 150.

### PRESENCE OF THE TESTATOR.

Under a statute providing that wills shall be attested and subscribed by a certain number of witnesses "in the presence of the testator," it is not necessary that the witnesses sign in the presence of each other. The words "in the presence of the testator" should be construed according to their ordinary import, as indicating the testator as the person within whose presence the subscription of the witnesses should be made. *Appeal of Gaylor*, 43 Conn. 82, 85.

The phrase "subscribe in the presence of the devisor," in the English statutes requiring wills to be subscribed in the presence of the devisor, has been uniformly held to require his actual presence at the subscription of the witnesses. *Compton v. Mitton*, 12 N. J. Law (7 Halst.) 70, 74.

"In the presence of the testator" means within the observance of his senses. *Reynolds v. Reynolds* (S. C.) 1 Speers, 253, 256, 40 Am. Dec. 599.

"In the presence of the testator" does not mean absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If the witnesses sign within his hearing, knowledge, and understanding, and so near as not to be substantially away from him, they are

considered to be in his presence, within the meaning of the statute. *Cook v. Winchester*, 46 N. W. 106, 108, 81 Mich. 581, 8 L. R. A. 822.

### Ability to see.

It is not essential that the testator should actually see witnesses to his will sign it, but he must at least be in a situation to see such signing if he desired it. *Edelen v. Hardey's Lessee* (Md.) 7 Har. & J. 61, 67, 16 Am. Dec. 292; *Turner v. Cook*, 36 Ind. 129, 130; *McElfresh v. Guard*, 32 Ind. 408, 412; *Ambre v. Weishaar*, 74 Ill. 109, 113; *Bradford v. Vinlpon*, 28 N. W. 401, 59 Mich. 139; *Cornellius v. Cornellius*, 52 N. C. 593, 595; *Robinson v. King*, 6 Ga. 539, 544; *Wright v. Lewis* (S. C.) 5 Rich. Law, 212, 217, 55 Am. Dec. 714; *Tucker v. Oxner* (S. C.) 12 Rich. Law, 141, 143; *Alken v. Weckerly*, 19 Mich. 482, 504; *Watson v. Pipes*, 32 Miss. 451, 467; *In re Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591; *Boyd v. Cook* (Va.) 3 Leigh, 32, 55.

The subscribing witnesses must be in such a position in relation to the testator that the testator may see the attestation without having to change his position. It is not sufficient if he could have seen the attestation by changing his position, or by having some one else change it for him. *Orndorff v. Hummer*, 51 Ky. (12 B. Mon.) 619, 625; *Moore v. Moore's Ex'r* (Va.) 8 Grat. 307, 315; *Jones v. Tuck*, 48 N. C. 202, 206; *Cornellius v. Cornellius*, 52 N. C. 593, 595; *Reed v. Roberts*, 26 Ga. 294, 71 Am. Dec. 210. See, also, *Reynolds v. Reynolds* (S. C.) 1 Speers, 253, 255, 40 Am. Dec. 599; *Ray v. Hill* (S. C.) 3 Strob. 297, 304, 49 Am. Dec. 647; *Witt v. Gardiner*, 41 N. E. 781, 783, 158 Ill. 176, 49 Am. St. Rep. 150 (citing *Ambre v. Weishaar*, 74 Ill. 109).

The requirement that a will must be attested in the presence of the testator is satisfied if the condition and position of the testator when the will is attested be such that he has knowledge of what is going forward, and is mentally observant of the specific act in progress; and, unless he is blind, the signing of the witnesses must occur where the testator, as he is then circumstanced, may see them sign if he chooses to do so. *Alken v. Weckerly*, 19 Mich. 482, 483.

### Adjoining room.

Where a testator signs his will in the presence of the subscribing witnesses, and retires to an adjoining room and lies down, and the witnesses subsequently signed as subscribing witnesses, the presumption is that they did not subscribe in the presence of the testator. *Lamb v. Girtman*, 33 Ga. 289; *Neil v. Neil* (Va.) 1 Leigh, 6, 81.

It is not good if it appears that, in the actual relative situation of testator and witnesses, the testator could not possibly have

seen the act of attestation, nor have so changed his position as to have enabled him to see it without aid from others, though such aid was at hand, but was neither asked nor given. *Neill v. Neill* (Va.) 1 Leigh, 6, 31. See, also, *Brooks v. Duffell*, 23 Ga. 441; *Reynolds v. Reynolds* (S. C.) 1 Speers, 253, 255, 40 Am. Dec. 599; *Reed v. Roberts*, 26 Ga. 294, 301, 71 Am. Dec. 210.

A will is attested by subscribing witnesses in the presence of the testator when, though not in the same room with testator, they are in such a situation that the testator either sees, or has it in his power to see, that they are subscribing, as witnesses, the same paper he had signed as his will. *Graham v. Graham*, 32 N. C. 219, 220. See, also, *In re Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591; *Robinson v. King*, 6 Ga. 539, 544; *Nock v. Nock's Ex'rs* (Va.) 10 Grat. 106, 115.

A will which the witnesses thereto, at the testator's request, took into an adjoining room, and there attested it, out of the vision of testator, and which, after attesting it, they carried to the testator, and informed him of the attestation, and received his approval thereof, was held not to have been attested in the presence of the testator. *Edelen v. Hardey's Lessee* (Md.) 7 Har. & J. 61, 67, 16 Am. Dec. 292. Contra. see *Sturdivant v. Birchett* (Va.) 10 Grat. 67, 69.

A statute requiring the witnesses to a will to subscribe in testator's presence is not complied with by signing in another room than that in which testator was, to which the witnesses withdrew after the signing of the will by the testator, and no part of which was visible from any part of the room where testator remained. *Mendell v. Dunbar*, 47 N. E. 402, 403, 169 Mass. 74, 61 Am. St. Rep. 277.

A will signed by the witnesses at a table in an adjoining room to that in which the testator lay, the intervening door being open, and the table in the line of vision of the testator if he had been able to look, who heard all that was said, and knew and understood all that was done, will be deemed to have been attested in his presence. *Riggs v. Riggs*, 135 Mass. 238, 242, 46 Am. Rep. 464.

#### Conscious presence.

"In the presence of the testator" means conscious presence, and not actual physical presence of which the testator has no realization. *Chappell v. Trent*, 19 S. E. 314, 344, 90 Va. 849.

The term "presence of the testator" means that the condition and position of the testator when his will is attested, and in reference to the act of signing, must be such that he has knowledge of what is going forward, and is mentally observant of the spe-

cific act in progress. *Aikin v. Weckerly*, 19 Mich. 482, 504.

If the witnesses to the will of a blind man attest and subscribe the will within the reach of the testator's remaining senses, when he is conscious of what they are doing, and may, if he choose, ascertain that they are subscribing the same will that he had signed, the subscribing is in the presence of the testator. *Ray v. Hill* (S. C.) 3 Strob. 297, 304, 49 Am. Dec. 647.

Under a statute requiring a will to be attested in the presence of the testator, the presence contemplated by the statute is not simply the bodily presence of the testator; but it is also essential that he be mentally capable of recognizing, and actually conscious of, the act of attestation, when performed. *Watson v. Pipes*, 32 Miss. 451, 467.

The word "presence," as used in the expression "in the presence of the testator," in the execution of wills, means in company with, in the same room with, and within the view of, the testator, coupled with consciousness on his part of such proximity. *Baldwin v. Baldwin's Ex'r*, 81 Va. 405, 410, 59 Am. Rep. 669.

#### Same room.

The term "in the presence of the testator" does not, in its legal signification, necessarily imply that the testator and the witnesses shall be in the same room at the time of the attestation, nor is it indispensable that they should be in the same house. Actual sight or inspection of the process of the witnesses signing their names is not required, for all the cases agree that it is not necessary that the testator should actually see the witnesses subscribe, but only that he may see if he will. In determining the legal force and import of the word "presence," we are not to be restricted to the sense in which, it is used in common and familiar parlance; but in order to decide whether it may be predicated, in a legal sense, of any particular case, that the witnesses subscribed their names in the presence of the testator or otherwise, we should look to the whole character of the transaction, and all the attendant circumstances. *Sturdivant v. Birchett* (Va.) 10 Grat. 67, 69.

The meaning of the word "presence" depends on the circumstances of each particular case. It is a word of which every man has something like a just idea, but which no man can accurately define. In fact, it implies an area which has no metes and bounds; but it is contracted or enlarged according as the attestation occurs, as it certainly may, in a small chamber, or a spacious hall, a public street, or an open field. To relieve the mind from the labor of ascertaining the meaning of the word in its application to particular cases, it was determined

at a very early period after the enactment of the statute of 29 Car. II that an attestation in the same room with the testator, and at his request, is an attestation in his presence, whether or not the will or the witnesses were visible to him, or in the range of his vision, at the time of the attestation. The four walls of a room, whatever may be its size, so completely inclose its area, and exclude all improper influence from without, that whatever may be done within them may generally be said to be done in the presence of all who may be therein. Where presence exists, sight is unnecessary. Though a thing cannot be done in the sight, it may be done in the presence, of a blind man. Proximity and consciousness may create presence. A room, *ex vi termini*, denotes such proximity as is required to constitute presence; but there may be such proximity as well without as within a room. And wherever that proximity exists, and presence is created, it has the same effect as if the transaction occurred in the same room, and sight becomes unnecessary. *Nock v. Nock's Ex'rs* (Va.) 10 Grat. 106, 115.

An attestation of a will of lands made in the same room with testator is *prima facie* an attestation in his presence, *Neil v. Neil* (Va.) 1 Leigh, 6, 11; *In re Howard's Will*, 21 Ky. (5 T. M. Mon.) 199, 202, 17 Am. Dec. 60; provided it be not done in a clandestine, fraudulent way, which would not be in the party's presence, *Bynum v. Bynum*, 33 N. C. 632, 636; *Boyd v. Cook* (Va.) 3 Leigh, 32, 55.

It is not sufficient if they are within the same room with the testator, but in such a position with reference to him that he cannot see them sign without changing his position. *Jones v. Tuck*, 48 N. C. 202, 206.

"In the presence of the testator" is not synonymous with "being in the same room." *Reed v. Roberts*, 26 Ga. 294, 300, 71 Am. Dec. 210.

#### As within view.

"In the presence of the testator" is to be so construed that the persons attesting the will must be within the scope of testator's vision. *Moore v. Moore's Ex'r* (Va.) 8 Grat. 307, 315; *Drury v. Connell*, 52 N. E. 368, 370, 177 Ill. 43. And in such way that he can know that it is his will which is being attested, though he may not exercise his privilege of actually seeing the signing. *Drury v. Connell*, 52 N. E. 368, 370, 177 Ill. 43.

"In the presence of the testator" has been construed as synonymous with the term "within view." *Tucker v. Oxner* (S. C.) 12 Rich. Law, 141, 143.

"It is true, the terms 'in the presence' and 'within view' are considered generally

synonymous, because the sight of the testator is the best means of preventing the fraud, within the province of the act. They are not perfectly so, for a blind man may make a will. Besides, as the court here said, actual view is never necessary, but it is sufficient if the party might see the witness attest, though in a different as well as in the same room." *Bynum v. Bynum*, 33 N. C. 632, 636.

## PRESENT — PRESENTED — PRESENTATION.

See "Duly Presented."

"Presentation," as used in a delivery order stating that certain goods were held, which would be delivered on the presentation of the order duly indorsed, meant delivering up the order, and not merely showing the same. *Bartlett v. Holmes*, 20 Eng. Law & Eq. 277, 279.

#### Of bill to Governor.

The Constitution, providing that a bill passed by the Legislature must, before it becomes a law, be "presented to the Governor," means to afford him an opportunity to deliberately consider its provisions, and prepare his objections, if he have any, to its passage, and does not mean that it shall be merely exhibited, and immediately thereafter taken away or withdrawn. *Harpending v. Haight*, 39 Cal. 189, 199, 2 Am. Rep. 432.

A bill is presented to the Governor, within the meaning of Const. art. 76, declaring that every bill which shall have passed both houses shall be presented to the Governor, and, if he approves it, he shall sign it, and, if not, he shall return it, with his objections, in writing, etc., when the clerk of the House of Representatives or secretary of the Senate carries the bill to the executive office and offers or tenders it to the Governor or his secretary. *State ex rel. Pharmaceutical Ass'n v. Secretary of State*, 27 South. 565, 567, 52 La. Ann. 936.

#### Of bill of exchange.

Where the acceptance of a bill of exchange is in writing, the words "Accepted," "Seen," "Presented," written on the bill, or on any other paper relating to the transaction, will amount to an acceptance. *Barnet v. Smith*, 30 N. H. (10 Fost.) 256, 266, 64 Am. Dec. 290.

#### Of a claim against an estate.

"Presented," as used in a statute requiring claims in assignment to be presented by a certain time to the assignee, contemplates a delivery to the assignee; and hence the statute was not complied with by mailing a claim on the last day of the period allowed for presenting claims, where the letter did

not reach the assignee until the next day. *Ellison v. Lindsley*, 33 N. J. Eq. (6 Stew.) 258, 260.

"Present," as used in Hill's Ann. Laws, § 1131, requiring an administrator to publish notice requiring all persons having claims against a decedent's estate to present them, accompanied by proper vouchers, etc., means simply a display or a profert of the claim, accompanied with a proper voucher, and a reasonable opportunity to the administrator to examine into, and determine for himself upon, the justness and validity of the demand, and, as used in the statute, is synonymous with "exhibit." *Willis v. Marks*, 45 Pac. 293, 296, 29 Or. 493.

Under a statute providing that a claimant against an estate must present or exhibit his claim or demand to the court or commissioners, a formal pleading is not required in the first instance. *Fitzgerald's Estate v. Union Sav. Bank of Lincoln*, 90 N. W. 994, 995, 65 Neb. 97.

#### Of an indictment.

To "present an indictment" means to lay before a court; to indict; to give notice officially of a crime or offense. *State v. Hinckley*, 4 Minn. 345, 358 (Gil. 261, 266).

"Presented," as used in the beginning of an indictment, declaring that the jurors, on their oath, presented, means nothing more than that the jury presented or showed to the court that a certain person had committed a certain offense. *Commonwealth v. Keefe*, 75 Mass. (9 Gray) 290, 292.

### PRESENT.

See "At Present."

A charter declaring that each person being present at an election shall be entitled to vote means an actual, and not a constructive, presence. This is the ordinary sense of the word. The clause in question, by strong implication, includes all voting by absent stockholders. *Brown v. Commonwealth* (Pa.) 3 Grant, Cas. 209.

In the election of church wardens, if a poll be demanded, the votes are to be given by the qualified inhabitants present; but all qualified inhabitants, whether they are present, or not, at the show of hands, have a right to be admitted into the vestry room and vote during such poll, though the qualified inhabitants present at the time of granting the poll resolve that the poll shall be confined to those then present. *Reg. v. Rector of St. Mary*, 8 Adol. & El. 356.

#### Constructive presence.

The word "present" means being in view or immediately at hand; but the presence

necessary to render a person a principal in the second degree does not require strict, actual, immediate presence—such presence as would make him an eye or an ear witness of what passed—but may be a constructive presence. *Grimsinger v. State*, 69 S. W. 583, 587, 44 Tex. Cr. R. 1.

One may be present, in the eye of the law, though not actually present, as, if several confederate to do a deed of death, and one keeps guard at the door while the other inflicts the wound, the one on guard is present, in legal contemplation, participating in the act done, and is equally responsible with those actually present, doing the act. *State v. Town (Ohio) Wright*, 75, 76; *Mitchell v. Commonwealth (Va.)* 33 Grat. 845, 868.

#### As present in court.

"Present," as used in a statute requiring judges or the greater part of them present to instantly affix their seals to exceptions, etc., means present at the trial. *Agnew v. Campbell's Adm'rs*, 17 N. J. Law (2 Har.) 291, 294.

"Present," as used in the Constitution, providing that the concurrence of four justices present at the argument is necessary for a judgment by the court in bank, and that, if four justices so present do not concur in a judgment, all the justices qualified to sit shall hear the argument, should not be construed as requiring that a judgment cannot be pronounced by the court in bank unless concurred in by four of the justices who were physically present at an oral argument, but means that the argument shall be considered by the court, and that the judgment shall be concurred in by four of the justices of the court. *Niles v. Edwards*, 30 Pac. 134, 135, 95 Cal. 41.

### PRESENT ABILITY.

*Burns' Rev. St. § 2067* (Rev. St. 1881, § 1983), declaring guilty of criminal provocation "whoever by word provokes or attempts to provoke another, who has the present ability to do so, to commit an assault or an assault and battery upon him," means that the person to whom they are applied is free from physical impediment or restraint which might prevent him at the time from striking or attempting to strike or to do other violence to a person giving him offense. *Warwick v. State*, 46 N. E. 650, 651, 17 Ind. App. 334.

Possession of a loaded revolver, with which the prisoner threatened to kill the prosecutor, whom he shot at several times, and wounded once, will be deemed a present ability to commit the crime of assault with intent to kill. *State v. Sheerin*, 31 Pac. 543, 12 Mont. 539, 33 Am. St. Rep. 600.

**PRESENT ATTENDANT PHYSICIAN.**

A devise to "my present attendant physician," to aid in the education of his children, means the physician attending the testator at the date of the execution of the will. *Everett v. Carr*, 59 Me. 325, 330.

**PRESENT CAPITAL.**

A will providing that the testator's executors should leave all his present capital invested in a partnership, of which testator was a member, for two years, means only the capital proper which the testator had contributed to the partnership business, and does not include the accumulated and undivided profits of the firm, which had accrued after the testator's original investment. *Dean v. Dean*, 11 N. W. 239, 241, 54 Wis. 23.

**PRESENT HEIRS.**

"Present heirs," as used in a conveyance of land by one in consideration of natural love and affection which he bears to his daughter and her present heirs, and to have and to hold the land to the daughter and her present heirs forever, must be construed to mean heirs apparent who were the children of the daughter named, and conveys to the persons in being jointly with the daughter. Since the words "present heirs" are descriptive of a class who shall take the estate, and are not words carrying the estate to the first-named person in severalty, and to his successors in perpetuity, they consequently operate to convey a joint estate to persons in being. The class of which the words used in the deed are descriptive is composed of the daughter and her present heirs jointly, and, as she can have no heirs while living, they mean heirs presumptive. The modification of the word "heirs" implied by the addition of the word "present" strips the word "heirs" of its technical meaning, and gives it the general meaning of "heirs apparent," and the word "heirs," not being used in its technical sense, does not operate to convey a fee to the person first named. *Fountain County Coal & Mining Co. v. Beckleheimer*, 1 N. E. 202, 102 Ind. 76, 52 Am. Rep. 645.

**PRESENT INTEREST.**

A present interest entitles the owner to the immediate possession of property. Civ. Code Mont. 1895, § 1110; Rev. Codes N. D. 1899, § 3288; Civ. Code S. D. 1903, § 204.

**PRESENT LIABILITIES.**

A guaranty of present liabilities includes obligations that are not due. *Hart v. Wynne* (Tex.) 40 S. W. 848, 849.

A will devising property in trust for the use and benefit of a certain person and his family until he should discharge his "present liabilities" must be taken to refer to his liabilities existing at the date of the will, rather than to those which might exist at the date of the testator's decease. It is an equivalent expression to "his liabilities existing at the present time." *St. John v. Dann*, 34 Atl. 110, 111, 66 Conn. 401.

**PRESENT MARKET VALUE.**

"Present market value of land" means the price obtainable for such after such reasonable and ample time to sell as would ordinarily be taken by an owner. *City of Santa Ana v. Harlin*, 34 Pac. 224, 225, 99 Cal. 538.

**PRESENT PROPRIETORS.**

A vote by the proprietors of a bridge that all the "present proprietors" of stock shall pass free of toll is confined to the then proprietors, and will not include future purchasers of stock. *Central Bridge Corp. v. Abbott*, 58 Mass. (4 Cush.) 473, 474.

**PRESENT SUPPORT.**

The allowance of a widow provided for by Rev. St. c. 165, § 1, is an allowance for her present support only, and is not a gift, or intended as a compensation for any apparent injury to which she may be exposed by the statute of distribution, or the will of her husband. It is to enable her to support herself until her interest in the estate can be set out to her. *Foster v. Foster*, 36 N. H. 437, 438.

An allowance to a widow for "present support," under Rev. St. c. 165, § 1, means for her support immediately after the death of her husband, and is intended to enable her to support herself until her interest in the estate can be set out to her; and an allowance made 30 years after her husband's death, and her appointment as administratrix, was not warranted. *Mathes v. Bennett*, 21 N. H. (1 Fost.) 188, 192.

Under Comp. St. c. 175, § 1, authorizing the judge of probate to make to the widow of any person deceased, intestate or testate, the widow not being mentioned in such deceased person's will, a reasonable allowance out of the personal estate for her present support, the allowance contemplated by the statute is for the present support of the widow—that is, for her support presently and immediately after the death of her husband—and not in the nature of a gift, nor intended to compensate her for any apparent injustice to which she may in some cases be exposed by the statute of distribution or the will of her husband. *Kingman v. Kingman*, 31 N. H. (11 Fost.) 182, 190, 191.

Under a statute authorizing the judge of probate to make an allowance to a widow for her "present support," it is held that the term refers only to the present, temporary wants for which she has no other resource immediately after the death of her husband, and that an allowance of \$1,000 for temporary support to a widow occupying the homestead, and having \$2,000 in her own right, was excessive. *Woodbury v. Woodbury*, 58 N. H. 44.

The statute providing that a widow shall have a reasonable allowance out of the personal estate of her deceased husband for her present support was designed to provide a supply for the widow's immediate wants, extending, perhaps, to the time when she could derive something from her interest in the estate; but the statute did not intend to give her a share of the estate as an heir, and the amount to be allowed must depend on the circumstances of each case, regard being had to the circumstances of the estate and the amount of the widow's dower. *Duncan v. Eaton*, 17 N. H. 441, 442.

An allowance made by the judge of probate for a widow's present support, under Rev. St. c. 165, § 1, is intended to be for her support immediately after the death of her husband, at a time when the affairs of the estate are not supposed to have been examined, and when there is no specific property which the widow has a right to appropriate for her support. *Hubbard v. Wood*, 15 N. H. 74, 78.

### PRESENT TIME.

"Present time" usually means a period of time of some appreciable duration, and generally of some considerable duration. It may mean a day, a year, or a century. It generally means some period of time within which certain transactions are to take place. *State v. Rose*, 1 Pac. 817, 820, 30 Kan. 501.

"Present time," as used in *Land Law* 1837, § 12, providing that the party was required to prove actual citizenship up to the present time, etc., does not mean the period of the passage of that law, but the time of the claimant's application. *State v. Castanova*, 1 Tex. 401, 403.

### PRESENT VALUE.

The terms "present value" and "original cost" are not equivalent. *National Waterworks Co. v. Kansas City* (U. S.) 62 Fed. 853, 865, 10 C. C. A. 653, 27 L. R. A. 827.

### PRESENTLY.

"Presently," as used in an agreement whereby a person was to absent herself presently from a certain vicinity, means

that her going should be commenced and prosecuted with such speed as diligent persons would make use of, who had fully determined to do the same thing for themselves. *Davis v. Logan*, 28 Ky. (5 J. J. Marsh.) 298, 299.

## PRESENTMENT.

### See "Due Presentment."

#### In administration of estates.

The word "presentment," as employed in the statutes providing for the presentment of claims against an estate to the executor or administrator, has a technical signification, and necessarily includes every ingredient which the law has fixed to it in the particular connection in which it stands. An executor or administrator is the representative of an interest which the Legislature has guarded with solicitude, and one seeking to bind the estate must show a substantial compliance with each requirement of the statute on the subject of the presentment of claims. *Douglass v. Folsom*, 33 Pac. 660, 663, 21 Nev. 441.

#### In commercial law.

Anything which amounts to a notification of the holding of a bill of exchange, with a request to accept, accompanied by the bill, will amount to a presentment. There is no form for a presentment. The bill explains itself, and the object is understood in the mercantile community when it is shown, and an answer required. The holder is the proper person to make the presentment, or he may do it by an agent. It may be even made by a wrongful holder, and, if acceptance be refused, a valid protest may be made, which will inure to the benefit of the rightful owner of the bill. *Carmichael v. Bank of Pennsylvania*, 5 Miss. (4 How.) 567, 570, 35 Am. Dec. 408.

Presentment for payment, to be sufficient, must be made (1) by the holder, or by some person authorized to receive payment on his behalf; (2) at a reasonable hour on a business day; (3) at a proper place, as herein defined; (4) to the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made. *Negotiable Instruments Law* N. D. § 72 (Rev. Codes N. D. 1899, § 1048).

#### In criminal law.

An indictment is an accusation, at the suit of the King, by the oath of 12 men of the same county wherein the offense was committed, returned to inquire of all offenses in general in the county, determinable by the court into which they are returned, and finding a bill brought before them to be true; but when such accusation is found by



a grand jury, without any bill brought before them, and afterwards reduced to a formal indictment, it is called a "presentment." In *re Grosbois*, 109 Cal. 445, 447, 42 Pac. 444.

A presentment, at common law, was a mere informal statement of the grand jury, not prepared by the law officer of the court, calling attention to the existence of some violation of law which the jury might think needed correction. *State v. Millain*, 3 Nev. 409, 439.

A presentment, properly speaking, is the notice taken by the grand jury of any offense from their own knowledge or observation, without any bill of indictment being laid before them at the suit of the commonwealth, *Commonwealth v. Green*, 17 Atl. 878, 879, 126 Pa. 531, 12 Am. St. Rep. 894; and upon which the prosecuting attorney must afterwards frame an indictment, *State v. Whitlock*, 41 Ark. 403, 406.

A presentment is the notice taken by the grand jury of any offense from their own knowledge and observation, and into which it is their duty to inquire. *Nunn v. State*, 1 Ga. (1 Kelly) 243, 245.

A presentment is an accusation by a grand jury without any bill before it, and afterward reduced to a formal indictment. *Mack v. People*, 82 N. Y. 235, 237.

A presentment differs from an indictment, in that it wants technical form, and is usually found by the grand jurors on their own knowledge, or on evidence before them, without having any bill from the public prosecutor. It is an informal accusation, to be regarded in the light of instructions on which the indictment may be framed. This form of accusation has, however, fallen into disuse, since the practice has prevailed for the prosecuting officer to attend the grand jury and advise them in their investigations." *Charge to Grand Jury* (U. S.) 30 Fed. Cas. 991, 996 (quoted and approved in *Re Gardiner*, 64 N. Y. Supp. 760, 762, 31 Misc. Rep. 364).

A presentment by the grand jury is an indictment setting forth an accusation in writing presented by the grand jury to a competent court, charging a person with a crime. *People v. Flaherty*, 29 N. Y. Supp. 641, 642, 79 Hun, 48.

In its limited sense, a presentment is a statement by the grand jury of an offense from their own knowledge, without any bill of indictment laid before them, setting forth informally the name of the party, place of abode, and the offense committed, upon which the officer of the court afterwards frames an indictment. But presentment, as generally taken, includes not only presentment in its limited sense, but indictment by a grand jury, and in the practice of Florida the word "presentment" is applicable to an

indictment found by a grand jury. *Collins v. State*, 13 Fla. 651, 663.

A presentment as a means or as a link in the chain to hold a person to answer for a crime, it may be safely said, is now unknown to the law of the state. Sometimes, however, our grand juries make a sort of general presentment of evil and evil things, to call public attention to them, yet not as instructions for any specific indictment. No one could be called to answer to such a presentment. 1 *Bish. Cr. Proc.* (4th Ed.) § 137, subd. 2.

While it may be observed that the court has tolerated, rather than sanctioned, such presentments of things general, yet the grand jury should never, under cover of a presentment, present an individual in this manner, for, if it have legal evidence of the commission of the crime, it should find an indictment against him, upon which he could be held to answer, and, if it have no such evidence, it ought, in fairness, to be silent. In *re Gardiner*, 64 N. Y. Supp. 760, 762, 31 Misc. Rep. 364.

The word "presentment," in the fourteenth section of the Bill of Rights, declaring that no man shall be put to answer any criminal charge but by presentment, indictment, or impeachment, is used in its common-law sense, and necessarily presupposes the action of the grand jury. *Eason v. State*, 11 Ark. (6 Eng.) 481, 482.

Both the Constitution of the United States and that of Maryland use the terms "indictment," "presentment," and "charge" interchangeably, and as referring to the first step in the prosecution of a crime. *State v. Klefer*, 44 Atl. 1043, 1044, 90 Md. 165.

A presentment is an informal statement in writing by the grand jury, representing to the court that a public offense has been committed, which is triable in the county, and that there is reasonable ground for believing that a particular individual named or described therein has committed it. *Pen. Code Cal.* 1903, § 916; *Rev. Codes N. D.* 1899, § 8011; *Code Cr. Proc. S. D.* 1903, § 184; *Pen. Code Idaho* 1901, § 5302; *Comp. Laws Nev.* 1900, § 4169; In *re Grosbois*, 42 Pac. 444, 445, 109 Cal. 445.

A presentment is an informal statement of facts, for the purpose of obtaining the advice of the court as to the law thereon. It is made by the foreman in the presence of the grand jury, and with the concurrence of 12 of their number. *Ballinger's Ann. Codes & St. Wash.* 1897, § 6831.

## PRESERVATIVE.

The word "preservative" is defined in the *Century Dictionary* as "that which preserves anything; which tends to keep safe and sound or free from injury, corruption,

or decay; a preventive of damage, decomposition, or waste"; and in the Standard Dictionary, "that which keeps safe, or tends to preserve; that which has power to keep safe or sound; a safeguard"; and, in Webster's International Dictionary, "that which preserves, or has the power of preserving; a preservative agent." Agricultural Laws, § 27, as amended by Laws 1900, c. 534, prohibiting the sale of any butter or cheese product containing a preservative, except salt, and spirituous liquor in cheese, and sugar in condensed milk, and prohibiting the sale of any preserving substance to be so used, is unconstitutional as an improper restraint on the personal liberty to sell articles of commerce, the word not indicating that it is injurious to the public health. *People v. Biesecker*, 68 N. Y. Supp. 1067, 1069, 58 App. Div. 391.

## PRESERVE.

"Preserved," as used in the provision of the federal Constitution that the right of trial by jury shall be preserved, means that it shall remain as it existed at common law at the time of the adoption of the Constitution. *Gribble v. Wilson*, 49 S. W. 736, 101 Tenn. 612.

The word "preserve" means to keep; to secure; to uphold; and when used in a statute intended to preserve the public peace it means to secure that quiet order and freedom from agitation or disturbance which is guaranteed by the laws. *Neuendorff v. Duryea* (N. Y.) 52 How. Prac. 267, 269.

To "preserve order" means to keep or secure the "proper state or condition" or "established mode of proceeding." *Neuendorff v. Duryea* (N. Y.) 6 Daly, 276, 280.

A power to "preserve and manage" a mine will not be held to include an authority to mortgage it, and is inconsistent with the idea of imposing a certain charge on the principal, except for such expenses as may be incurred in its preservation and management. *Golinsky v. Allison*, 46 Pac. 295, 296, 114 Cal. 458.

## PRESERVING.

The word "preserving," as used in the statement of the nature of an invention, setting out that it consists in a method of preserving fish and other articles by placing them within a chamber and cooling the latter by means of a freezing mixture, refers to the process to which the article is subjected in such chamber. *Piper v. Moon* (U. S.) 19 Fed. Cas. 724, 726.

## PRESIDE.

When a judge "holds" court he directs, controls, and governs it as the chief officer,

and this is the extent of the meaning of the word "preside." The presiding judge of a court consisting of several members, or of a court of which he is the sole judge, as of a court of oyer and terminer, with its grand and petit jury, its attending sheriffs, clerks, and other officers, does this, and nothing else, under the name of "holding" or "presiding" in the court. *Smith v. People*, 47 N. Y. 330, 334.

## PRESIDENT.

Of bank as agent, see "Agent."

The president of a business corporation is its chief executive officer. He may, without express authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. *Roe v. Bank of Versailles*, 67 S. W. 303, 307, 167 Mo. 406.

An indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], authorizing the punishment of the president, cashier, or agent of any national bank who shall embezzle or willfully misapply any of its funds, which charges that the funds embezzled were at the time in the possession of the defendant as president and agent, means that they had come into his possession in his official character, so that he held them in trust for the bank. *United States v. Northway*, 7 Sup. Ct. 580, 581, 120 U. S. 327, 30 L. Ed. 664.

## PRESIDENT OF THE COURT.

The use of the words "president of the district court" in a signature to an exemplification of the record of a judgment rendered in the district court, which is signed by one describing himself as president of the district court, etc., sufficiently shows that the person executing the certificate is a judge of the court. "We are of the opinion that the phrase 'president of the court' imports a judicial officer; that it has a definite meaning in common parlance, and is as well understood as the phrase 'presiding magistrate.' Undoubtedly the title 'president of the court' may, by some possibility, in some state or kingdom, be used to designate some other than a judicial officer; but until the contrary appears the title will be presumed to be used in its ordinary and appropriate sense." *Gavit v. Snowhill*, 26 N. J. Law (2 Dutch.) 76-78.

## PRESIDENTIAL ELECTION.

See "Election for President."

## PRESIDING JUDGE.

Const. art. 66, provides that the Governor shall, upon the recommendation in

writing of the Lieutenant Governor, Attorney General, and presiding judge of the court before which the conviction was had, or any two of them, have power to grant pardons, commute sentences, remit fines and forfeitures after conviction. It was held that such article cannot refer to the judge who presided at the trial, and who has since ceased to be judge. He is no longer the "presiding judge," and the fact that he was judge at the time conviction was had cannot affect his authority as presiding judge for the particular purpose of passing upon application for executive clemency in cases which were on trial before him. The article speaks of the presiding judge of the court before which conviction was had. The predecessor of the presiding judge is not judge of that court, and the article can have no possible application to him. *State ex rel. Gibson v. Judge of Eleventh Judicial Dist. Court*, 16 South. 744, 745, 47 La. Ann. 154.

The term "presiding justice" is equivalent to that of "presiding magistrate" or "chief judge." *Bean v. Loryea*, 22 Pac. 512, 81 Cal. 151.

#### PRESIDING OFFICER.

The phrase "presiding officer" in the charter of a city providing that the presiding officer shall, in case of a tie, have a casting vote, does not apply to an alderman called to the chair in the absence of the mayor. *In re Dudley*, 53 N. Y. Supp. 703, 707, 24 Misc. Rep. 278.

In statutes relative to elections the term "presiding officer" shall apply to the warden or chairman at a caucus, to the warden, chairman of the selectmen, moderator, or town clerk in charge of a polling place at an election, or to a justice of the peace acting as moderator at a town meeting; or, in the absence of any such officer, to the deputy warden or the clerk or senior inspector or senior selectman present who shall have charge of a polling place. *Rev. Laws Mass.* 1902, p. 104, c. 11, § 1.

#### PRESSURE.

"Pressure" and "variation of pressure," in the telephonic art, usually refer to the effect of the movements of the diaphragm caused by the sound waves at the contact between the electrodes. In every variable resistance transmitter the sound waves vibrate the diaphragm, and the movements of the diaphragm cause vibrations of pressure at the surface contact between the electrodes, which vary the resistance, and thereby reproduce speech. "Variable pressure," however, in connection with the Berliner invention, signifies variations of pressure which vary the intimacy of the contact between solid electrodes, and so vary the resistance, as distinguished from variations of pressure

which vary the area of contact between a solid electrode and a liquid electrode, or the area of contact between two solid electrodes, or vary the compression of the mass between solid electrodes. The terms "pressure" and "variation of pressure," considered by themselves, are mere abstractions, and cannot involve invention. *American Bell Tel. Co. v. National Tel. Mfg. Co. (U. S.)* 119 Fed. 893, 915, 56 C. C. A. 423.

#### PRESUME.

"Presume" is from the Latin "presumere," consisting of "præ," before, and "sumere," to take, and signifies to take or assume a matter beforehand without proof; to take for granted. *Morford v. Peck*, 46 Conn. 380, 385; *Green v. Maloney (Del.)* 30 Atl. 672, 674, 7 Houst. 22; *Hammock v. McBride*, 6 Ga. 178, 184; *Pittsburgh, C. & St. L. Ry. Co. v. Bennett*, 35 N. E. 1033, 1089, 9 Ind. App. 92.

"Presume," as used in a statement by a witness that the defendant had one of his hands in a certain place, "I presume," etc., means "to the best of his recollection." *People v. Soap*, 59 Pac. 771, 772, 127 Cal. 408.

The word "presume" in an instruction that fraud will not be presumed when all the facts consist as well with honesty and fair dealing as they do with an intention to defraud, "is adapted to mislead, not to instruct. The word 'presume,' as here used, is obviously ambiguous, confounding the different meanings of 'infer' and 'assume,' and, although this ambiguity does not deceive lawyers, it is very likely to deceive jurors. They may be told that the burden of proof is upon the party who asserts the fraud without being perplexed with an instruction which may seem to them to imply that they can infer fraud or presume it inferentially from facts in evidence." *State, to Use of Erhardt, v. Estel*, 6 Mo. App. 6, 10.

The word "presumed," as used in an instruction in an action on a fire policy on the issue of arson that fraud is never presumed, but must be clearly proven, is not erroneous, for the word "presumed" has an entirely different meaning from the word "inferred," which, if used in place of the word "presumed" in the instruction, would be misleading, as leading the jury to believe that fraud could not be proved by circumstantial evidence. *Bannon v. Insurance Co. of North America*, 91 N. W. 666, 669, 115 Wis. 250.

**Believe distinguished.**

See "Believe."

#### PRESUMED DERELICTION.

Dereliction is not presumed except when it appears by evident declaratory acts or circumstances, as when the property is thrown

away in a public place where it cannot be taken up, or where another is suffered to possess without contradiction, or where possessory acts have been long abstained from; but, when once established upon reasonable grounds, and in circumstances where doubt would be detrimental to the plan of human society, it cannot be contradicted as untrue, or complained of as iniquitous. *Rhodes v. Whitehead*, 27 Tex. 304, 313, 84 Am. Dec. 631.

### PRESUMPTION.

See "Artificial Presumption"; "Disputable Presumption"; "Legal Presumption"; "Mixed Presumption"; "Natural Presumption"; "Violent Presumption."

A presumption is an inference as to the existence of a fact not actually known, arising from its connection with another which is known. *Lane v. Missouri Pac. Ry. Co.*, 33 S. W. 645-650, 132 Mo. 4; *Jackson v. Warford* (N. Y.) 7 Wend. 62, 66; *Hilton v. Bender*, 69 N. Y. 75, 82. It is founded upon a knowledge of human nature and the motives of which are known to influence human conduct, particularly the disposition of man to enjoy what belongs to him. *Jackson v. Warford* (N. Y.) 7 Wend. 62, 66. The ground of all presumption is the necessary or usual connection between facts and circumstances, the knowledge of which connection results from experience and reflection. *Pell v. Ball's Ex'rs* (S. C.) *Cheves*, Eq. 99, 123.

A presumption is a probable inference which common sense draws from circumstances usually occurring in such cases. The slightest presumption is of the nature of probability, and there are almost infinite shades from slight probability to the highest moral certainty. A presumption, strictly speaking, results from a previously known and ascertained connection between the presumed fact and the fact from which the inference is made. *State v. Tibbetts*, 35 Me. 81, 83.

A presumption is the inference of the existence of one fact from the existence of some other fact founded on previous experience of their connection. *Starkie, Ev.*; *Welch v. Sackett*, 12 Wis. 243, 257; *Snediker v. Everingham*, 27 N. J. Law (3 Dutch.) 143, 153; *Fay v. Reynolds*, 60 Conn. 217, 220, 21 Atl. 418; *Allison v. State*, 42 Ind. 354, 356, 357. The inference may be certain or not certain, but merely probable, and therefore capable of being rebutted by proof to the contrary. *State v. Heaton*, 23 W. Va. 773, 782.

Presumption is a principle of law by which, for the furtherance of justice and support of right, facts not established by positive evidence are inferred from circum-

stances. *Math. Pres. Ev.* 1; *Erhart v. Dietrich*, 24 S. W. 188, 191, 118 Mo. 418; *Iynch v. Metropolitan St. Ry. Co.*, 20 S. W. 642, 645, 112 Mo. 420.

A "presumption" is a probable inference which our common sense draws from circumstances usually occurring in such cases. *Newton v. State*, 21 Fla. 53, 98. A presumption, strictly speaking, results from a previous known and ascertained connection between the presumed fact and the fact from which the inference is made without the intervention of any act of reason in the individual existence. *State v. Tibbetts*, 35 Me. 81, 83.

A presumption is defined as "a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved." *Brandt v. Morning Journal Ass'n*, 80 N. Y. Supp. 1002, 1004, 81 App. Div. 183; *Ulrich v. Ulrich*, 32 N. E. 606, 136 N. Y. 120, 18 L. R. A. 37; *United States v. Sykes* (U. S.) 58 Fed. 1000, 1004. Presumption is an inference of the truth or falsehood of a proposition, drawn by a process of probable reasoning, in the absence of its actual certainty. It is the probability of the proposition being true or false, reduced from its conformity or repugnancy to our general knowledge, observation, and experience. *Best, Presumptions*, 3. *Snediker v. Everingham*, 27 N. J. Law (3 Dutch.) 143, 153; *Ulrich v. Ulrich*, 49 N. Y. St. Rep. 33, 34.

A presumption is a conclusion drawn from the proof of facts or circumstances, and stands as establishing facts until overcome by contrary proof. *Johnson v. Territory*, 50 Pac. 90, 91, 5 Okl. 695.

Presumptions are consequences which the law or the judge draws from a known fact to a fact unknown. Presumptions not established by law are left to the judgment and discretion of the judge. *Cronan v. City of New Orleans*, 16 La. Ann. 374.

A presumption is a deduction which the law expressly directs to be made from particular facts. *Code Civ. Proc.* § 1959. *Fisher v. McInerney*, 69 Pac. 622, 624, 137 Cal. 28, 92 Am. St. Rep. 68; *McDougall v. McDougall*, 67 Pac. 778, 779, 135 Cal. 316; *Ann. Codes & St. Or.* 1901, § 784.

Presumptions are consequences which the law or the judge draws from a known fact to a fact unknown. *Civ. Code La.* 1900, art. 2284.

To constitute a presumption it is necessary that there be a previous experience of the connection between the thing and inferred facts of such another that, as soon as the existence of the one is established, admitted, or assumed, the inference as to the existence of the other immediately arises inde-

pendent of any reasoning upon the subject. *Welch v. Sackett*, 12 Wis. 243, 257.

"A presumption is a probable inference, which common sense, enlightened by human knowledge and experience, draws from the connection, relation, and coincidence of facts and circumstances with each other. When a fact shown in evidence necessarily accompanies the fact in issue, it gives rise to a strong presumption as to the existence of the fact to be proved. If the fact in the evidence usually accompanies the fact in issue, it gives rise to a probable presumption of the existence of the fact to be proved. If the fact shown in evidence only occasionally accompanies the fact in issue, it gives rise only to a slight and insufficient presumption; but even this fact may, in connection with other relevant and consistent facts and circumstances, constitute an element in circumstantial evidence." *United States v. Searcey* (U. S.) 26 Fed. 435, 437.

A presumption which the jury is to make is not a circumstance in proof, and is not, therefore, a legitimate foundation for a presumption. *Moore v. Renick*, 68 S. W. 936, 939, 95 Mo. App. 202.

The office of presumptions is not to overthrow admitted facts, but rather to supply the absence of facts. There can be no presumption against ascertained and established facts. *Conway v. Supreme Council Catholic Knights of America*, 70 Pac. 223, 225, 137 Cal. 384.

Presumptions serve a most useful and indispensable part in the correct decision of many questions, but they are out of place when the facts are known or are admitted. *Erhart v. Dietrich*, 24 S. W. 188, 191, 118 Mo. 418.

Presumptions are either legal and artificial or natural, and may be divided into three classes: First, legal presumptions, made by the law itself, or presumptions of mere law; second, legal presumptions made by a jury or presumptions of law and fact; third, mere natural presumptions or presumptions of mere fact. *Welch v. Sackett*, 12 Wis. 243, 257.

"Presumptions" are sometimes called inferences of the law. They are inferences or possessions established for the most part by the common and occasionally by the statute law, and are obligatory alike on judges and juries. *Doane v. Glenn*, 1 Colo. 495, 504.

Presumptions are of four kinds: (1) Irrebuttable presumptions of law; (2) rebuttable presumptions of law (these are acted on by the court itself as a part of the law); (3) mixed presumptions (called mixed because the court lays down the law and the jury acts on it); (4) presumptions of fact (subdivided into slight and strong presumptions,

according to their effect). *Lee v. Pearce*, 68 N. C. 76, 85.

"Presumption," as used in Bill of Rights, § 9, providing that all prisoners shall be bailable, unless for capital offenses, where the proof is evident or the "presumption great," "is as definite to the legal mind as any words of explanation would make it, and is intended to indicate the same degree of certainty whether the evidence be direct or circumstantial. The design is to secure the right of appeal in all cases except those in which the facts might show with reasonable certainty that the prisoner is guilty of a capital offense." *McCoy v. State*, 25 Tex. 33, 38, 78 Am. Dec. 520.

Where two successive juries have failed to agree in their verdict on an indictment, that fact is a circumstance strongly going to show that as to the person's guilt the proof was not evident, nor the "presumption great," and when coupled with other circumstances going to show that the accused will meet the coming trial will authorize his admittance to bail. *Ex parte Alexander*, 59 Mo. 598, 600, 21 Am. Rep. 393.

Presumption is at best but a prima facie method of proof, and may be rebutted. *Bernhardt v. Western Pennsylvania R. Co.*, 28 Atl. 140, 141, 159 Pa. 360.

#### **Belief distinguished.**

See "Belief."

#### **Circumstance synonymous.**

An instruction that, if defendant made a threat, it was a presumption of guilt, was not erroneous, the word "presumption" having been used as synonymous with "circumstance." *Grigsby v. Moffat*, 21 Tenn. (2 Humph.) 487, 489.

#### **Conclusiveness.**

The strength and weight of what is denominated a "disputable presumption" must necessarily be affected by the attendant facts, which will weaken or strengthen it as they accord in each case with the experience of mankind, and the opportunities for knowledge must affect the weight of such presumption. *Lynch v. Metropolitan St. Ry. Co.*, 20 S. W. 642, 645, 112 Mo. 420.

A presumption, unless declared to be conclusive, may be controverted by other evidence, direct or indirect, but, unless so controverted, the jury are bound to find for the presumption. *In re Bauer's Estate*, 21 Pac. 759, 760, 79 Cal. 304.

The term "presumption" is used to signify that which may be assumed without proof or taken for granted. It is asserted as a self-evident result of human reason and experience. In its origin every presumption is one of fact, and not of law. It may in

course of time become a presumption of law, and often an indisputable one. Its truth may be so universally accepted as to elevate it to the position of a maxim of jurisprudence. Its convenience as a rule or decision may be so generally recognized as to place it in the rank of legal fictions. But so long as it retains its original character as a presumption of fact it has simply the force of an argument. *Ward v. Metropolitan Life Ins. Co.*, 33 Atl. 902, 904, 66 Conn. 227, 50 Am. St. Rep. 80.

#### **As evidence of great weight.**

In its charge the court instructed the jury that certain facts, if proved, would "raise a strong presumption" that plaintiff was the child of a certain person; and, again, that certain facts, if proved, would "raise a strong presumption" that plaintiff was the legitimate child of such person—a presumption which could "only be overcome by strong and convincing proof." Held, that the expressions quoted, taken in the connection in which they occur, and as used by the court below, are, in effect, equivalent to the expression, "are strong evidence," or "evidence of great weight," and that in this construction they are objectionable in this case. *McArthur v. Craigie*, 22 Minn. 351, 355.

#### **Included in the word evidence.**

A presumption, being a species of evidence, is included in the word "testimony" in Laws 1884, p. 125, § 30, where it is provided that the court in charging the jury may state the testimony and declare the law. *United States v. Clark*, 14 Pac. 288, 291, 5 Utah, 226.

#### **As inference.**

The word "presumption," as used in an instruction that the law presumes that a person injured, prompted by a natural instinct to avoid danger, exercised care, is not used in its ordinary technical sense, but as meaning inference, and as a substitute for the word "inference." *Bell v. Town of Clarion*, 84 N. W. 962, 964, 113 Iowa, 126.

"A presumed fact is one taken for granted and accepted as a result of human experience and general knowledge, while an inference is the conclusion drawn from the proof or admission of circumstances, which, by reason of the same human experience and knowledge, would naturally lead to it. A man is presumed to regard his will as a private and sacred document, and on that account is presumed to keep it with the same degree of care and privacy as he does his most important papers and documents; and when it is shown by competent evidence that his will has been found in a place where he is in the habit of keeping his papers and documents of importance and value, with the signature erased, or no will is found in such

a place, as the case may be, there is a legal inference arising from such evidence, together with the presumptions mentioned, that in the one case he canceled the document himself, and in the other that the destruction was by his own hand." *In re Hopkins' Will*, 72 N. Y. Supp. 415, 417, 35 Misc. Rep. 702.

A presumption is compulsory, and cannot be disregarded by the jury. In *Johnson v. Chambers*, 32 N. C. 292, the court distinguishes between a presumption and an inference. Malice may, in some cases, be inferred from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make, and it should have been left to them. *State v. Wilcox*, 44 S. E. 625, 631, 132 N. C. 1120.

#### **As opinion.**

The word "presumption" in a statement by a juror, in answer to a question, that he had no presumption regarding the guilt or innocence of defendant, was construed to mean "opinion." *Bohanan v. State*, 18 N. W. 129, 130, 15 Neb. 209.

#### **Presumption on presumption.**

A "presumption" can arise only from facts actually proven by direct evidence. A presumption is not a legitimate foundation for a presumption. If this were not true, there would be no limit to conjecture. *Thayer v. Smoky Hollow Coal Co.*, 96 N. W. 718, 721, 121 Iowa, 121.

### **PRESUMPTION OF FACT.**

"A presumption of fact is an inference of the existence of a certain fact arising from its necessary and usual connection with other facts which are known." *Roberts v. People*, 13 Pac. 630, 638, 9 Colo. 458; *Home Ins. v. Welde*, 78 U. S. (11 Wall.) 438, 441, 20 L. Ed. 197; *Hilton v. Bender*, 69 N. Y. 75, 82; *Jackson v. Warford* (N. Y.) 7 Wend. 62, 66; *Lane v. Missouri Pac. Ry. Co.*, 33 S. W. 645, 650, 132 Mo. 4.

A presumption of fact is an inference which a reasonable man would draw from certain facts which have been proven. Its basis is in logic, and its source is probability. *Liverpool & L. & G. Ins. Co. v. Southern Pac. Co.*, 58 Pac. 55, 58, 125 Cal. 434.

A presumption of fact "is the natural connection of one fact with others by a combined process of proof and argument." *Levins v. Rovegno*, 12 Pac. 161, 163, 71 Cal. 273 (quoting *Burrill*, Circ. Ev. 55).

Presumptions of fact are derived wholly and directly from the circumstances of the particular case by means of the common experience of mankind, without the aid or control of any rules of law whatever. Po-

*dolski v. Stone*, 58 N. E. 340, 343, 186 Ill. 540; *Pittsburgh, C., C. & St. L. Ry. Co. v. Bennett*, 35 N. E. 1033, 1039, 9 Ind. App. 92; *Kent v. People*, 9 Pac. 852, 858, 8 Colo. 563.

Presumptions of fact are inferences as to the existence of some fact drawn from the existence of some other fact; inferences which common sense draws from circumstances usually occurring in such cases. *Kent v. People*, 9 Pac. 852, 858, 8 Colo. 563.

A presumption of fact is an inference as to the existence of some fact drawn from the existence of some other fact. The presumption of fact must always be drawn by a jury, and every fact and circumstance which tends to prove any fact which is in issue is admissible. Presumptions of fact result from the proof of a fact or a number of facts and circumstances which human experience has shown are generally associated with the matter under investigation. *United States v. Searcey* (U. S.) 26 Fed. 435, 437.

"A presumption of fact is a logical argument from a fact to a fact; or, as the distinction is sometimes put, it is an argument which infers a fact otherwise doubtful from a fact which is proved. Hence a presumption of fact, to be valid, must rest on a fact in proof." *McIntyre v. Ajax Min. Co.*, 60 Pac. 552, 557, 20 Utah, 323 (citing *Whart. Ev.* [3d Ed.] § 1226); *Bluedorn v. Missouri Pac. R. Co.* (Mo.) 24 S. W. 57, 60; *Smith v. Gardner*, 55 N. W. 245, 36 Neb. 741.

Presumptions of fact depend on inferences to be drawn by a jury in ascertaining one fact from the proved existence of another, without the aid of any rule of law. This process of finding out the truth of matters of fact in controversy in a trial at law belongs to the exclusive province of the jury. They may be properly aided by the advice and instruction of the judge, but he should not control them by positive directions, as the whole matter should be left to their free and independent determination. Presumptions of fact have been classified by text-writers and judicial decisions as strong, probable, and slight. When a fact proved always accompanies a fact sought to be proved, it gives rise to a strong presumption that may control a jury in their investigation. When the fact proved usually accompanies the fact sought to be proved, a probable presumption arises. Slight presumptions, which arise from the occasional connection of distinct facts, are generally disregarded by a jury. Presumptions of fact which the law recognizes must be immediate inferences from the facts proved, and must be such as sensible men, influenced by observation, experience, and reason, would draw from clearly established facts, that usually accompany the matter at issue. *United States v. Sykes* (U. S.) 58 Fed. 1000, 1005.

Presumptions of fact are but inferences drawn from other facts and circumstances in the case, and should be made upon the common principles of induction. *United States v. Griego* (N. M.) 72 Pac. 20, 24 (citing *Lawson, Pres. Ev.* p. 556).

A presumption of fact is a conclusion drawn by logic and argument, which infers a fact otherwise doubtful from a fact which is proved. *Commonwealth v. Frew*, 3 Pa. Co. Ct. R. 492, 496.

#### Conclusiveness.

A presumption of fact is a mere inference from certain evidence, and as the evidence changes the presumption necessarily varies. A trial court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions arose. *Chicago, St. P., M. & O. Ry. Co. v. Bryant* (U. S.) 65 Fed. 969, 975, 13 C. C. A. 249.

A presumption of fact is an inference from evidence, and may be resisted by evidence leading to an opposite conclusion. As a matter of fact it is to be submitted to a jury. *Bow v. Allenstown*, 34 N. H. 351, 365, 69 Am. Dec. 489.

#### Presumption of law distinguished.

Wharton defines presumption of fact as a logical argument from fact to fact. 2 *Whart. Ev.* § 1226. And in the same volume (section 1234) the author, in defining presumption of law, as distinguished from presumption of fact, uses this language: "The conditions to which are attached presumptions of law are fixed and uniform. Those which give rise to presumptions of fact are inconsistent and fluctuating." *Smith v. Gardner*, 55 N. W. 245, 36 Neb. 741.

A presumption of fact differs from a presumption of law in that, while presumptions of law are reduced to fixed rules, presumptions of fact are mere natural presumptions, derived solely and directly from the circumstances of the particular case. These presumptions fall within the province of the jury. *Snediker v. Everingham*, 27 N. J. Law (3 Dutch.) 143, 147, 153.

A presumption of law can be drawn by the court, while a presumption of fact can only be made by the jury; and it frequently happens in opinions that the one may be confounded with the other, and in the discussion of cases the term "burden of proof" is used when the writer intended simply to say "presumption of fact." *Cook v. Dowling*, 26 N. Y. Supp. 764, 765, 6 Misc. Rep. 271.

The difference is between presumptions of fact and rebuttal presumptions of law, or *presumptiones juris tantum*, as distinguished

from *presumptiones juris et de jure*, according to the classification of Best (Law of Ev. § 314 [4th Eng. Ed.]), who states the practical test for distinguishing them thus: "Sec. 323. Where a presumption of law is disregarded by a jury, a new trial will be granted *ex debito justitiæ*; but where the presumption disregarded is only one of fact, however strong or obvious, the granting of a new trial is at the discretion of the court in banc." In other words, when the testimony has been sifted and weighed, and the actual circumstances of the transaction stated in a connected form, the law, by means of its presumptions, determines whether they establish such a relation between the parties as to give rise to reciprocal rights and obligations, and, if so, what legal consequences have followed. The issue to be determined may be one, in form, merely of fact, as whether a particular contract was made, or whether one or both of the parties have been guilty of negligence. The circumstances of the entire transaction having been ascertained and stated, the issue is determined by the interpretations which the law puts upon them. This is an office quite distinct from ascertaining the circumstances themselves by the process of reduction from the original mass of evidence. It involves only a consideration of the facts as found in their relation to each other, in view of fixed legal presumptions, in order to determine and declare the effect to be given to them as a connected whole. *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 1 Sup. Ct. 582, 593, 107 U. S. 485, 27 L. Ed. 337.

### PRESUMPTION OF GUILT.

The use of the term "presumption of guilt" with reference to the possession of stolen goods by one on trial for burglary is misleading. Possession of goods recently stolen in connection with burglary does not in itself create a presumption that the possessor is guilty. *State v. Brady* (Iowa) 91 N. W. 801, 805.

### PRESUMPTION OF INNOCENCE.

The legal presumption of innocence which arises in favor of the defendant on the trial of every criminal case is to be regarded by the jury as a matter of evidence in favor of the accused, introduced by the law in his behalf, to be considered as proof by the jury, and involves more in the trial of the case than "reasonable doubt," which is only the result of insufficient proof. *North Carolina v. Gosnell* (U. S.) 74 Fed. 734, 737.

Reasonable doubt is the reason of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof going to bring about the proof from which reasonable doubt arises.

*Davis v. United States*, 16 Sup. Ct. 353, 358, 160 U. S. 469, 40 L. Ed. 499. See, also, *Coffin v. United States*, 15 Sup. Ct. 394, 404, 156 U. S. 432, 39 L. Ed. 481.

The distinction between the "presumption of innocence" and a "reasonable doubt" has been drawn with great ability by Justice White, speaking for the court, in *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481. We quote as follows from his learned opinion: "The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a *presumptio juris*, demonstrates that it is evidence in favor of the accused; for in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy. Concluding, then, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is reasonable doubt. It is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause. It is a result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof going to bring about the proof from which reasonable doubt arises. Thus one is a cause, the other an effect. To say that the one is the equivalent of the other is, therefore, to say that legal evidence can be excluded from the jury," etc. *State v. Harrison*, 23 Mont. 79, 81, 57 Pac. 647, 648.

### PRESUMPTION OF LAW.

See "Conclusive Presumption of Law."

A presumption of law "is a presumption artificially made by annexing a rule at law or legal incident to a particular fact proved." *Levins v. Rovegno*, 12 Pac. 161, 163, 71 Cal. 273 (quoting *Burrill*, Circ. Ev. 52).

A presumption of law is a judicial postulate that a particular predicate is universally assignable to a particular subject. *Territory v. Lucero*, 46 Pac. 18, 20, 8 N. M. 543 (citing *Whart. Cr. Ev.* § 707).

A presumption of law is conclusive, and is an inference which the court will draw from the proof, which no evidence, however strong, will be permitted to overturn. *Lyon v. Guild*, 52 Tenn. (5 Helsk.) 175, 182.

A presumption of law is such as is conclusive or absolute; that is, such as is not permitted to be overcome by proof that the fact is otherwise. *Snediker v. Everingham*, 27 N. J. Law (3 Dutch.) 143, 147, 153.

Legal presumptions are artificial rules established by law on consideration of public policy or public convenience, against which



no evidence is received. *Bow v. Allenstown*, 34 N. H. 351, 365, 69 Am. Dec. 489.

Presumptions of law are usually founded upon reasons of public policy and social convenience and safety, which are warranted by the legal experience of courts in administering justice. Some of these presumptions have become established and conclusive rules of law, while others are only *prima facie* evidence, and may be rebutted. *United States v. Searcey* (U. S.) 26 Fed. 435, 437.

A presumption of law is one which a judge draws from the language or principles of the law and from particular facts or evidence, unless or until the truth of such inference is disproved. Such presumption derives its force from the law, and should only be rebutted by clear and satisfactory proof to the contrary. *United States v. Sykes* (U. S.) 58 Fed. 1000, 1004.

Presumptions of law are in reality rules of law, and a part of the law itself, and a court may draw the inference whenever the requisite facts are developed in the pleading; while all other presumptions, however obvious, being only inferences of fact, cannot be made without the intervention of a jury. *Doane v. Glenn*, 1 Colo. 495, 504.

The presumption of law is that every one understands its provisions, and ignorance in that regard cannot be pleaded in law. *Hartness v. Great Western Ry. Co. of Canada*, 2 Mich. N. P. 80, 82.

A presumption of law establishes a certainty. It is a uniform, constant rule, with conditions fixed and unvarying. The policy of the law attaches a presumption of law to all men generally. A presumption of fact is such that our knowledge of human nature and affairs leads us to draw from a particular range of facts presented in a specific case. When we say a prisoner is presumed to be innocent until proved guilty, or that every man is bound to know the law, these are presumptions of law, and binding upon us, however untrue and absurd they may be. But a presumption of fact depends upon the proof from which it is to be inferred. Thus possession of stolen goods, when proved, is a fact from which a jury may infer that they were stolen by the possessor, but they are not bound to do so. There are conditions to be found before they can infer that the possessor is the thief. The possession must be personal, recent, unexplained, and must involve a conscious assertion of property in the goods. *Commonwealth v. Frew*, 3 Pa. Co. Ct. R. 492, 496.

#### Classes.

"Presumptions of law are of two kinds: First, such as are made by the law itself, or, as they are called, 'presumptions of mere

law'; and, secondly, such as are to be made by a jury, or presumptions of law and fact. Again, presumptions of law are either absolute or conclusive; as, for instance, that a bond or other specialty was executed on a valid consideration cannot be rebutted by evidence so long as the presumption is impeached for fraud, or they are not absolute, and may be rebutted by proof." *Bryan v. Walton*, 20 Ga. 480, 508.

Legal presumptions are of two kinds: First, such as are made by the law itself, or presumptions of mere law, which are conclusive; and, second, presumptions of law and fact, which are not absolute, and may be rebutted. A presumption of payment arising from lapse of time belongs to the latter class. In *re Brown's Estate* (Pa.) 8 Phila. 197, 198.

#### Presumption of fact distinguished.

See "Presumption of Fact."

#### PRESUMPTION OF LEGAL KNOWLEDGE.

It is often said that the "presumption of legal knowledge" is a positive rule of law, and applies to all cases where acts are knowingly done which are expressly forbidden by law, and gives rise to a conclusive presumption of criminal intent. If the word "conclusive," in this connection, means "irrebuttable," then such presumption is very unreasonable when applied to all criminal charges, and is not justified to that extent of meaning by any consideration of public policy. No man knows all the law. Judges differ in their legal decisions, and lawyers are continually discussing in the courts doubtful and controverted questions of law. The presumption of legal knowledge is a general rule, and not accurately defined as to the extent of its application. I do not regard it as a positive rule of law, but as a very strong presumption, subject to some reasonable qualifications, in criminal trials, where the life and liberty of the citizen are involved. In such cases the law should be literally construed, so as to give effect to all of its beneficent provisions, to avoid conflict of rules of law, and secure the citizen against anything that would be unjust or oppressive. The beneficent presumption of innocence, and the doctrine of a reasonable doubt, so important in a trial by jury, would be of little benefit to a person on trial for crime, if the mere proof of an unlawful act, knowingly committed by him, was received in a court of justice as conclusive evidence of guilt. *United States v. Smith* (U. S.) 27 Fed. 854, 856, 857.

#### PRESUMPTION OF OUSTER.

What is called the "presumption of an ouster," or of a deed or release, in cases

where one tenant in common gives leases and receives rent of the premises without actual acknowledgment of the rights of his co-tenants, is not a presumption of law which the courts control, but must be submitted to and found by the jury. *Dubois v. Campan*, 28 Mich. 304, 328.

### **PRESUMPTION OF PAYMENT.**

There is a presumption of law that a judgment on which no execution has been issued or attempt made to enforce the same for 20 years has been paid. *Beekman v. Hamlin*, 24 Pac. 195, 196, 19 Or. 383, 10 L. R. A. 454, 20 Am. St. Rep. 827.

Mere lapse of time less than the period prescribed by the statute of limitations creates no "presumption of payment." *Snediker v. Everingham*, 27 N. J. Law (3 Dutch.) 143, 147, 153.

### **PRESUMPTIVE.**

See "Heir Presumptive."

### **PRESUMPTIVE BAR.**

Lapse of time, in connection with non-payment of interest and a continued possession of a mortgagor, unaccompanied by any effort on the part of the mortgagee to enforce payment, warrants a presumption of payment; but this is not a legal bar, but only an equitable or presumptive one, depending on a principle coincident with the earliest jurisdiction of the court of equity; but all the authorities agree that this presumption may be rebutted by circumstances, and, though there is some conflict whether defendant must insist on the bar or whether plaintiff should repel the presumption, the better opinion seems to be that such circumstances as entitle the party to relief, notwithstanding the lapse of time, should be stated in the bill. *Abbott v. Godfrey's Heirs*, 1 Mich. (Manning) 178, 182.

### **PRESUMPTIVE DAMAGES.**

The term "presumptive damages" is used to designate damages in excess of compensatory damages, which are allowed as a punishment of the wrongdoer. It is synonymous with the terms "exemplary," "vindictive," and "punitive" damages. *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366.

### **PRESUMPTIVE EVIDENCE.**

"Presumptive evidence" consists in the proof of minor or other facts incidental to or usually connected with the fact sought to be proved, which, when taken together, inferentially establish or prove the fact in

question to a reasonable degree of certainty. *Horbach v. Miller*, 4 Neb. 31, 44, 45.

The term "presumptive evidence" is sometimes used to designate what is ordinarily known as circumstantial evidence. *State v. Miller* (Del.) 32 Atl. 137, 141, 9 Houst. 564.

Circumstantial or presumptive evidence is that which shows the existence of one fact by proving the existence of others, from which the first may be inferred. *State v. Kornstett*, 61 Pac. 805, 808, 62 Kan. 221.

The word "presumptive," in Code, § 82, is used to define evidence that must be received and treated as true "until rebutted by other testimony, which may be introduced by the defendant," and is therefore synonymous with "prima facie." *State v. Mitchell*, 25 S. E. 783, 784, 119 N. C. 784.

"Mr. Best, in his valuable work on Evidence, says that presumptions or presumptive evidence is as original as is direct evidence, and that the presumption of a fact is as good as any other proof of such fact, when the presumption is legitimate." *Jones v. Granite State Fire Ins. Co.*, 37 Atl. 326, 328, 90 Me. 40.

Statutes providing that the possession of a salmon less than nine inches in length, or of a trout less than five inches in length, shall be "presumptive evidence" that they were unlawfully taken, and similar provisions with respect to the possession of the carcasses of moose and deer during the closed season, are of the same effect as other statutes in relation to circumstantial evidence, as, for example, the statute declaring the payment of the United States tax as a liquor seller to be prima facie evidence of the guilt of the defendant, and merely mean that such evidence is competent and sufficient to justify a jury in finding a defendant guilty providing it does in fact satisfy them of his guilt beyond a reasonable doubt, and not otherwise. *State v. Intoxicating Liquors*, 12 Atl. 794, 795, 80 Me. 57.

"Evidence, whether written or oral, is either positive or presumptive. Positive evidence is the direct proof of the fact or point at issue. Presumptive evidence consists in the proof of some other fact or facts from which the point at issue may be inferred. The strength of the presumption is always in proportion to the frequency in connection between the fact to be inferred and that which is proven. If the connection be found by experience and observation to be invariable, in all instances the presumption is what in law is denominated violent, and is equal to full proof. If the connection be general, and not universal, the inference of the existence of the one from the proof of the other, though rational, is not necessary, and

the presumption amounts to a probable one only; but if experience shows that the fact intended to be inferred is as often or oftener disjoined than it is in connection with what is proven, the proof of the latter creates no presumption of the existence of the former." *Davis v. Curry*, 5 Ky. (2 Bibb) 238, 239.

Presumptive evidence consists of evidence drawn by human experience from the connection of cause and effect and observation of human conduct. Civ. Code Ga. 1895, § 5143; Pen. Code Ga. 1895, § 983.

### PRESUMPTIVE NOTICE.

Presumptive notice is where the law imputes to a purchaser the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprised him. As where a purchaser cannot make out a title but by a deed which leads him to another fact whether by description of the parties, recital, or otherwise, he will be deemed conusant thereof. *Brush v. Ware*, 40 U. S. (16 Pet.) 93, 98, 10 L. Ed. 672.

The difference between "presumptive notice" and "constructive notice" is that the former is an inference of fact which is capable of being explained or contradicted, while the latter is a conclusion of law which cannot be contradicted. *Brown v. Baldwin*, 25 S. W. 858, 860, 121 Mo. 106.

Some confusion has arisen in the use of the words "actual," "presumptive," and "constructive" in defining notice. According to some authors and courts, notice is actual or constructive; and actual notice is divided into direct or positive, and indirect, implied, or presumptive notice; the difference between presumptive notice and constructive notice being that the former is an inference of fact which is capable of being explained or contradicted, while the latter is a conclusion of law, which cannot be controverted. Bisp. Eq. (3d Ed.) 268. This division furnishes a satisfactory explanation of the use of the terms. *Drey v. Doyle*, 99 Mo. 459, 467, 12 S. W. 287, 289.

### PRESUMPTIVELY.

"Presumptively," as defined by Worcester, means by previous supposition; by Bouvier, "presumption" means an inference as to the existence of one fact from the existence of some other fact, founded on a previous experience of their connection, or it is an opinion that circumstances give rise to, relative to a matter of fact which they are supposed to attend. But by the use of the word "presumptively" in Code Civ. Proc. § 1773, providing that where the husband fails to pay the allowance to his wife, and it appears presumptively that payment cannot be enforced in a certain way, the hus-

band may be punished for a contempt of court, the codifier meant that before the husband's person should be seized proof satisfactory to the court should be given that the alimony could not be collected out of his estate. *Isaacs v. Isaacs* (N. Y.) 61 How. Prac. 369, 371.

### PRETEND.

The common and generally accepted meaning of the verb "pretend" is to hold out as true that which is false; to feign; to simulate. So that the use of "pretend" in an instruction was erroneous, as implying that the court believed that the transfer referred to in the instruction was spurious. *Brown v. Perez* (Tex.) 25 S. W. 980, 983.

As used in an instruction referring to a sale as a pretended sale, the word "pretended" signifies something falsely assumed, something claimed contrary to the truth of the matter, and rendered such instruction erroneous as assuming a fact which should have been found by the jury. *Powell v. Yeazel*, 64 N. W. 695, 697, 46 Neb. 225.

The word "pretended," as used in the section of the Texas Constitution providing that all pretended sales of a homestead involving any condition of defeasance shall be void, means feigned, not real, and hence does not apply to an actual sale with an agreement for a reconveyance. *Astugueville v. Loustaunau*, 61 Tex. 233, 239.

### PRETENDED RIGHT OR TITLE.

"Pretended right or title," within the meaning of the statute to prevent and punish champerty and maintenance, which prohibits any person from buying or selling any pretended right or title, was construed to include the interest acquired by the assignee of a certificate procured from the surveyor general of the state that the assignor had purchased a lot of land, such assignment having been made after the land had been sold under execution against the assignor. It is immaterial, under the statute, whether the title or claim sold is good or bad. It has also been held that a sale of a copyhold estate or giving a lease for years, when the vendor or lessor is not in possession, is within the statute. Lord Coke says the words of the statute be "any pretended right," and therefore a lease for years is within the statute, for the statute saith not the right, but any right, and the offender shall forfeit the whole value of the land. And again: "Also the statute speaks of any right or title to land. A customary right or a pretence thereof to lands holden by copy is within this statute." Quoting Coke, Litt. 369a, b. The statute intended to prohibit the sale of pretended rights by which the possession of another might be disturbed.

*Tomb v. Sherwood* (N. Y.) 13 Johns. 289, 291.

## PRETENSE.

See "False Pretense."

A "pretense" is a show or a holding forth in form of something which does not exist. *Sprague v. Fletcher*, 30 Atl. 693, 694, 67 Vt. 46.

Pretense is the holding out or offering to others of something false or feigned. This may be done either by words or action which amount to false representations; in fact, false representations are inseparable from the idea of a pretense. *State v. Grant*, 53 N. W. 120, 121, 86 Iowa, 216.

The word "pretense," in an instruction that a man cannot in any case justify the killing of another upon the pretense of self-defense, unless he be without fault in bringing the necessity of so doing upon himself, implies sham, falsity, and groundlessness, and, in effect, says to the jury that the defense set up by the accused is a mere false pretense. *Hash v. Commonwealth*, 13 S. E. 398, 404, 88 Va. 172.

The term "pretense," in the statute in reference to false pretenses, does not include a false promise to do something in the future. *State v. King*, 34 Atl. 461, 462, 67 N. H. 219.

A representation which has reference to the future only, and not to the past or to the present, is not a "pretense," within Rev. St. § 813, providing that whoever, "by any false pretense, shall obtain, or aid and assist another in obtaining, from any person money or any property, with intent to defraud him of the same," shall be punished by imprisonment. *State v. Colly*, 2 South. 496, 497, 39 La. Ann. 795.

## PRETEXT.

"Webster, in his *Unabridged Dictionary*, defines the word 'pretext' as an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." So that an indictment charging that defendant did sell and give away liquor did state an offense under a statute making it unlawful to give away liquor upon any pretext. *State v. Ball*, 43 N. W. 398, 399, 27 Neb. 601.

Acts 1831, c. 103, § 3, providing that if any owner or other person having the charge of a slave shall permit him to go about the country under the "pretext of practicing medicine or healing the sick," he shall be liable to certain punishment, etc., should not be construed so as to include only a pretext of practicing medicine, etc., for the accomplishment of any unlawful ends, but should be

construed to prohibit slaves from practicing medicine or healing the sick under all circumstances; the Legislature assuming that the practice of medicine by a slave would be a pretext. *Macon v. State*, 23 Tenn. (4 Humph.) 421, 423.

## PRETIUM AFFECTIONIS.

The words "pretium affectionis" are defined in *Bouv. Law Dict.* as "an imaginary value put upon a thing by the fancy of the owner in his affection for it or for the person from whom he obtained it." Pretium affectionis has no relation to an expensive pleasure yacht totally destroyed in a collision. *The H. F. Dimock* (U. S.) 77 Fed. 226, 233, 23 C. C. A. 123.

## PREVAILING PARTY.

"Prevailing party," as used in Code, tit. 10, § 303, providing that there may be allowed to the prevailing party on the judgment certain sums by way of indemnity for his expenses in the action, which are termed "costs," means the party who prosecutes a meritorious action or defends successfully. *Belding v. Conklin* (N. Y.) 2 Code Rep. 112.

The term "prevailing party," as used in a rule of chancery awarding costs, applies to a complainant who has prevailed on the main issue, though not to the full extent of his claim, yet to a greater extent than admitted by the defendant; as, for instance, upon the proportions of water of a mill privilege to which the parties were respectively entitled. *Weston v. Cushing*, 45 Vt. 531.

A plaintiff who obtains not the judgment claimed, but an order requiring a credit to be entered by the defendant mortgagee which had not been previously allowed, is a "prevailing party," entitled to costs. *Hawkins v. Nowland*, 53 Mo. 328, 329.

A city obtaining a verdict in condemnation that the value of the ground was just equal to the benefits of the owner is the "prevailing party," entitled to costs. *Rogers v. City of St. Charles*, 54 Mo. 229, 234.

Under a statute authorizing the condemnation of land for public roads, and declaring that either party dissatisfied with the estimate made by the commissioners of damages may apply for a jury to assess the damages, and that upon such application the "prevailing party" shall recover legal costs, a landowner is held to be the prevailing party and entitled to costs if the jury find in his favor for any amount, though they assess the damages at a less amount than the county commissioners have done. *New Haven & Northampton Co. v. Inhabitants of Northampton*, 102 Mass. 116, 122, 123.

Upon the dismissal of an appeal from a lower court, on the motion of the appellee, on the ground that no appeal was in fact taken, the appellee is the "prevailing party," within the meaning of a statute entitling the prevailing party to recover costs, and this even though it was alleged in the motion that no action was ever brought in the lower court to be appealed from. *Pomroy v. Cates*, 17 Atl. 311, 81 Me. 377.

In an action to settle the affairs of an insolvent corporation there was a controversy between a surety company and a bank which claimed as assignee of a bond by the surety company to the corporation guarantying the fidelity of its officer. Both were defendants to the original suit, and the bank appealed from the judgment, which held that the surety company was not liable to the bank, and obtained a modification holding that the surety was liable, although not for the full amount of the penalty, a set-off being allowed. Held, that the bank was the "prevailing party," within Code, § 323, and the costs of appeal were properly taxed to the fidelity company instead of to plaintiff in the original suit. *Murray v. Alken Mining & Porcelain Mfg. Co.*, 18 S. E. 5, 7, 39 S. C. 457.

A writ of review is a new action, and the party who obtains in it a result more favorable to him than that of the original action is the "prevailing party," within Pub. St. c. 187, § 34, providing that the prevailing party shall recover costs, unless the court in granting the review imposes on the petitioner terms respecting costs. *Williams v. Williams*, 133 Mass. 587.

## PREVAILING RATE OF WAGES.

The word "prevailing," as used in Labor Laws 1897, c. 415, as amended by Laws 1889, cc. 192, 567, providing that laborers on public work should be paid the prevailing rate of wages, is too indefinite in its meaning to be made the test or condition of a penalty or forfeiture for a violation of the provisions of a statute, for what is the prevailing rate of wages? Is it the rate that the best workman, or the largest mass of workmen, or the average workman, can demand? Does it depend on ability? If so, on which grade? Or on numbers? If so, is it the majority of all or of a class, and, if of a class, of which class, and why? What rights have those who do not come within the dominant class? Does it depend on supply and demand—on fair competition? *People v. Coler*, 166 N. Y. 1, 42, 59 N. E. 716, 724, 52 L. R. A. 814, 82 Am. St. Rep. 605.

## PREVENT.

In Co. Litt. bk. 3, "Estates upon Condition," 202a, it is said that "if tender of

rent is made upon any part of the land at any time of the last day of payment, and the landlord refuses, the condition is saved for that time, for by an express reservation the money is to be paid on the day indefinitely, and convenient time before the very last instant is the uttermost time appointed by law, to the intent that, then both parties should meet together, the one to demand and receive, and the other to pay, it, so as the one should not prevent the other." It will be remembered that in the time of Coke and Bacon the word "prevent" signified "to come before the usual time," in which former, but now obsolete, sense the word was used by Lord Coke. *Smith v. Whitbeck*, 13 Ohio St. 471, 478.

In discussing the change in meaning of "adjoining" from its original meaning, the court cited the word "prevent" as having a similar history, saying it "is derived from the Latin 'prævenio,' to go before, and in our translation of the Bible, in the liturgy, and in old theological standards it is implied to express the idea of assisting and going before. At present it means hindrance, impediment, and is used in no other sense." *Peverelly v. People* (N. Y.) 3 Parker, Cr. R. 59, 69.

It would seem that there ought not to be any difficulty in arriving at the significance of the words in the act of Congress providing that "if at any election for representative," etc., "any person shall, by force, threat, menace, intimidation, or otherwise, unlawfully prevent any qualified voter from freely exercising the right of suffrage," etc. When a man is spoken of as "exercising a right," it is commonly understood that he is doing something. When a voter casts his ballot into the box, do we not say that he is exercising the right of suffrage? Can any words be used that better define the act of voting? And when he exercises this right freely, does he not do it according to his pleasure, without any constraint either upon his mind or his body? His will must not be controlled, and his physical opportunity for doing the act must not be interfered with. Any control over the one, or interference with the other, encroaches upon his freedom of action, and produces the mischief which the words of the statute were designed to guard against and cure. And what is it to prevent a voter from exercising this right? It is to put such a restraint upon his volition or his body that he cannot perform the act; producing, by threats or otherwise, such apprehension of personal loss or injury as to induce him not to vote, or to vote contrary to his wishes, being a restraint upon his will; intervening between him and the ballot box, so as to render it physically impossible for him to cast his vote, being a restraint upon his body. *United States v. Souders* (U. S.) 27 Fed. Cas. 1267, 1269.

**Act implied.**

"Prevent" means to intercept; to hinder; to frustrate; to stop; to thwart; to hinder from happening by means of previous measures; keep from occurring or being brought about as an event or result; ward off; preclude; hinder, as to prevent the escape of a prisoner; to stop in advance from some act or operation; intercept or bar the action of; check; restrain. As used in an indictment charging that the accused persons "did, in a violent and tumultuous manner, prevent the sheriff" from doing a certain act, embraces the idea that the accused persons necessarily committed an act of some character. *Green v. State*, 35 S. E. 97, 99, 109 Ga. 536.

The word "prevent," as now understood, means to hinder; to obstruct; to intercept. Representations of inability to pay a debt, though false; promises to pay, if broken; appeals to the sympathies of the creditor for indulgence, or statements untrue—are not such improper acts on the part of the debtor as to prevent the commencement of an action, within the meaning of the twenty-ninth section of the statute of limitations, as the creditor might, notwithstanding such acts, have commenced his suit at any time. By such representations, promises, and appeals the creditor might have been induced to delay such suit, but he was clearly not prevented from suing. *Burr v. Williams*, 20 Ark. 171, 185.

"Prevented," as used in a declaration on a contract alleging that plaintiff was prevented from supplying goods thereunder by the purchaser, did not mean an obstruction by physical force, but would apply to a notice by the purchaser that he would not accept any more goods under the contract. *Cort v. Ambergate, N. & B. & E. Junction Ry. Co.*, 17 Q. B. 127, 145.

**As complete prevention.**

A positive contract in a charter party to proceed to a port, unless "prevented by the dangers and accidents of the seas," meant prevented from doing so at all, and a temporary obstruction would not put an end to the obligation. *Schilizzi v. Derry*, 4 El. & Bl. 873, 888.

**Hinder synonymous.**

See "Hinder."

**Knowledge implied.**

Webster, after giving two definitions of the verb "prevent"—first, to go before; to precede; second, to be beforehand with; to get the start of; to anticipate—which he says are obsolete, defines it to mean to intercept; to stop; to hinder; to obstruct; to impede. The use of the word in an allegation that defendants were prevented from

protesting against the prosecution of a certain work, which they desired to do, strongly implies that the defendants had knowledge of the facts warranting the protest. *Brady v. Bartlett*, 56 Cal. 350, 364.

**As prohibit.**

"Prevent," as used in Acts 1878-79, p. 413, conferring power on the municipal authorities of a city to prevent the selling of spirituous, vinous, or malt liquors within the corporate limits whenever they may deem it expedient, is synonymous with "prohibit." The difference between "prevent" and "prohibit" is not material. If there is any difference, "prevent" is the stronger word—conveying the idea of prohibition, and the use of the means necessary to give it effect. *In re Jones*, 78 Ala. 419, 421.

**PREVIOUS.**

"Previous" means before and up to. *State v. Gunagy*, 50 N. W. 882, 884, 84 Iowa, 177.

**PREVIOUS BUILDING.**

Act March 2, 1869, providing that any person who shall furnish to a "previous building" any machinery or fixtures, alterations, and additions or repairs, which are capable of being removed from such building without material injury thereto, shall have a lien thereon superior to all others, applies only to the actual structure; and persons who furnish machinery to the lessee of a flour mill, to enable him to convert it into a rolling mill, are entitled to remove machinery capable of removal without serious injury to the mill, though they did not put the former machinery back in the condition it was before being attached. *Slocum v. Caldwell (Ky.)* 13 S. W. 1069, 1070.

**PREVIOUS CHASTE CHARACTER.**

Gen. St. 1878, c. 100, § 6, providing that any man who seduces and has illicit connection with any unmarried female of previous chaste character is guilty of a felony, means chaste character immediately previous to the act. Such character must have continued down to the time of the seduction. It is not enough that her character was chaste down to some time prior to that of the seduction. *State v. Gates*, 6 N. W. 404, 405, 27 Minn. 52.

An instruction in a seduction case that, in order to convict, the jury must find that complainant was a woman of previous chaste character, is not open to the objection that it left the jury free to find complainant to be of chaste character if at any previous time she had been chaste, since the word "previous," as used in the instruction, means

before and up to the time of the seduction. *State v. Gunagy*, 50 N. W. Rep. 882, 884, 84 Iowa, 177.

In the statute to punish for seduction, the term "previous chaste character" means that the female never had sexual intercourse before; and, to establish her previous chaste character, it is not necessary for the state to introduce a witness who would swear that she never had had sexual intercourse with any person before, but it is sufficient to show that her reputation before that time was that of a chaste girl. *Powell v. State* (Miss.) 20 South. 4, 6.

A woman who has been previously in the habit of illicit intercourse, but has reformed, and become chaste from principle, and who is so at the time of the act charged, is of "previous chaste character," within the meaning of Pub. St. c. 96, § 6, punishing the seduction of a woman of previous chaste character. *State v. Timmens*, 4 Minn. 325, 335 (Gil. 241, 249).

#### PREVIOUS DEMAND.

"Previous demand" means a demand made on a substantially different occasion. *Tyler v. Bland*, 9 Mees. & W. 338, 340.

#### PREVIOUS INTENTION.

An instruction that if any person who, in the exercise of a lawful employment, goes about without any previous intention to sell or expose for sale any goods prohibited, yet nevertheless does sell on the request of purchasers, such act is not a violation of the law relating to hawkers and peddlers, means an intention formed before he sets out on his journey. *Commonwealth v. Ober*, 68 Mass. (12 Cush.) 493, 496.

#### PREVIOUS NOTICE.

"Previous notice," as used in Rev. St. § 2324, providing that a statute should not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor, is equivalent to "actual notice," as used in section 2243, providing that when a deed purports to be an absolute conveyance in terms, but is made or intended to be made defensible by force of a deed of defeasance or other instrument for that purpose, the original conveyance shall not be thereby defeated or affected, as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded in the office of the register of deeds of the county

where the lands lie. Notice is actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man on inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase. Where the subsequent purchaser has knowledge of such facts, it becomes his duty to make inquiry, and he is guilty of bad faith if he neglects to do so, and consequently he will be charged with the actual notice he would have received if he had made the inquiry. *Hooser v. Hunt*, 26 N. W. 442, 445, 65 Wis. 71.

#### PREVIOUS SUPPORT.

The words "previous support," as used in Rev. St. c. 24, § 28, providing that an estoppel to deny that a pauper had a settlement in a certain town shall operate on an action brought to recover for expenses incurred for his previous support, etc., does not mean the support furnished before a removal, but support furnished prior to the commencement of the suit. *City of Bangor v. Madawaska*, 72 Me. 203, 205.

#### PREVIOUS YEAR.

Under a statutory limitation on the power of the county board to contract for bridge building to cost a sum not greater than the amount of money on hand in the county bridge fund, derived from a levy of previous years and two-thirds of the levy of the current year, it is held that the terms "previous year" and "current year" do not refer to the previous calendar year or current calendar year, but refer to the year from one levy to another. *Clark v. Lancaster County* (Neb.) 96 N. W. 593, 598.

#### PREVIOUSLY.

"Previously," as used in Code 1873, § 2534, providing that, when a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense as though it had arisen under the provisions of the act, is an adverb of time, used in comparing an act or state named to another act or state subsequent in order of time, for the purpose of asserting the priority of the first. The act of defendant, residing in another country, must have been prior in point of time in comparison with some other act. *Lebrecht v. Wilcoxon*, 40 Iowa, 93.

A rule of court provided that plaintiff might enter judgment by default any time after the return day and 10 days' service of the writ, provided he had filed a declaration, unless the defendant should have previously filed an affidavit of defense. Held, that the

word "previously" might, without doing violence to the language, be referred to the entry of judgment, rather than the time when it might have been entered, and a supplemental affidavit stating a sufficient defense was entitled to be filed at any time after the argument of the rule for judgment, and before judgment had been entered. *Bloomer v. Reed*, 22 Pa. (10 Harris) 51, 53.

### PREVIOUSLY PATENTED.

An invention for which a foreign patent was granted between the date of filing the American application and the date of the issuance of the American patent must be held to have been previously patented, within the meaning of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], making an American patent for an invention previously patented in a foreign country expire at the same time with the foreign patent. *Bate Refrigerating Co. v. Sulzberger*, 15 Sup. Ct. 508, 509, 157 U. S. 1, 39 L. Ed. 601.

### PREVIOUSLY UNCHASTE.

Under Cr. Code, c. 4, § 12, declaring the carnal knowledge of a female child under the age of 18, with her consent, to be rape, unless she was over 15 years of age and previously unchaste, the term "unchaste" does not require that she be a woman of notoriously lewd and lascivious habits, or that she must be a prostitute. A woman not previously unchaste, within the meaning of the statute, is one who has never had unlawful sexual intercourse with a male prior to the act of intercourse for which the prisoner stands indicted. The object of the statute was to protect the virtuous maidens of the commonwealth—in other words, to protect those girls who were undefiled virgins—and a female under 18 years of age, and over 15 years of age, who has been guilty of unlawful sexual intercourse with a male, is not within the act. *Bailey v. State*, 78 N. W. 284, 285, 57 Neb. 706, 73 Am. St. Rep. 540.

### PRICE.

See "Contract Price or Value"; "Cost Price"; "Current Price"; "Factory Price"; "Going Prices"; "Inadequate Price"; "Invoice Price"; "Long Price"; "Market Price"; "Reasonable Price"; "Selling Price"; "Shipping Price"; "Wholesale Price."

The price is the value which a seller places upon his goods for sale. It is not a fixed and unchangeable thing. It may be one thing to-day, and another to-morrow, and one valuation to one customer, and a different one to another, on the same day or hour. Whatever a seller asks any one to give is the price, until he changes it for another.

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The price asked is the existing fact until it is changed. When the price asked is changed to another price, the former price is no longer an existing fact. The existing fact is not what a party may be willing to take in case he cannot do better, but what he then proposed to take. *Scott v. People* (N. Y.) 62 Barb. 62, 72.

### As market price.

The price of an article which has its value in the market rises or falls accordingly as the relation between supply and demand changes. *Washington Ice Co. v. Webster*, 68 Me. 449, 463.

"Price" is defined as the sum or amount of money, or its equivalent, which a seller asks or obtains for goods in market—the exchangeable value of a commodity—and hence, as used in a contract providing for the sale of articles at a fixed price, and that, if the price falls below such fixed price, a rebate will be given, the word "price" means market price. *Wing v. Wadhams Oil & Grease Co.*, 74 N. W. 819, 820, 99 Wis. 248.

Rev. St. § 3315, as amended by Laws 1885, c. 312, after giving a lien to any subcontractor, provided that (1) a subcontractor's claim shall not constitute a lien, except to the extent of the owner's indebtedness at the time of notice, or thereafter, to the principal contractor; (2) in no case shall the owner be compelled to pay a greater sum "than the price or sum stipulated in the original contract." Laws 1887, c. 535, retains all the essential provisions of section 3315, above, except the first restriction. Held, that the term "the price or sum stipulated in the original contract," as used in the act of 1887, does not mean the price stipulated for a full performance of the contract by the principal contractor, unless he fully performed the same, and, in case of partial non-performance, it means the proportionate contract price for the part performed, and restricts the subcontractor's lien to the unpaid balance of that sum. *Wright v. Pohls*, 53 N. W. 848, 849, 83 Wis. 560.

### As price in money or equivalent.

The word "price" generally means the sum of money which an article is sold for, but this is so simply because property is generally sold for money, not because the word has necessarily such a restricted meaning. Among writers on political economy, who use terms with philosophical accuracy, the word "price" is not always or even generally used as denoting the money equivalent of property sold. They generally treat and regard "price" as the equivalent of "compensation," in whatever form received, for property sold. The Latin word from which price is derived sometimes means "reward," "value," "estimation," "equivalent"; and Web-



ster shows that "price" is sometimes used in the same sense. *Hudson Iron Co. v. Alger*, 54 N. Y. 178, 177; *London & Yorkshire Bank v. Belton*, 15 Q. B. Div. 457, 460; *Schrandt v. Loung*, 88 N. W. 1085, 1089, 62 Neb. 254.

Where one receives a flock of sheep for care and pasturage under an agreement that he is to receive a share of the wool and of the increase as his compensation, such compensation constitutes a price, within the meaning of Comp. St. c. 4, art. 1, § 28, creating an agister's lien for the contract price. In this connection the court says that the word "price," in ordinary parlance, undoubtedly refers to money, and that as the reason of the law extends to all contracts of agistment, whether for money or some other valuable consideration, the word "price" should be construed to include agreements such as that mentioned. *Schrandt v. Young*, 62 Neb. 254, 266, 88 N. W. 1085.

"Price," as used in a letter of attorney, authorizing him to sell land for such sum or price and on such terms as to him should seem meet, does not authorize the acceptance of some other form of payment than money. There is no distinction between the words "price" and "sum." *Paul v. Grimm*, 30 Atl. 721, 722, 165 Pa. 139, 44 Am. St. Rep. 648.

The term "price," as implied in the common definition of a sale as a transfer of the absolute title to property for a certain agreed price, does not necessarily refer to a sum of money only, but is equivalent to "compensation." *Borland v. Nevada Bank of San Francisco*, 33 Pac. 737, 738, 99 Cal. 89, 37 Am. St. Rep. 32.

"Price" does not simply mean value or cost, but it means the sum of money for which a thing is bought or sold, or offered for sale. An allegation that "defendant refused to account for, pay, and remit the price of the same" may be construed to mean that he refused to account for, pay, and remit the sum for which he sold the same. *Guy v. McDaniel*, 29 S. E. 196, 197, 51 S. C. 436.

The word "price" signifies the sum stipulated as the equivalent of the thing sold, and also every incident taken into consideration for the fixing of the price put to the debit of the vendee, and agreed to by him; and it has such meaning in Code 1825, art. 3126, providing that the payment of so much of the price of sale as remains unpaid shall be secured by the vendor's privilege. *De L'Isle v. Succession of Moss*, 34 La. Ann. 164, 167.

Price is the sum in money or other equivalent set upon an article by a seller, which he demands for it. In the sale of chattels, the general rule is that the measure of dam-

ages for nondelivery is the difference between the contract price and the market price at the time and place of delivery. When the market price is unnaturally inflated by unlawful means, it is not the true means of ascertaining the measure of damages in such a case. *Kountz v. Kirkpatrick*, 72 Pa. (22 P. F. Smith) 376, 388, 13 Am. Rep. 687.

#### As purchase price.

Purchase money is money paid for land, or the debt created by the purchase. *Austin v. Underwood*, 37 Ill. 439, 87 Am. Dec. 254. The term "price of real property," as used in Rev. St. § 3336, providing that a mortgage given for the price of real property at the time of the conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws, is the money paid for real property, or the debt created by the purchase thereof. *Kneen v. Halin*, 59 Pac. 14, 15, 6 Idaho, 621.

#### As value.

See, also, "Value."

"Price," as used in an indictment charging the larceny of a horse of a certain price, is equivalent to the word "value." All the lexicographers, both law and general, in certain instances, give the words "value" and "price" as convertible and synonymous. In the sense used in the indictment, the words, if not synonymous, are certainly the equivalent of each other. *State v. Sparks*, 3 S. E. 40, 42, 30 W. Va. 101.

Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. "Value" and "price" are therefore not synonymous, or the necessary equivalents of each other, though commonly "market value" and "market price" are legal equivalents. *Theiss v. Weiss*, 31 Atl. 63, 66, 166 Pa. 9, 45 Am. St. Rep. 638 (citing *Kountz v. Kirkpatrick*, 72 Pa. [22 P. F. Smith] 376, 13 Am. Rep. 687).

#### PRICE CURRENT.

Price current is a statement or list of current prices, which are the market value of the merchandise stated in the list. *Three Thousand One Hundred and Nine Cases of Champagne* (U. S.) 23 Fed. Cas. 1168, 1171.

#### PRICES F. O. B.

In a contract providing for "prices f. o. b." a certain place, the term "prices f. o. b." will not be held to mean delivery f. o. b. at such place, so as to prevent the title passing until such delivery. *Neimeyer Lumber Co. v. Burlington & M. R. R. Co.*, 74 N. W.

670, 671, 54 Neb. 321, 40 L. R. A. 534. This rule was held not to be inflexible in all similar cases. *Globe Oil Co. v. Powell*, 76 N. W. 1081, 1082, 56 Neb. 463.

## PRIMA FACIE.

"Prima facie," in criminal cases, means proof beyond all reasonable doubt. *Copp v. Henniker*, 55 N. H. 179, 205, 20 Am. Rep. 194.

## PRIMA FACIE CASE.

A prima facie case is that state of facts which entitles the party to have the case go to the jury. In *Commonwealth v. Kimball*, 41 Mass. (24 Pick.) 359, 366, 35 Am. Dec. 326, it is said: "Making it a prima facie case does not necessarily or usually change the burden of proof. A prima facie case is that amount of evidence which would be sufficient to counterbalance the general presumption of innocence, and warrant a conviction if not then encountered and controlled by evidence tending to contradict it and render it improbable, or to prove other facts inconsistent with it." *State v. Hardelein*, 70 S. W. 130, 131, 169 Mo. 579.

A prima facie case is a case made out by proper and sufficient testimony. Gen. St. 1878, c. 73, § 104, providing that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by such other evidence as tends to convict the defendant of his offense, or the circumstances thereof, does not require a case to be made out against an accused sufficient for his conviction before the testimony of an accomplice can be considered, for that would make it available only when its necessity did not exist. Neither do the terms used require such an interpretation. *State v. Lawlor*, 28 Minn. 216, 223, 9 N. W. 698, 702.

## PRIMA FACIE EVIDENCE.

Prima facie evidence of a fact, says Mr. Justice Story, is such evidence as, in the judgment of the law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose. *Crane v. Morris*, 31 U. S. (6 Pet.) 598, 611, 8 L. Ed. 514 (cited in *Lilienthal's Tobacco v. United States*, 97 U. S. 268, 24 L. Ed. 901); *State v. Roten*, 86 N. C. 701, 703; *United States v. Wiggins*, 39 U. S. (14 Pet.) 334, 347, 10 L. Ed. 481; *Blough v. Parry*, 43 N. E. 560, 564, 144 Ind. 463; *Smith v. Burrus*, 106 Mo. 94, 100, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without

any rebutting evidence, they disregard it. It would be error on their part which would require the remedial interposition of the court. In a legal sense, then, such prima facie evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive, to found their verdict as to the fact. Such are understood to be the clear principles of law on this subject. *Kelly v. Jackson*, 81 U. S. (6 Pet.) 622, 631, 8 L. Ed. 523.

"Prima facie evidence" is defined by *Starkie* (1 *Starkie*, Ev. 479) as "that which, being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favor that it must prevail if it be credited by the jury, unless rebutted, or the contrary proved." *Smith v. Gardner*, 55 N. W. 245, 36 Neb. 741; *People v. Thacher* (N. Y.) 1 *Thomp. & C.* 158, 167.

Prima facie evidence is an inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference. *People v. Thacher* (N. Y.) 1 *Thomp. & C.* 158, 167.

Prima facie evidence is evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. *State v. Lawlor*, 28 Minn. 216, 223, 9 N. W. 698, 702 (citing *Emmons v. Westfield Bank*, 97 Mass. 230).

"Prima facie evidence of a fact is such as establishes the fact, and, unless rebutted or explained by the evidence, becomes conclusive, and is to be considered as if fully proved." *State v. Burlingame*, 48 S. W. 72, 73, 146 Mo. 207.

Prima facie evidence is an inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference. *People v. Thacher* (N. Y.) 7 *Lans.* 274, 285.

Prima facie evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. For example, the certificate of a recording officer is prima facie evidence of a record, but it may afterward be rejected upon proof that there is no such record. *Code Civ. Proc. Cal.* 1903, § 1833.

Prima facie evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. *Code Civ. Proc.* § 1833; *Moore v. Hopkins*, 23 Pac. 318, 319, 83 Cal. 270, 17 Am. St. Rep. 248; *Swamp Land Dist. No. 307 v. Gwynn*, 12 Pac. 462, 464, 70 Cal. 566.

Prima facie evidence is a case made out until the contrary is proven, and, in the case

even of an informal writing, must be clearly met and explained and overturned by explanatory proof to the satisfaction of the court or the jury, as the one or the other may be called upon to decide the question, and is improperly defined to the jury as "a strong fact." *Weisinger v. Bank of Gallatin*, 78 Tenn. (10 Lea) 330, 337.

Whenever evidence is offered to the jury which is in its nature prima facie or presumptive proof, its character as such ought not to be disregarded, and no court has a right to direct a jury to disregard it, or to view it under any different aspect from that in which it is actually presented. *Lillenthal's Tobacco v. United States*, 97 U. S. 237, 268, 8 L. Ed. 514.

The use of the term "prima facie," as applied to evidence, does not shift the burden of proof. *Bowman v. State*, 41 S. W. 635, 38 Tex. Cr. R. 14. Contra, see *State v. Roten*, 86 N. C. 701, 703.

A provision of Act 1887, c. 140, amendatory of the liquor law, declaring that payment of the United States special tax as a liquor seller shall be held to be "prima facie evidence" that the one paying the tax is a common seller of intoxicating liquors, does not mean that it is the duty of the jury, where such payment appears, to find the defendant guilty, whether they believe him to be so or not. The phrase "prima facie evidence," as so used, has the same meaning as "presumptive evidence," used in similar statutes in relation to the possession of the carcasses of moose and deer during the closed season, etc., and merely means that the evidence is competent and sufficient to justify a jury in finding a defendant guilty, provided it does in fact satisfy them of his guilt beyond a reasonable doubt, and not otherwise. *State v. Intoxicating Liquors*, 12 Atl. 794, 795, 80 Me. 57.

The term "prima facie evidence of title" means "evidence sufficient to establish title, unless some person shows a perfect title." *Bell v. Skillcorn*, 28 Pac. 768, 769, 6 N. M. 399 (citing *Barger v. Hobbs*, 67 Ill. 592).

## PRIMAGE.

"Primage" denotes a small payment to the master of a ship for his care and trouble, which he is to receive to his own use unless he has otherwise agreed with his owners. *Peters v. Speights*, 4 Md. Ch. 375, 381 (citing *Abb. Shipp*, 492).

"Primage" means a compensation to the master of a vessel for his particular care of the goods, and is not to be recovered by the owners of a vessel unless they show that they have paid it to him. *Blake v. Morgan* (La.) 3 Mart. (O. S.) 376, 381.

Primage is not a gratuity to the master of a ship, unless especially stipulated, but it belongs to the owners or freighters, and is nothing but an increase of the freight rate. *Carr v. Austin & N. W. R. Co.* (U. S.) 14 Fed. 419, 421.

## PRIMARY—PRIMARILY.

Worcester defines the word "primary" to mean "first in time; original; primitive; first." Webster defines the word "primary" to mean "first in order of time or development; original; first in order; preparatory to something higher." *State v. Hirsch*, 24 N. E. 1062, 1063, 125 Ind. 207, 9 L. R. A. 170.

An agreement by which a certain person upon consideration was to have the exclusive right to sell a certain sewing machine at a discount within a certain radius of a certain place, and was to devote his time and abilities "primarily" to the forwarding of the company's interest, left such person free to engage in a business of another kind, but he could not fairly undertake to dispose of sewing machines which might obviously interfere with the sale of the other machines. *Appeal of Ewing* (Pa.) 4 Atl. 832, 836.

## PRIMARILY LIABLE.

The person "primarily" liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. *Rev. Laws Mass.* 1902, p. 653, c. 73, § 208; *Code Supp. Va.* 1898, § 2841a; *B. & C. Comp. Or.* § 4592; *Bates' Ann. St. Ohio* 1904, § 3178a.

## PRIMARY BATTERY.

"Primary battery," as the term is used with relation to electrical apparatus, means "a battery which is active by virtue of the materials of which it is made." *Electrical Accumulator Co. v. Brush Electric Co.* (U. S.) 52 Fed. 130, 132, 2 C. C. A. 682.

A primary battery is a chemical generator of electricity, which is active only by virtue of the materials of which it is composed. A secondary battery and a primary battery "differ as a spring differs from a reservoir." In a secondary battery the electrodes are of the same materials, and electro-motively similar, and the plates are insoluble in the battery fluid. In a primary battery the electrodes are of different materials and differ electro-motively, and the positive plate is dissolved in the battery fluid. *Brush Electric Co. v. Milford & Hopedale St. Ry. Co.* (U. S.) 58 Fed. 387, 388.

## PRIMARY DEBTOR.

"Primary debtors" are those who are first liable to pay a debt, and include an un-

conditional acceptor of a bill of exchange or the maker of a promissory note. *Hunt v. Johnson*, 11 South. 387, 389, 96 Ala. 130.

### PRIMARY DISPOSAL.

The Arizona organic law, which provides that no laws shall be passed interfering with the "primary disposal" of the soil, means the disposal of it by the United States government when it parts with its title. *Oury v. Goodwin* (Ariz.) 26 Pac. 376, 377.

Act Cong. May 2, 1890, establishing territorial government for Oklahoma, and providing that no law shall be passed interfering with the "primary disposal" of the soil, means the disposal by officers or agents of the government to some person, who, having the qualification to acquire such lands, and who has complied with the terms of the law therefor, is entitled to conveyance thereof by patent or deed, without any reserved authority in the government or its officers to withhold the same. *Topeka Commercial Security Co. v. McPherson*, 54 Pac. 489, 491, 7 Okl. 332.

### PRIMARY ELECTION.

As an election, see "Election."

*Rapalje & Lawrence's Law Dictionary* defines a primary election as a popular election held by members of a particular political party for the purpose of choosing delegates to a convention empowered to nominate candidates for that party, to be voted for at an approaching election. "Under our form of government, we have a well-defined system of choosing or electing officers, regulated by law. There exists equally as well-defined an unbroken custom on the part of the various political parties to choose or elect candidates by such parties for the various offices prior to the holding of the election at which they shall be voted for, and the choice made by all the electors of the persons to fill the various offices. There is chosen first a candidate by the members of each political party for each particular office to be filled, to be voted for at the final election. The respective parties first make choice of candidates between the various candidates, and, secondly, all the electors make choice between the various candidates, and the word 'primary election' well expresses the choice made by the respective political parties." *State v. Hirsch*, 24 N. E. 1062, 1063, 125 Ind. 207, 9 L. R. A. 170.

A primary election is purely a creation of political parties and associations. These parties and associations may hold such elections, or may not. It is not obligatory upon them, and, if they do hold such elections, they may hold them at such hours, places, and on such terms and conditions as to them may

seem fit. *People v. Cavanaugh*, 44 Pac. 1057, 1058, 112 Cal. 676.

A "primary" is not an election in the sense of the common law. It was not known at common law, but it is an outgrowth of modern convenience and necessity. It is merely a selection of persons to be balloted for at such election, so that a fraud committed at a primary election will not come within the common-law offense of fraud at an election. *Woodruff v. State*, 52 Atl. 294, 296, 68 N. J. Law, 89.

A "primary election" is defined in St. c. 41, art. 12, § 1550, as an election held within the state, county, city, district, or subdivision thereof by the members of any political party, or the voters of some political faith, for the purpose of nominating candidates for office. *Young v. Beckham* (Ky.) 72 S. W. 1092.

A "primary election," within the meaning of the chapter relating to elections, is an election held by voters who are members of any political party, for the purpose of nominating a candidate or candidates for public office, which, at the last general election before the convention, polled at least 3 per cent. of the entire vote of the state, or any division or subdivision thereof, for which the nominations are made. Code W. Va. 1899, p. 70, c. 3, § 19.

The words "primary election," as used in the act to protect primary elections and conventions of political parties and punish offenses committed thereat, shall be construed so as to embrace all elections, held by any political party, convention, election, or association or delegation therefrom, for the purpose of choosing a candidate for office, or the election of delegates to other conventions, or for the purpose of any political party, organization, or association. *Cobbey's Ann. St. Neb.* 1903, § 5720.

A primary election is an election held within the state, county, district, or subdivision thereof, as the case may be, by the members of any political party, or by the voters of some political faith, for the purpose of nominating candidates for office; provided that the said party shall have cast at least 3 per cent. of the entire vote cast within the state, county, district, or subdivision thereof. Rev. St. Mo. 1899, § 7082.

"Primary election" shall be construed to mean election by ballot for the nomination of candidates for office, as opposed to nomination by convention, to run at subsequent elections to be held under the laws of the state for state, county, or municipal officers. Pen. Code Ga. 1895, § 448.

A "primary election," within the meaning of the election act, is an election held within the state, county, district, or subdivi-

vision thereof, as the case may be, by the members of any political party, or by the voters of some political faith, for the purpose of nominating candidates for office, or for electing delegates to party conventions. *Cobbey's Ann. St. Neb.* 1903, § 5800.

Every election required by the rules of a political party for the purpose of ascertaining the will of the electors on the purpose of a nomination is a "primary election," within the meaning of Act June 29, 1881. P. L. 128. *Commonwealth v. Young*, 16 Pa. Super. Ct. 317, 322.

A "primary election," within the meaning of the article relating thereto, and as used in the chapter relating to elections generally, is an election held within the state, county, city, district, or subdivision thereof, as the case may be, by the members of any political party, or by the voters of some political faith, for the purpose of nominating candidates for office. *Ky. St.* 1903, § 1550.

#### PRIMARY EVIDENCE.

Primary evidence is that which suffices for the proof of a particular fact until contradicted or overcome by other evidence. 1 *Hill's Code*, § 674. A decree approving a final account is not conclusive, but prima facie evidence only, of the correctness of the account as thereby settled and allowed, under 1 *Hill's Code*, § 1174. *Cross v. Baskett*, 21 Pac. 47, 49, 17 Or. 84. See, also, *Ann. Codes & St. Or.* 1901, § 686.

Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus a written instrument is itself the best possible evidence of its existence and contents. *Code Civ. Proc. Cal.* 1903, § 1829.

Primary evidence is such as in itself does not indicate the existence of other and better proof. *Civ. Code Ga.* 1895, § 5164.

#### PRIMARY MEETING.

A convention or "primary meeting" is defined in the Australian Ballot Law, in reference to nominations which may be made at conventions or primary meetings, as an organized assemblage of electors or delegates representing a political party or principle. *Price v. Lush*, 24 Pac. 749, 10 Mont. 61, 9 L. R. A. 467; *State v. Tooker*, 46 Pac. 530, 531, 18 Mont. 540, 34 L. R. A. 315.

A convention or "primary meeting," within the meaning of the election laws, is an organized assemblage of electors or delegates representing a political party. *Rev. St. Wyo.* 1899, § 219.

#### PRIMARY OBLIGATION.

The words "primary and direct," contrasted with "secondary," when spoken of an obligation, refer to the remedy provided by law for enforcing the obligation, rather than to the character and limits of the obligation itself; and hence, where the law gave the creditors of a corporation the right to sue a stockholder simultaneously with the corporation, the remedy was direct, and hence the obligation was primary. *Kilton v. Providence Tool Co.*, 48 Atl. 1039, 1040, 22 R. I. 605.

#### PRIME.

The use of the word "prime," in the advertised notice of sale of a prime negro slave, is to be considered merely in the light of a notice to persons wishing to purchase slaves, in order to attract bidders, and not as intending to hold out the terms and condition of the proposed sale. It cannot be considered to amount to the warranty of every slave to be sold on the date and at the place mentioned. *Limehouse v. Gray* (S. C.) 3 Brev. 231-233.

"Prime quality winter oil" is good and superior to other oil in the market. *Hastings v. Lovering*, 19 Mass. (2 Pick.) 214, 222, 13 Am. Dec. 420.

#### PRIME BARLEY.

The meaning of the term "prime barley," in a contract for the sale of prime barley, may be explained by the evidence of commission merchants dealing in such grain, as they are presumed to know the meaning of the words, as well as to know the distinction of that kind of grain used by those employed in buying and selling. *Whitmore v. Coates*, 14 Mo. 9, 10, 15.

#### PRIME COST.

"Prime cost," as used in 1 St. 677, c. 22, § 39, requiring owners and consignees of imported goods to make an entry thereof at the customhouse, specifying the prime cost thereof, means "the true and real price paid for the goods upon a genuine bona fide purchase." *United States v. Sixteen Packages* (U. S.) 27 Fed. Cas. 1111, 1113.

#### PRINCIPAL

See "Assistant Principal"; "Vice Principal."

"Principal," whether due or to become due in the future, is a part of the debt of a municipality within the provisions of the Constitution limiting such debt. *Epping v. City of Columbus*, 43 S. E. 808, 809, 117 Ga. 263.

**In agency.**

The county court directed the selectmen of a town within a specified time to put a certain highway in good repair, and in case of their neglect appointed the defendant as agent to do it at the expense of the selectmen. In performing this duty the defendant employed plaintiff to do certain work on the highway. In considering the claim of plaintiff that defendant was acting not as agent, but as principal, in doing such work, the court said: "I feel constrained by civility to take notice of an objection which, if it had not been distinctly made, would never have occurred to me. It has been said that from the facts stated the defendant was not an agent, but a principal. Who, then, is a principal? I answer, one primarily and originally concerned, and who is not an accessory or auxiliary. Who is an agent? A substitute or a person employed to manage the affairs of another. The test on this inquiry is, who derives the benefit? The person receiving goods or employing workmen for his own advantage is a principal, and he who receives or employs workmen for another is an agent. It contradicts the plainest meaning of language to assert that the defendant who derives no more advantage from the repaired highway than every other man in the state, and whose only business it was to act by an appointment, was other than an agent." *Adams v. Whittlesey*, 3 Conn. 560, 567.

**In commercial law.**

The terms "principal" and "interest" are correlative. Each implies and excludes the other. That which is principal cannot be interest, yet we contract for compound interest, and this necessarily is an agreement that the installment of interest which is compound shall be made a principal and bear interest. But the term "principal" applies to the new sum only in relation to the interest upon it, and it is still true that this principal itself accrued upon the contract sued upon as interest. If we were to speak of it with reference to the original principal, or in regard to the mode in which it accrued on the obligation—became part of the debt—we should call it interest. Hence Const. art. 6, § 5, giving superior courts jurisdiction of cases in which the demand exclusive of interest amounts to three hundred dollars, does not give them jurisdiction of an action on a note originally for less than three hundred dollars, but which, by compounding the interest, has created a new principal, amounting to more than three hundred dollars. *Christian v. Superior Court of San Diego County*, 54 Pac. 518, 519, 122 Cal. 117.

**In criminal law.**

By the ancient common law those persons only were deemed principals who committed the overt act, while those who were

present, aiding and abetting, were deemed accessories at the fact; and those who, not being present, had advised the felony, were deemed accessories before the fact. Later the courts in England came to hold as principals all persons present, aiding and abetting, and these were called principals of the second degree. Such was the common law at the time of its adoption in this country. There is now a clear recognition in the law of the principal that all persons whose will has contributed to the doing of a criminal act are equally guilty of that act, by whomsoever perpetrated; and Pen. Code, § 27, provides that such persons shall hereafter be prosecuted and punished as principals. *Trimble v. Territory* (Ariz.) 71 Pac. 934, 935.

All persons who are guilty of acting together in the commission of an offense are principals, and may be prosecuted and convicted as such. *Colter v. State*, 39 S. W. 576, 577, 37 Tex. Cr. R. 284; *Smith v. State*, 17 S. W. 552, 554, 21 Tex. App. 107; *Welsh v. State*, 3 Tex. App. 413, 420.

Any one who is present and aids, abets, assists, advises, or encourages a criminal act, is guilty as a principal. *State v. Dunn*, 89 N. W. 984, 987, 116 Iowa, 219; *United States v. Gilbert* (U. S.) 25 Fed. Cas. 1287, 1291.

A person concerned in the commitment of a crime, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime, is a principal. *People v. Kerr*, 6 N. Y. Cr. R. 406, 435, 6 N. Y. Supp. 674; *People v. McLaughlin*, 11 N. Y. Cr. R. 97, 109, 37 N. Y. Supp. 1005; *People v. Bosworth*, 19 N. Y. Supp. 114, 117, 64 Hun, 72; *People v. Kief*, 11 N. Y. Supp. 926, 927, 58 Hun, 337; *People v. Bliven*, 6 N. Y. Cr. R. 365, 371; *People v. Sanborn*, 14 N. Y. St. 120, 126; *People v. Brien*, 7 N. Y. Cr. R. 166, 171, 6 N. Y. Supp. 198; *People v. Fielding*, 55 N. Y. Supp. 530, 542, 36 App. Div. 401; *People v. Rivello*, 14 N. Y. Cr. R. 49, 50, 57 N. Y. Supp. 420; *People v. Wilzig*, 4 N. Y. Cr. R. 403, 416; *Cullinan v. Burkhard*, 84 N. Y. Supp. 825, 827, 41 Misc. Rep. 321; Pen. Code N. Y. 1903, § 29.

Every person who is present at the commission of a crime for the purpose of assisting in its accomplishment either by performing the principal felonious act or by standing watch, or by waiting in reserve, ready to render such aid as may be necessary to the success of the common criminal purpose, is a principal. *State v. Berger*, 96 N. W. 1094, 1095, 121 Iowa, 581.

In offenses less than felony all who aid, advise, or procure the commission of the offense, though absent at the time of its commission, are principals, while in all class-

es of offenses those present at the commission, giving aid and assistance, are principals. *State v. Munson*, 25 Ohio St. 381, 383.

A principal is one who is the actual perpetrator of the crime, or who is present aiding and abetting in the same. *Hatch v. State*, 15 Ga. 346, 347 (citing 1 Hill, 233, 615, 1 Chit. Cr. Law, 256).

Pen. Code, art. 78, defines a principal to be any person who advises or agrees to the commission of an offense, and who is present when the same is committed, whether he aids or not in the illegal act. *Taylor v. State*, 9 Tex. App. 100, 103.

A principal is one who, in furtherance of the commission of a crime, is actively engaged at the time the crime is actually committed in performing part of the work assigned him in connection with the plan and furtherance of the criminal purpose, whether he be present where the main act is to be accomplished or not. *Smith v. State*, 17 S. W. 552, 554, 21 Tex. App. 107.

McClain's definition of a principal in larceny as one who actually took the property, or assisted in the taking, or who forms or combines in the general plan and assists in receiving and disposing of the property, though not present at the taking, quoted with approval in *Pearce v. Territory*, 68 Pac. 504, 506, 11 Okl. 438.

It is error to instruct the jury that the presence of the accused at the time of the robbery, his failure to give the alarm, his silence, his inaction, and the supposed concealment of the offense by him were sufficient to authorize a conviction. The Code requires advice given, or an agreement entered into to commit the offense, coupled with an actual presence at the commission of the offense. *Ring v. State*, 42 Tex. 282, 283.

To constitute a principal in a felony, the person charged must be present, actually or constructively, aiding in some manner in the commission of the act; or the act must be done in his absence through some agency or instrumentality innocent in itself, which includes an innocent person employed by him for the purpose. *People v. Lyon* (N. Y.) 33 Hun, 623, 635.

All persons concerned in the commission of a crime, whether it is a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics, or idiots to commit any crime, or who by fraud, contrivance, or force occasion the drunkenness of another for the purpose of causing him to commit any crime,

or who by threats, menaces, command, or coercion compel another to commit any crime, are principals in any crime so committed. Rev. Codes N. D. 1899, § 6825; Pen. Code S. D. 1903, § 27; Rev. St. Utah 1898, § 4074.

All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, are principals. Rev. St. Okl. 1903, § 1948.

When an offense is actually committed by one person, but another is present, and, knowing the unlawful intent, aids by act or encourages by words or gestures the person actually engaged in the commission of the unlawful act, such other person is a principal offender. *Grinsinger v. State*, 69 S. W. 583, 587, 44 Tex. Cr. R. 1; *Walker v. State*, 16 S. W. 548, 549, 29 Tex. App. 621.

"A crime may consist of many acts, which must all be committed in order to complete the offense; but each person present consenting to the commission of the offense and doing any one act which is either an ingredient of the crime or immediately connected with or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense." *United States v. Reeves* (U. S.) 33 Fed. 404, 407.

In determining the question whether one accused of crime is liable as principal or principal offender, the inquiry is not as to what occurred prior to the commission of the given offense or subsequent thereto, but did the parties act together in its commission. *Welsh v. State*, 3 Tex. App. 413, 420.

Where it is sought to hold one amenable as a principal to some other person who actually commits the unlawful act, not only is his presence essential to be shown, but it must further be shown that he knew the unlawful intent of the party about to commit the crime, and that, knowing the unlawful intent, he aided him by acts and encouraged him by words in its commission. The mere presence of the party, nor the mere knowledge that an offense is about to be committed, nor knowledge that an offense is being committed, nor failure to give an alarm, his silence, inaction, or supposed concealment of the offense, will neither or any of them constitute him a principal offender. *Walker v. State*, 16 S. W. 548, 549, 29 Tex. App. 621.

#### **Same—Accessory before the fact distinguished.**

See "Accessory before the Fact."

#### **Same—Accomplice distinguished.**

The dividing line between a principal and an accomplice is the commencement of

the commission of the principal offense. If the parties acted together in the commission of the offense, they are principals. If they agreed to commit the offense together, but did not act together in its commission, the one who actually committed it is the principal, while the other who was not present at its commission, and who was not in any way aiding in its commission, as by keeping watch or by securing the safety or concealment of the principal, would be an accomplice. To constitute a principal, an offender must be either present where the crime is committed, or he must do some act during the time when the offense is being committed which connects him with the act of commission in some of the ways named in the statute. Where the acts occur prior to the commission of the principal offense or subsequent thereto, and are independent of and disconnected with the actual commission of the principal offense, and no act is done by the parties during the commission of the principal offense in aid thereof, such party is not a principal offender, but an accomplice or an accessory, according to the facts. *Bean v. State*, 17 Tex. App. 60, 61. Thus one who advises and agrees to the burning of a building, but is not present when the act was done, and did not act in furtherance of the design, is an accomplice, and not a principal. *Dawson v. State*, 41 S. W. 599, 600, 38 Tex. Cr. R. 50; *Bean v. State*, 17 Tex. App. 60, 61; *Smith v. State*, 17 S. W. 552, 554, 21 Tex. App. 107.

The distinction between "accomplice" and "principal" is a vexing one to always maintain. The general rule, however, seems to be that the act of the accomplice is a consummated act at the time the crime is committed. The act of the principal is somewhat in the nature of a continuous act. He is simply acting a part of a drama, so to speak, or a tragedy, as the case may be; but, in order to constitute one a principal when not actually present, he must be doing some act in pursuance of a common design at the time of the consummation of the crime, such as keeping watch, or preventing detection by any means or manner. *Mitchell v. State*, 70 S. W. 208, 209, 44 Tex. Cr. R. 228.

#### Same—Actual presence.

To constitute one a principal in felony he must be present at its commission. His presence may, however, be constructive, and this is established when it is shown that he acted with another in the pursuance of a common design, and was so situated as to be able to give aid to his associates with a view to insure the success of a common purpose. *McCarney v. People*, 83 N. Y. 408, 412, 38 Am. Rep. 456.

One who aids in the commission of a murder, in order to be held liable as a prin-

cipal, must be present at the transaction. If he is absent, he may be an accessory. *United States v. Hand* (U. S.) 26 Fed. Cas. 103, 104.

The presence need not always be an actual standing by within sight or hearing of the fact, but there may also be a constructive presence; as when one commits a robbery or murder, and another keeps watch or guard at a convenient distance. *Connaughty v. State*, 1 Wis. 159, 163, 60 Am. Dec. 370 (citing *Black*, Comm. 33; 1 *Hale*, P. C. 615; 1 *Russell on Crimes*, c. 2, p. 29).

It is not necessary that the presence at the commission of the offense be strictly actual and immediate, so as to make the person an eye or ear witness of what passes. It may be a constructive presence. Thus, if several persons set out in concert, whether together or apart, upon a common design which is unlawful, each taking the part assigned to him, some to commit the act and others to watch at a proper distance to prevent a surprise or to favor the escape of the immediate actors, all are in the eye of the law present and principals. *Mitchell v. Commonwealth* (Va.) 33 Grat. 845, 868.

When an offense is actually committed by one person, but another, who, not being actually present, keeps watch, so as to prevent the interruption of the person engaged in the commission of the crime, such person so keeping watch is a principal offender. *Grinsinger v. State*, 69 S. W. 583, 587, 44 Tex. Cr. R. 1.

A person does not cease to be a principal because personally absent, and aiding the criminal through an innocent agent. There can be no crime without a principal, and therefore a man whose sole will executes a criminal transaction is principal, whatever physical agency he employs, and whether he is present or absent when the thing is done. *Smith v. State*, 17 S. W. 552-554, 21 Tex. App. 107.

Pen. Code, § 29, provides that a person concerned in the commission of a crime, whether he directly does the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commits, or induces or procures another to commit a crime, is a principal. Actual presence at the commission of a crime is not necessary to constitute one a principal under the statute. *People v. Winant*, 53 N. Y. Supp. 695, 696, 24 Misc. Rep. 361.

A person charged in an indictment with a commission of a felony may be convicted on proof that, though absent when the crime was committed, he advised and procured its commission; and it is not necessary to set out in the indictment the facts showing the crime was committed through the agency of



another, but a conviction may be had under an indictment charging merely that defendant himself committed the crime for which the conviction is sought. *People v. McLaughlin*, 11 N. Y. Cr. R. 97, 109, 37 N. Y. Supp. 1005.

**Same—Degrees.**

Persons participating in a crime are either "principals" or accessories. Principals are such either in the first or second degree. Principals in the first degree are those who are the immediate perpetrators of the act. Principals in the second degree are those who did not with their own hand commit the act, but were present aiding and abetting it. *Mitchell v. Commonwealth (Va.)* 33 Grat. 845, 868.

A "principal in the first degree" is he who is the actor or absolute perpetrator of the crime charged; while a "principal in the second degree" is he who is present, aiding and abetting the act to be done. In an assault and battery not only he who is the actor or actual perpetrator of the offense, but he also who, being present when the act is done, aids and abets therein, is a principal, and liable in the suit of the injured party. *Cooney v. Burke*, 11 Neb. 258, 259, 9 N. W. 57.

In 1 Bish. Cr. Law, § 648, a principal of the first degree is defined as "one who does the act, either in person or through an innocent agent." A principal of the second degree is "one who is present, lending his countenance, aid, encouragement, or other mental aid while another does the act." Under the Constitution there is no such division of principals, but all are principals who are present encouraging the act, including both the one actually performing the act and others who may be present aiding in its performance. While there are no degrees under the statute, yet the principles governing the question who are principals are the same as at common law, and both at common law and under the statute it is not necessary to allege the facts relied on to show the party to be a principal though the offense may not have been actually committed by him, if he is a principal by reason of the part performed by him in the commission of the offense. If one enters into the commission of an offense with the same intent and purpose that another actually commits the offense, then his offense would be of the same degree as the actual doer; but he may have a different criminal intent from the one who perpetrates or does the act, and in such case he will be guilty according to the intent with which he may have performed his part of the act. *Red v. State*, 47 S. W. 1003, 1004, 39 Tex. Cr. R. 667, 73 Am. St. Rep. 965.

A "principal in the first degree" is he who is the actor or absolute perpetrator of

the crime charged; while a "principal in the second degree" is he who is present aiding and abetting the act to be done. In an assault and battery not only he who is the actor or actual perpetrator of the offense, but he also who, being present when the act is done, aids and abets therein, is a principal, and liable in the suit of the injured party. *Cooney v. Burke*, 11 Neb. 258, 259, 9 N. W. 57.

The principal in the first degree is he that is the actor or absolute perpetrator of the crime; and of the second degree he who is present aiding and abetting the act to be done, which presence need not always be an actual and immediate standing by within the hearing, but there may also be a constructive presence, as where one commits a murder or robbery, and another keeps watch or guard at some convenient distance. *Mulligan v. Commonwealth*, 8 Ky. Law Rep. 211, 212, 1 S. W. 417, 84 Ky. 229.

A man may be principal in one of two degrees. A principal in the first degree is he that is the actor or actual perpetrator of the crime, and in the second degree he who is present aiding and abetting the fact to be committed. *State v. Phillips*, 24 Mo. 475, 481 (citing *Chitty's Crim. Law*, 256).

A principal in the first degree is he that is the actor or absolute perpetrator of the crime. *Connaught v. State*, 1 Wis. 159, 164, 60 Am. Dec. 370 (citing 4 Bl. Comm. 33; 1 Hale, P. C. 615); *Travis v. Commonwealth*, 27 S. W. 863, 864, 96 Ky. 77 (citing 4 Bl. Comm. p. 34); *State v. Haines*, 25 South. 372, 373, 51 La. Ann. 731, 44 L. R. A. 837; *Pen. Code Ga.* 1895, § 42.

Blackstone, in his Commentaries, p. 34, says that a principal in the second degree is he who is present aiding and abetting the fact to be done. *Travis v. Com.*, 27 S. W. 863, 864, 96 Ky. 77; *State v. Haines*, 25 South. 372, 373, 51 La. Ann. 731, 44 L. R. A. 837; *Connaught v. State*, 1 Wis. 159, 163, 60 Am. Dec. 370; *Komrs v. People*, 73 Pac. 25, 31 Colo. 212.

"Principals in the second degree are those who do not with their own hands commit the act, but are present aiding and abetting it." *Walrath v. State*, 8 Neb. 80, 82 (quoting 3 Greenl. Ev. § 40).

A principal in the second degree is one who is present aiding and abetting at the commission of the felony. *Albritton v. State*, 13 South. 955, 956, 32 Fla. 358.

A principal in the second degree is he who is present, aiding and abetting the act to be done; which presence need not always be an actual, immediate standing by, within sight or hearing of the act; but there may be also a constructive presence, as when one commits a robbery or murder or other crime and another keeps watch or guard at

some convenient distance. Pen. Code Ga. 1895, § 42.

**Same—Silence and failure to prevent.**

The mere fact that a person knows that an offense has been committed, and remains silent, will not make him a principal; nor will the further fact that on the day following the commission of the offense such person concealed his knowledge of the offender's connection with it. *Schackey v. State*, 53 S. W. 877, 878, 41 Tex. Cr. R. 255.

Although a man be present while a felony is committed, if he takes no part in it, and does not act in concert with those who committed it, he will not be a principal merely because he did not endeavor to prevent the felony or apprehend the felon. Whether he was aware of the intention of his companions, and participated in it, is the fact to be proved in order to implicate him in the criminality of the act. *Burrell v. State*, 18 Tex. 713, 732.

**In wills.**

"Principal," as used in a will, which, after making a number of legacies, provided that the residuary estate, both real and personal, should be divided into two equal parts, one part of which should belong to a certain school in trust, the "principal" to be invested, and the income only to be applied for the benefit and use of the school, means the original gift, as distinguished from its income. *Gammon v. Gammon*, 38 N. E. 890, 891, 153 Ill. 41.

As used in a will providing that testatrix's two sons should share alike, and, if neither have children, the principal will come back to the children of a certain daughter, the daughter to get her full share, "principal" is synonymous with "share." The testatrix did not use it in the sense of a sum of money placed at interest. In *re Kennedy's Estate*, 42 Atl. 459, 461, 190 Pa. 79.

"Principal," as used in a will providing that a certain part of testator's estate should be held in trust, the income to be paid annually to a certain person during his life, and immediately upon his decease the trustee should pay over and transfer the principal thereof to the children of such person, implies that, in so far as the real estate might constitute a part of the trust estate, it might be converted into personalty. *Rhode Island Hospital Trust Co. v. Harris*, 37 Atl. 701, 702, 20 R. I. 160.

More commonly the word "principal" is used to denote a sum of money placed at interest or employed as a fund. As distinguished from its income or profits, the word itself has no strict legal meaning. The loose general idea involved in it is a source of income. A will provided that all of the testator's estate, real and personal, should

go to his children, share and share alike, and the executor was ordered to invest the estate so far as converted into money, and pay the interest and rents to the testator's children, and after the death of any child the principal to be paid over to such child's children. It was held that the word "principal" as used in the will involved in it a source of income. In *re Sheets' Estate*, 52 Pa. (2 P. F. Smith) 257, 267.

Where a will provided for a residuary legacy of all of testator's principal money, it was held to signify all of testator's capital. *Prichard v. Prichard*, L. R. 11 Eq. Cas. 232, 234.

**PRINCIPAL AND INTEREST.**

"Principal and interest," as used in a verdict for plaintiff for principal and interest, construed to mean the principal and interest demanded in the declaration. *Phillips v. Behn*, 19 Ga. 298-301.

**PRINCIPAL CHALLENGE.**

Challenges propter affectum were of two kinds: (1) For principal cause; and (2) to the favor. A challenge is called principal "because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triors." Co. Litt. 156b. It is "the naming of some exception, which, being found true, the law presently allows." Term. de la L. "Challenge"; *Temple v. Sumner* (N. H.) Smith, 226, 228; *State v. Howard*, 17 N. H. 171, 191.

A challenge for principal cause admits of no answer, counterplea, or qualification. If it be for kindred, it is immaterial that the juror is also of kin, though in a nearer degree, to the other party, or that, notwithstanding the kinship, the triors find him to be in fact indifferent. 7 Edw. IV, p. 4, pl. 12; *Brooke*, Abr. "Challenge," 167; Co. Litt. 157a; *Hunsdon v. Baker*, Cro. Eliz. 663; 21 Vin. Abr. 237, 238. No evidence is heard or considered except such as tends to show the existence or nonexistence of the particular fact alleged as the ground of the challenge. The triors are sworn to well and truly try whether the juror is a cousin, servant, or tenant, etc., as the case may be, of the party. *Barrett v. Long*, 3 H. L. Cas. 395, 400; *Rex v. Dolby*, 1 Car. & K. 238. A fact which, if established, was not, in judgment of law, inconsistent with indifference,—which admitted of qualification, and might be explained away by other evidence,—was never a ground of principal challenge. *State v. Sawtelle*, 32 Atl. 831, 836, 66 N. H. 488.

A principal challenge is a challenge to a juror which is sufficient, if established, to authorize the rejection of the juror as a

matter of right. It is the common-law term expressing the same meaning as the term "challenge for cause." Lord Coke says that "a principal cause or challenge is so called because, if it be found true, it standeth sufficient itself, without leaving anything to the conscience or discretion of the triors. Co. Litt. 155b." Or, as stated in Bacon's Abridgment, it is grounded on such a manifest presumption of partiality that, if found to be true, it unquestionably sets aside the juror. *Reynolds v. United States*, 98 U. S. 145, 154, 25 L. Ed. 244 (citing Bac. Abr. tit. "Juries," E. 1).

A principal challenge is such where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favor; as that a juror is of kin to either party within the ninth degree, that he is the party's master, servant, counselor, steward, or attorney, or of some society or corporation with him. All these are principal causes of challenge, which, if true, cannot be overruled. That a juror is a tenant of one of the parties is a ground of principal challenge *propter affectum*. *Harrisburg Bank v. Forster* (Pa.) 8 Watts, 304, 306.

The scruples of a juror, whether real or not, amounting to a predetermination to condemn, disregarding the evidence or disregarding the law, if declared by the juror or otherwise made known, form a legal ground for a principal challenge by the state or the accused in a capital case. *Commonwealth v. Leshner* (Pa.) 17 Serg. & R. 155, 160.

#### PRINCIPAL CONTRACT.

A "principal contract" is one entered into by both parties on their own accounts or in the several qualities they assume. Civ. Code La. 1900, art. 1771.

#### PRINCIPAL COURSE OF DRAINAGE.

The words "the principal course of drainage," used in a city charter, mean those lines along which the principal drainage does or would flow. *Bayha v. Taylor*, 86 Mo. App. 427, 441.

#### PRINCIPAL CREDITOR.

Where one creditor's claim is for sixty thousand dollars, and the claims of other creditors are each less than one hundred dollars, the former is entitled to administer as a "principal creditor," under Ballinger's Codes, authorizing such creditor to administer upon the estate. *In re Sullivan's Estate*, 65 Pac. 793, 795, 25 Wash. 430.

#### PRINCIPAL DEBTOR.

The words "principal debtor," as used in Bankr. Act 1867, § 33, are to be taken in their

ordinary legal acceptation, and do not include one liable as indorser on the notes of others, although the notes have been duly protested, and notice of nonpayment duly given. *In re Loder* (U. S.) 15 Fed. Cas. 780; *Id.* (U. S.) 15 Fed. Cas. 778, 779.

#### PRINCIPAL DEPARTMENT.

Act March 20, 1895, provides that certain officers and those whose appointment is subject to confirmation by the city council and the "heads of any principal department" of the city are not within the civil service act. At the time the act was passed there was no department in the city that had more than one head. Though the word "heads" is used in the plural and "department" in the singular, both words are used in connection in the singular in other parts of the act. Held, that the phrase "heads of any principal department" does not mean those at the head of a division or a department under the supervision of a subordinate; and therefore neither an assistant superintendent of police, an inspector of police, nor a captain of police is excepted from the act as a head of a principal department. *People v. Kipley*, 49 N. E. 229, 241, 171 Ill. 44, 41 L. R. A. 775.

#### PRINCIPAL DUTY.

The phrase, "one whose principal duty is superintendence," in the Massachusetts employers' liability act, giving a right of action for a personal injury caused to an employé by reason of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, was construed to include a superintendent actively exercising the duty of superintending, though he was also during the same time working with his hands. *Canney v. Walkeine* (U. S.) 113 Fed. 66, 51 C. C. A. 53, 58 L. R. A. 33.

#### PRINCIPAL LEGATEE.

"Principal legatee," as used in Code Civ. Proc. § 2643, providing that letters of administration may be granted to one or more of the "principal" or "specific" legatees qualified to act, if there is no qualified residuary legatee, or none who will accept, is not used as a synonym for "chief" or "most important" legatee, but has the force and effect rather of the word "general" legatee, and is meant to be descriptive of all legatees who are neither specific nor residuary. *Quintard v. Morgan* (N. Y.) 4 Dem. Sur. 168, 170.

#### PRINCIPAL OBLIGATION.

Where a mortgage was given to secure a debt of the mortgagor and such advances as should thereafter be made to him by

the mortgagee, such "indebtedness," and not the notes whereby it was evidenced, constituted the "principal obligation," within Civ. Code, § 2911, providing that a lien is extinguished by the lapse of the time within which, under the Code, an action can be brought on the principal obligation. *London & S. T. Bank v. Bandmann*, 52 Pac. 583, 584, 120 Cal. 220, 65 Am. St. Rep. 179.

### PRINCIPAL OFFICE.

Principal place of business synonymous, see "Principal Place of Business."

The principal office of a corporation as fixed by itself includes only such offices as are created by the charter, or by the directory in pursuance of the charter, for the administration of the corporate affairs proper; but such term does not necessarily include merely the administrative offices of the company, and as so used is synonymous with the word "headquarters." *Jossey v. Georgia & A. Ry.*, 28 S. E. 273, 274, 102 Ga. 706.

A corporation's principal office is the place where the principal affairs, business and otherwise, of the company are transacted. An office for the annual election of officers, while its business is done elsewhere, is not a principal office. *Milwaukee Steamship Co. v. City of Milwaukee*, 53 N. W. 839, 840, 83 Wis. 590, 18 L. R. A. 353.

### PRINCIPAL OFFICER.

A "principal officer" of a corporation is one whose oversight or agency exists either over the whole or some particular department of the general business of the corporation; as a president, who has ordinarily a general oversight over its entire business, a secretary over its records, or a treasurer over its moneys. Thus, where a railroad company, defendant in a suit, was held in trust by a foreign corporation, such corporation's "principal" agent in managing the road could not be held to be the defendant's principal officer within Rev. St. c. 120, § 18, authorizing the service of process in actions against corporations on its president, cashier, or other principal officer. *Farmers' Loan & Trust Co. v. Warring*, 20 Wis. 290, 291.

Under Pub. Laws, p. 579, § 241, authorizing the service of summons on the "president or other principal officer" of a corporation, it is held that the phrase "president or other principal officer" means the chief executive officer of the corporation, whether called chairman, president, or by any other title, and was not intended to include a general manager. *Dale v. Blue Mountain Mfg. Co.*, 31 Atl. 633, 167 Pa. 402.

### PRINCIPAL PLACE OF BUSINESS.

"Principal" means highest in rank, authority, character, importance, or degree;

most considerable or important; chief; main—as, the principal officers of a government, the principal men of a state, the principal productions of a country, the principal arguments in a case. As used in St. § 576, providing for the punishment of every corporation doing business in the state which shall fail to have its corporate name painted or printed on its principal place or places of business, "principal place of business" does not mean every place of business, but only its principal places, the word "principal" being given the meaning first stated above. *Standard Oil Co. v. Commonwealth*, 62 S. W. 897, 898, 110 Ky. 821.

The principal place of business under Gen. St. c. 710, providing that the personal property of certain corporations shall be assessed and set in the list of the towns in which such corporations have their "principal place of business" or exercise their corporate powers, is where the governing power of the corporation is exercised, where those meet in council who have a right to control its affairs and prescribe what policy of the corporation shall be pursued, and not where the labor is performed in executing the requirements of the corporation in transacting its business. *Middletown Ferry Co. v. Town of Middletown*, 40 Conn. 65, 69.

"Principal place of business," as used in Code Civ. Proc. § 169, allowing writs of attachment to issue out of the city court of New York against a domestic corporation whose principal place of business is not within the city of New York, means the place designated as the principal place of business of the corporation in its certificate of incorporation or amended certificate. *Blumenthal v. Hudson Boot & Shoe Mfg. Co.*, 15 N. Y. Supp. 826.

Within a statute requiring corporations to be taxed at the place where the principal office or place of business is located, the place where the principal affairs, business, and otherwise of the company are transacted is its principal place of business, and hence the mere fact that a steamship company had an office outside of the city of Milwaukee, on which was a sign with its name, etc., and at which the annual election of officers was held, but at which no other business was transacted, the entire business of the company being transacted in the city of Milwaukee, that city, and not the township outside, in which the election was held, was the corporation's principal place of business. *Milwaukee Steamship Co. v. City of Milwaukee*, 53 N. W. 839, 840, 83 Wis. 590, 18 L. R. A. 353.

The principal place of business of a corporation is no test of residence, whether of a corporation or natural person. A natural person might reside in one state, and have his principal, or, for that matter, his sole,

place of business in another state. *Guinn v. Iowa Cent. Ry. Co.* (U. S.) 14 Fed. 323, 324.

**Principal office synonymous.**

Laws 1892, c. 678, § 3, provides that the term "office of a corporation" means its principal place of business within the state, if it has any principal office therein; and that the office of a stock corporation shall be in the county, town, or city in which its business is principally carried on. Held, that the terms "principal office" and "principal place of business" are synonymous when used in respect to corporations organized under the law of the state. *People v. Barker*, 34 N. Y. Supp. 269, 270, 87 Hun, 341.

Code 1886, § 1595, provides that all corporations organized for the building, constructing, and operating a railroad must keep within the state a principal place of business. Section 3169 recites that an action to vacate the charter of a corporation must be brought in the circuit court of a county in which the corporation has its "principal office," or, if it has no principal office, of any county in which it does business. Construing such provisions together, it was held that "principal office" and "principal place of business" were synonymous terms. *State v. Mobile & G. R. Co.*, 18 South. 801, 804, 108 Ala. 29.

**PRINCIPLE.**

Conscience distinguished, see "Conscience."

"Principle" is defined by Webster to be in a general sense "a cause, a source, or origin of anything." "That from which a thing proceeds, as the principle of motion, the principle of actions; ground, foundation, that which supports an assertion; a source of action, or of reason and general truth." *People v. Stewart*, 7 Cal. 140, 143.

The word "principle," as used in a specification of error that commissioners, in assessing damages in condemnation proceedings, adopted an erroneous principle, is held to be inapplicable to a mistake of fact; the court observing that, "while we speak of a principle of law or a principle of ethics as meaning a tenet of a science, we never speak of a principle of fact." *New Jersey R. & Transp. Co. v. Suydam*, 17 N. J. Law (2 Har.) 25, 67.

The word "principle" is used by elementary writers on patent subjects with such a want of precision as to mislead. A principle in an abstract is a fundamental truth; an original cause; a motive. These cannot be patented, as no one can claim in either of them an exclusive right. *Singer v. Walmsley* (U. S.) 22 Fed. Cas. 207, 210.

**PRINCIPLE OF A MACHINE.**

That is called a "principle" in a machine which applies, modifies, or combines mechanical powers to produce a certain result. *Smith v. Pearce*, Fed. Cas. No. 13,089.

The distinction between a patent for a principle and a patent which can be supported is that you must have an embodiment of the principle in some practical mode described in the specification of carrying into actual effect; and then you take out your patent, not for the principle, but for the mode of carrying the principle into effect. A patent cannot be taken out solely for an abstract, philosophical principle; for instance, for any law of nature, or any property of matter, apart from the mode of turning it to account. A mere discovery of such a principle is not an invention in the patent law sense of the term. *Webster's Patent Cases*, 342, 683. However brilliant the discovery may be, to make it useful it must be applied to some practical purpose. Short of this no patent can be granted. *Le Roy v. Tatham*, 63 U. S. (22 How.) 132, 136, 137, 16 L. Ed. 366.

Principle may mean a mere elementary truth, or it may also mean constituent parts, as where a specification for a patent recites that "the contrivance by which the lessening of the consumption of steam is accomplished consists in the following principles." *Hornblower v. Boulton*, 8 Term R. 95, 105.

The word "principle," as applied to mechanics, is where two machines or things are made to operate substantially in the same way so as to produce a similar result, they are considered the same in principle; as where any of the mechanical powers, the lever, the screw, the wheel, etc., are used to accomplish certain purposes, the same powers being used in a somewhat different form to do the same thing, will not be a difference in principle. Whether the mechanical instruments be larger or smaller, whether their action be horizontal or vertical, the principle is the same. *Roberts v. Ward* (U. S.) 20 Fed. Cas. 936.

The word "principle" means the operative cause by which a certain effect is produced; the combination of certain mechanical powers; the mode of operation. Upon the question of principle we may arrive at a correct conclusion by ascertaining what is the result which the invention is designed to produce. Whatever is essential to produce the appropriate result of a machine, independently of its mere form, is a matter of principle. *Olcott v. Hawkins* (U. S.) 18 Fed. Cas. 639, 640.

**As mode of operation.**

By the term "principle" as applied to a machine is understood its mode or manner

of operation. *Latta v. Shawk* (U. S.) 14 Fed. Cas. 1188, 1190; *Goshen Sweeper Co. v. Bissell Carpet-Sweeper Co.* (U. S.) 72 Fed. 67, 74, 19 C. C. A. 13.

The "principle of a machine" is properly defined to be its "mode of operation," or that peculiar combination of devices which distinguishes it from other machines. *Burr v. Duryee*, 68 U. S. (1 Wall.) 531, 570, 17 L. Ed. 650, 660, 661; *Boyden v. Power-Brake Co. v. Westinghouse*, 18 Sup. Ct. 707, 716, 170 U. S. 537, 42 L. Ed. 1136.

By the principle of a machine or improvement of a machine, as used in the patent laws, is to be understood the peculiar mode, manner, or device by which the proposed result or effect is produced. *Pitts v. Wemple* (U. S.) 19 Fed. Cas. 762, 764; *Whittemore v. Cutter* (U. S.) 29 Fed. Cas. 1123, 1124.

The principle of a machine is the particular means of producing a given result by a mechanical contrivance. *Parker v. Stiles* (U. S.) 18 Fed. Cas. 1163, 1175.

#### As motion.

"In the minds of some men a principle means an elementary truth or power; so that, in the view of such men, all machines which perform their appropriate functions by motion in whatever way produced, are alike in principle, since motion is the element employed; but no one, however, in the least acquainted with the law, would for a moment contend that the principle in this sense is the subject of a patent, and, if it were otherwise, it would put an end to all patents for all machines which employed motion, for this has been known as a principle or elementary power from the beginning of time. The true legal meaning of the principle of a machine, with reference to the patent act, is the peculiar structure or constituent parts of such machine. The principles of two machines may be the same, although the form or proportions may be different. They may substantially employ the same power in the same way, though the external mechanism be apparently different. On the other hand, the principles of two machines may be very different, though their external structure may have great similarity in many respects." *Barrett v. Hall* (U. S.) 2 Fed. Cas. 914, 923.

By the "principles of a machine," within the meaning of the patent law authorizing a patent if the principles of a machine are new, either to produce a new or an old effect, is not meant the original elementary principles of motion, which philosophy and science have discovered, but the *modus operandi*, the peculiar device or manner of producing any given effect. The expansive powers of steam and the mechanical powers of wheels have been understood for

many ages; yet a machine may well employ either the one or the other, and yet be so entirely new in its mode of applying these elements as to entitle the party to a patent for his whole combination. If a machine produces several different effects by different combinations of machinery, and these effects are produced in the same way in another machine, and another effect added, the inventor of the latter is not entitled to a patent for the whole machine. *Whittemore v. Cutter* (U. S.) 29 Fed. Cas. 1123, 1124.

## PRINT—PRINTING.

See "Incidental Printing"; "Public Printing."

Webster defines "to print": (2) to take an impression of; to copy or take off the impress of; to stamp. (3) Hence, specifically to strike off an impression of or impressions of from types, stereotypes, or engraved plates, or the like, by means of a press; or to print books, hand bills, newspapers, and the like. (4) To mark off by pressure, to form an impression upon, to cover with figures by a press or something analogous to it; as to print calico, etc. Print, noun: A mark made by impression; a line, character, figure, or indentation made by the pressure of one body or thing upon another. (3) A printed cloth, a fabric, figures by stamping. *Arthur v. Moller*, 97 U. S. 365, 367, 368, 24 L. Ed. 1046.

As defined in *Bouvier's Law Dictionary*, printing "is the art of impressing letters, the art of making books or papers by impressing legal characters." *Le Roy v. Jamison* (U. S.) 15 Fed. Cas. 373, 376.

Prints are impressions on paper or some substance of engravings on copper, steel, wood, or stone, etc., representing some particular subject or composition. Prints, like paintings, embrace every variety of subjects, but differ very widely in the manner in which they are engraved. *Arthur v. Moller*, 97 U. S. 365, 368, 24 L. Ed. 1046 (citing *Homans' Enc. of Commerce*).

Printing is a process of multiplying the copies of a composition by sheets. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 192.

"Print" is a word of wide signification, but in its ordinary sense means to impress letters, figures, and characters by types and ink of various forms and colors on paper of various kinds or on some such yielding surface. *Forbes Lithograph Mfg. Co. v. Worthington* (U. S.) 25 Fed. 899, 900.

Printing is an art; it is more than a mere mechanical pursuit. A contract to do printing involves the element of personal ability or efficiency, so as not to be assigna-

ble without the consent of the other party. *Campbell v. Sumner County Com'rs*, 67 Pac. 866, 867, 64 Kan. 376.

"Printed copy," as used in Rev. St. § 4956, providing that a printed copy of the title of a book or other article shall be delivered or mailed to the Librarian of Congress, includes a copy of the title of a map which has the appearance of a printed one, whether made by an improved type, or with a pen, or without the aid of tracing paper; the result, and not the means by which the printing is accomplished, being the thing to be considered. *Chapman v. Ferry (U. S.)* 18 Fed. 539, 540.

#### Engraving synonymous.

"A print is defined to be a mark or form made by impression or printing; anything printed; that which, being impressed, leaves its form, as a butter print; a cut in wood or metal to be impressed on paper; the impression made; a picture; a stamp; the letters in a printed book." As used in 4 Stat. 436, providing that a person inventing any print or engraving, etc., shall have the right of printing, reprinting, etc., such cut or engraving for the term of twenty-eight years, it is synonymous with the term "engraving," as there used. *Wood v. Abbott (U. S.)* 30 Fed. Cas. 424, 425.

Printing is defined as the act, art, or practice of impressing letters, characters, or figures on paper, cloth, or other material, and it is not identical with the term "engraving," since engraving is defined as the act or art of producing on hard material incised or raised patterns, characters, lines, and the like, an impression from an engraved plate, block of wood, or other material; so that the engraving of certain certificates is not covered by a law directing the manner of public printing. In re American Bank-Note Co., 58 N. Y. Supp. 275, 276, 27 Misc. Rep. 572.

#### Letters.

In construing the statute prohibiting the mailing of obscene books, pamphlets, pictures, papers, writings, prints, or other publication, etc., the United States Supreme Court, in *United States v. Chase*, 10 Sup. Ct. 756, 135 U. S. 255, 34 L. Ed. 117, say: "In the statute under consideration the word 'print' is used as one of a group or class of words—book, pamphlet, picture, paper, writing, print—each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase 'or other publication,' which applies to all the articles enumerated, and defines each with the common quality indicated. It must, therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the statute, and not a private letter on the outside

of which there is nothing but the name and address of the person to whom it is written." *United States v. Warner (U. S.)* 59 Fed. 355, 356.

"Print," as used in Rev. St. § 3893, providing that every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character is unmailable matter, in its broadest sense may be an impression of either figures, characters, or letters. In the more common sense it is used as applicable to letters. *United States v. Harman (U. S.)* 83 Fed. 827, 828.

#### Pictorial illustrations.

Prints are impressions on paper, or engravings on copper, steel, wood, or stone representing some particular subject or composition, and which may be either colored or uncolored. Lithographs, pictures, or designs printed on paper from the lithographic stone, and on which they are traced or engraved, both when plain and when printed in colors, are commercially regarded as engravings. *Arthur v. Moller*, 97 U. S. 365, 368, 24 L. Ed. 1046 (citing *McElrath's Commercial Dict.*).

The copyright act of June 18, 1874 (18 Stat. c. 301, p. 78), declares that the words "print, cut and engraving" shall be applied only to pictorial illustrations or works connected with the fine arts. *Higgins v. Keuffel*, 11 Sup. Ct. 731, 733, 140 U. S. 428, 35 L. Ed. 470; *United States v. Marble*, 14 D. C. (3 Mackey) 32, 49.

"Print," as used in Rev. St. § 4952, providing that any engraving, cut, print, or photograph may be copyrighted, means a picture, something complete in itself, similar in kind to an engraving, cut, or photograph. It does not mean merely something printed on paper that is not intended for use as a picture, but is itself to be cut up and embroidered, and thus made into an entirely different article, as a balloon or a hanging basket. *Rosenbach v. Dreyfuss (U. S.)* 2 Fed. 217, 219.

In 4 Stat. 468, §§ 1, 8, providing that a citizen or resident of this country, if he be proprietor of any book, map, print, chromo, etc., may obtain a copyright therefor, print means a mark or form made by impression or printing; anything printed; that which, by being impressed, leaves its form, as a cut in wood or metal, to be impressed on paper; the impression made; a picture; a stamp; the letters in a printed book; an impression in an engraved plate; a picture impressed from an engraved surface. *Webst. Dict.*; *Worcester Dict.* It means, apparently, a picture; something complete in itself, similar in kind to an engraving, cut, or photograph, and includes a chromo lithograph. *Yuengling v. Schile (U. S.)* 12 Fed. 97, 107.

Pictures printed in successive colors on metal plates, from which part of the metal has been cut so as to leave portions thereof in relief, were entitled to copyright as prints, within Rev. St. § 4936, authorizing the copyright of any book, chart, cut, print, etc. *Hills & Co. v. Austrich* (U. S.) 120 Fed. 862, 863.

#### As publish.

The word "printed," as used in a statute requiring notice of foreclosure to be published in a newspaper printed in the county, does not include a newspaper published in the county, as a newspaper may be published in a county and yet not be printed there. *Bragdon v. Hatch*, 1 Atl. 140, 77 Me. 433 (citing *Blake v. Dennett*, 49 Me. 102).

"Print," as used in a statute requiring notice of judicial sale to be published in a paper printed in the county where such sale was to be made, was used in the sense of "publish," so that a publication in a paper published in the county, but not wholly printed therein, is sufficient. *Ætna Life Ins. Co. v. Wortaszewski*, 88 N. W. 855, 63 Neb. 636.

Code Iowa, § 2619, providing that the publication of notice in actions against non-residents must be made by publishing in some newspaper printed in the county where the petition is filed, should be construed to include a paper which had what is termed a "patent inside," printed in Chicago, but the outsides of which were received in the county where a petition was filed with the outside in blank, and the work was done in such county, which conferred on those sheets the characteristics which converted them into copies of the Spirit Lake Beacon; for to constitute a paper printed in the county it is not necessary that the whole paper be printed therein, but where the owners of such paper live in the county, have their sole place of business therein, and that portion of the paper which identified it and made it the paper it was called was printed in such county, such paper must be considered as in fact printed in that county. *Palmer v. McCormick* (U. S.) 30 Fed. 82, 83.

#### Setting up type, etc.

A newspaper, the entire matter for which is composed, set up, and placed in forms in H., after which the forms are sent to another city, where the presswork is done, and the papers are then brought back to the office in H., from whence they are issued to subscribers, is "printed and published" in H., within the meaning of P. L. p. 68, requiring the council proceedings to be published in certain newspapers printed and published in such city. The composition of the matter, the setting of the type, and preparing the forms for presswork constitute the sub-

stantial and important part of the printing. *Bayer v. City of Hoboken*, 44 N. J. Law (15 Vroom) 131, 133.

#### Typewriting.

Eq. Rule 111, § 14, provides that all bills, answers to bills, etc., shall be printed on white paper of convenient size, and that the prothonotary shall not permit any unprinted pleadings to be filed, etc. Under Act June 18, 1895 (P. L. 125), typewriting is given the same legal force, meaning, or effect as writing, so that a bill or answer to a bill, etc., in typewriting does not comply with the equity rule. *Sunday v. Hagenbuch*, 18 Pa. Co. Ct. R. 540, 541.

#### Writing.

The words "writing" and "written" include "printing" and "printed" except in the case of signatures and when the words are used by way of contrast to "printing." Writing may be made in any manner, except that when a person entitled to require the execution of a writing demands it to be made with ink it must be so made. Rev. Codes N. D. 1899, § 5137; Civ. Code S. D. 1903, § 2471.

#### PRINT WORKS.

The term "print works," as used in all laws relative to the employment of labor, shall mean any premises in which is carried on the process of printing figures, patterns, or designs upon cotton, linen, woolen, worsted, or silken yarn or cloth, or upon any woven or felted fabric which is not paper. Rev. Laws Mass. 1902, p. 917, c. 106, § 8.

#### PRINTED CIRCULAR.

The words "printed circular" in its usual acceptance in common language is synonymous with the word "handbill," and therefore an indictment for libel, charging in one count that the alleged libelous statements were contained in a printed circular and handbill, is not bad for duplicity on the ground that a circular is one thing and a handbill another. *People v. McLaughlin*, 68 N. Y. Supp. 1108, 1109, 33 Misc. Rep. 691.

#### PRINTED MATTER.

"Printed matter," as used in Rev. St. tit. 33, § 2502, imposing a tax of 25 per cent. ad valorem on all books, pamphlets bound or unbound, and all "printed matter" not specifically enumerated or provided for in the act, etc., applies only to articles ejusdem generis with books and pamphlets, and does not include show cards printed from lithographic stones by hand presses in the ordinary manner. *Forbes Lithograph Mfg. Co. v. Worthington*, 10 Sup. Ct. 180, 182, 132



U. S. 655, 33 L. Ed. 453, affirming Id. (U. S.) 25 Fed. 899, 900.

"Printed matter," as used in Rev. St. § 2504, laying a tariff duty on engravings, maps, charts, illustrated papers, and printed matter, includes certain chromo lithographs printed from oil stones upon paper, and known as "decalcomanie pictures." *Arthur v. Moller*, 97 U. S. 365, 368, 24 L. Ed. 1046.

#### PRINTED PUBLICATION.

In Walk. Pat. § 56, it is said that a printed publication is anything which is printed, and, without any injunction or secrecy, is distributed to any part of the public in any country. The statute permitting the introduction of printed publications in evidence goes upon the theory that the work has been accessible to the public, and that the invention has thereby been given to the public, and is no longer patentable by any one. *Collier v. Stinson* (U. S.) 20 Fed. 906, 910.

#### PRINTER.

See "City Printer."

##### Editor.

1 Dig. 61, requires that orders of publication against absent defendants shall be certified by the printer in whose paper the order was published. Held, that the term "printer" means not one who merely performs the mechanical process of printing, but one having an interest as owner of the paper in which the order is published; and hence a certificate of an editor is no compliance with the statute. *Brown v. Wood's Heirs*, 29 Ky. (6 J. J. Marsh.) 11, 18.

The word "printer," as used in a statute requiring proof of a publication in a newspaper to be made by the affidavit of the printer, etc., does not mean the person who sets up the type. It is rather used as synonymous with "publisher," and such provision is satisfied when the affidavit is made by the editor of the paper. *Pennoyer v. Neff*, 95 U. S. 714, 721, 24 L. Ed. 563, overruling *Neff v. Pennoyer* (U. S.) 17 Fed. Cas. 1279, where it was held that, under Code Or. § 69, providing that in case of publication of summons the proof of service shall be by the "affidavit of the printer or his foreman or his principal clerk," an affidavit to such a publication by one styling himself "editor" is not within the statute, which is imperative, and admits of no proof of service but the affidavit of the printer or his foreman or his principal clerk.

##### As laborer or mechanic.

See "Laborer"; "Mechanic."

##### As manufacturer.

See "Manufacturer."

#### Publisher or proprietor.

"Printer," as used in a statute requiring that proof of a publication shall be made by affidavit of the printer of a newspaper in which the publication is made, does not indicate the person who sets the type, but is used as synonymous with "publisher." *Pennoyer v. Neff*, 95 U. S. 714, 721, 24 L. Ed. 563; *Bunce v. Reed* (N. Y.) 16 Barb. 347, 350.

A statute requiring an affidavit of the publication of a summons to be made by the "printer" is satisfied by an affidavit made by one who styles himself to be the "publisher and proprietor." *Sharp v. Daugney*, 33 Cal. 505, 518.

The word "printer" in a statute requiring the affidavit of the publication of a summons to be made by the printer, is satisfied by the use of the word "proprietor," as the words in the sense used are synonymous. *Quivey v. Porter*, 37 Cal. 458, 464; *Woodward v. Brown*, 51 Pac. 2, 7, 119 Cal. 283, 63 Am. St. Rep. 108.

#### PRIOR.

"Prior to the passage," as used in Code, § 1249, providing that "a homestead may be sold on execution for debts contracted prior to the passage of this law," amounts to the same thing as if the Legislature had used the word "heretofore," and either must relate to the time of taking effect, and not to the time of the passage. *Charles v. Lamberston*, 1 Iowa (1 Clarke) 435, 443, 63 Am. Dec. 457.

"Prior to," as used in a lease providing that the lessors should have the privilege of terminating it at any time upon giving six months' notice of their intention to do so "prior to" the 1st day of July of any year during the lease, cannot be construed as synonymous with "on." *Quidort v. Bullitt*, 36 Atl. 881, 882, 60 N. J. Law, 119.

The words "prior to shipment," as used in a fire insurance policy expressed to cover the risk of fire on shore for ten days prior to shipment, means for ten days after the issuance of the policy. *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 7 Atl. 905, 910, 66 Md. 339, 59 Am. Rep. 162.

Under chapter 132, Sp. Laws 1875, providing that notice of the time, place, and object of a meeting to vote on the question of issuing bonds to aid in the construction of a railway should be posted at least ten days prior to the meeting, notices posted on the 13th day of May of a meeting to be held on the 23d was sufficient. *Coe v. Caledonia & M. Ry. Co.*, 27 Minn. 197, 6 N. W. 621.

In order to be enabled to offer evidence to impeach a certificate in bankruptcy on ac-

count of "some fraud or willful concealment by him of his property," the "prior reasonable notice, specifying in writing such fraud or concealment," required by the bankrupt act, should be by replication to the defendant's plea seasonably filed, or by written notice seasonably given, setting forth in either case specifically the fraud and concealment, and wherein it consisted, as if it were a special declaration in an action on the case. *Chadwick v. Starrett*, 27 Me. 138, 143.

### PRIOR APPROPRIATION.

In reference to the right to flowing water "prior appropriation" means the right which the first or original user thereof has as against the right of the riparian proprietor. It is the outgrowth of a custom among the people of the Western states, and is now recognized in such states usually by statutes. *Drake v. Earhart*, 23 Pac. 541, 542, 2 Idaho (Hasb.) 750.

The doctrine of prior appropriation of water confers upon a riparian owner or one having title to a water right by a grant from him the right to the use of the water of a stream which would be unreasonable at common law, and to this extent the doctrine of prior appropriation may be said to have abrogated the common-law rule. *Smith v. Denniff*, 60 Pac. 398, 399, 24 Mont. 20, 81 Am. St. Rep. 408.

### PRIOR CLAIMS.

"Prior claims," as used in an entry of land which calls for a certain number of acres "exclusive of prior claims," but gives no data by which the situation or extent of those claims can be ascertained by a subsequent locator, does not mean every species of claim, no matter how vague, and no matter whether it be surveyed or not, but intended such claims only as were valid in law. *Stansberry's Heirs v. Pope* (6 J. J. Marsh.) 29 Ky. 189, 192.

### PRIOR LIENS.

As between two liens, or in a class of liens, the one superior to the others very properly can be said to be "prior." *Fidelity Ins. Trust & Safe Deposit Co. v. Roanoke Iron Co.* (U. S.) 81 Fed. 439, 447.

Rent due under a coal lease is not a "prior lien" under Act April 6, 1830, relating to mortgages, so that a mortgage of the leasehold will be discharged by a sheriff's sale of the term under an execution against the lessee. By such act was meant such liens as appear of record in the ordinary course—judgments, mechanics' liens, and the like. *Miners' Bank of Pottsville v. Heilner*, 47 Pa (11 Wright) 452, 459.

### PRIOR NEGLIGENCE.

"Prior negligence" will usually be found substantially the same as negligence that is regarded as a remote cause of the injury. *Holwerson v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 775, 157 Mo. 218, 50 L. R. A. 850.

### PRIOR PAVEMENT.

To constitute a "prior pavement" within the meaning of Laws 1870, c. 383, in relation to local improvements, where the assessment in question is for paving the traveled part or carriageway of a street, there must have been a substantial pavement of that portion of the street. Although a street has been curbed, guttered, and a narrow strip on each side laid with cobble stones for the purpose of binding and protecting the gutter stones, and although the sidewalks have been flagged and crosswalks laid, this is not a prior pavement. *In re Brady*, 85 N. Y. 268, 270.

### PRIORITY.

"Priority" is a relative or comparative term. An "adjudication of priorities," within the meaning of the irrigation acts, is the judicial determination of the claims of different parties to the use of water for irrigation within the same irrigation district. *People v. Downer*, 36 Pac. 787, 788, 19 Colo. 595.

As used in Election Law, § 56, as amended by Laws 1901, c. 654, § 3, providing that a dispute arising from the substantial identity of names or emblems chosen by two or more political parties or independent bodies to designate their tickets is to be determined by the officer with whom a certificate of nomination is filed, being governed as far as possible in his decision by "priority of designation" in the case of a device or emblem, and of use in the case of the party name, does not mean strict priority in filing of the certificate for the purpose of election of the current year. If it did, a direct statement to that effect in the statute would naturally be looked for since a simple means of determining the dispute would then be afforded. The matter evidently depends upon the priority, use, and designation as a fact, and this leaves open an inquiry into the substantial rights of the contesting parties to the name and emblem for election purposes. *In re Smith*, 73 N. Y. Supp. 463, 464, 36 Misc. Rep. 292.

Under Code Civ. Proc. § 2719, providing that judgments docketed against a defendant shall be paid according to their priority, such judgments are payable in the order in which they were docketed, since the word "prior" can signify nothing but priority in

point of time when applied to a judgment. In *re Townsend*, 81 N. Y. Supp. 409, 410, 83 Hun, 200.

## PRISE

The word "prise," as used in maritime law, has the same sense as "capture" in English, and is used to designate not only a lawful taking or seizure in lawful war by the acts of governments, but any other detention on the sea. *Dole v. New England Mut. Marine Ins. Co.*, 88 Mass. (6 Allen) 373, 388, 389.

## PRISON.

See "State Prison."

"A prison," says Jacob in his *Law Dictionary*, "is a place of confinement for the safe custody of persons in order to their answering in any action, civil or criminal." *Scarborough v. Thornton*, 9 Pa. (9 Barr.) 451, 454.

St. 1887, c. 435, provides that whoever has been twice convicted of crime, sentenced, and "committed to prison" in this or any other state, or once in this and once at least in any other state, for terms of not less than three years each, shall on conviction of felony committed in this state after the passage of this act be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for twenty-five years. Held, that the act did not discriminate against persons who had been sentenced to state prison as against those sentenced to other places of imprisonment, since the words "committed to prison," as used in that statute, were not limited to states' prisons, but included all places of imprisonment or confinement. *Sturtevant v. Commonwealth*, 33 N. E. 648, 649, 158 Mass. 598.

The term "prison," as used in the chapter of the Penal Code relating to escapes, includes the penitentiary, county jails, and every place designated by law for the keeping of persons held in custody under process of law, or under any lawful arrest. Rev. Codes N. D. 1899, § 6956; Pen. Code S. D. 1903, § 152.

The term "prison," as used in the chapter of the Penal Code relating to escapes and aiding therein, means any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest. Pen. Code N. Y. 1903, § 92.

The term "prison," as used in the Penal Code, includes territorial prisons; also any other prison in any other territory or state in which this territory has the right by contract or otherwise to incarcerate persons convicted of crime in this territory; and also

county jails and every place designated by law for the keeping of persons held in custody under process of law or under any lawful arrest. Rev. St. Okl. 1903, § 2068.

## PRISON BREACH.

Prison breach is the crime of breaking out of prison. *Randall v. State*, 22 Atl. 46, 53 N. J. Law (24 Vroom) 488.

## PRISON CHARGES.

The term "prison charges," as used in St. 1821, c. 59, § 8, providing that plaintiff's agent or attorney who shall indorse his name on the original writ shall be liable in case of inability of plaintiff to pay defendant all costs that he shall recover and to pay all prison charges that may happen where plaintiff shall not support his action, do not include the sheriff's fees on execution rendered against plaintiff and in favor of defendant, nor does it include the officer's fees for committing the original plaintiff to prison, such expenses not being incurred in prison. *How v. Codman*, 4 Ma. (4 Greenl.) 79, 82.

## PRISONER.

All prisoners, see "AIL."

A "prisoner" is a person deprived of his liberty by virtue of a judicial or other lawful process. Authority granted by resolution of a city council, directing the marshal to work prisoners, does not confer the right to require those in custody, but illegally imprisoned, and not sentenced to hard labor, to be thus employed. *Royce v. Salt Lake City*, 49 Pac. 290, 292, 15 Utah, 401.

The verdict of a jury in a criminal case is always to be read in connection with the indictment, and if, on reading them together, the meaning of the verdict is certain, this is sufficient. A verdict finding a prisoner guilty by the use of the word "prisoner" identifies the person named in the indictment, in custody, and on trial as the person guilty of the offense. *Hairston v. Commonwealth*, 32 S. E. 797, 97 Va. 754.

A prisoner while within the prison bounds, established by the court of common pleas in pursuance of the statutes, which are to be considered as an extension of the four walls of the prison, is to all legal intents a prisoner, and as such is entitled to the support given by the act for the relief of insolvent debtors. *Buttles v. Carlton*, 1 Ohio (1 Ham.) 33, 34.

A prisoner who gives security for the prison bounds, while thenceforward no longer in the custody of the sheriff more than as may be sufficient to protect the sheriff against any suit which the creditors may

bring against him for not confining the debtor within the walls of the prison, is nevertheless a true prisoner, being in the custody of the law. *Meredith's Adm'x v. Duval* (Va.) 1 Munf. 76, 80.

The term "prisoner," as used in the chapter of the Penal Code relating to escapes and aiding therein, means any person held in custody under process of law or under lawful arrest. Pen. Code N. Y. 1903, § 93; Gen. St. Minn. 1894, § 6368.

The term "prisoner," as used in the chapter of the Penal Code relating to escapes, includes every person held in custody under process of law issued from a court of competent jurisdiction, whether civil or criminal, or under any lawful arrest. Rev. Codes N. D. 1899, § 6957; Pen. Code S. D. 1903, § 153; Rev. St. Okl. 1903, § 2069.

Under a statute providing that in case of the escape of any prisoner committed for debt the sheriff shall stand chargeable to the creditor or person to whose use any forfeiture was adjudged, it is held that a person committed on mesne process is not a person committed for debt, since the court observes, to construe the terms "prisoner committed for debt" to embrace prisoners committed on mesne process, is not only giving them a meaning which they do not usually have in common parlance, but is extending their meaning so as to embrace cases not within the terms of any sound reason whatever. *Lovell v. Bellows*, 7 N. H. 375, 389.

## PRIVACY.

See "Right of Privacy."

## PRIVATE.

See "Things Private."

Mr. Webster says that, in general, "public" expresses something common to mankind at large, to a nation, state, city, or town, and is opposed to "private," which denotes that which belongs to an individual, to a family, to a company or a corporation. *Chamberlain v. City of Burlington*, 19 Iowa, 395, 402.

The word "private," as used in a plat marking a certain square, simply indicates that the square was donated for the use of individuals that might thereafter become lot owners abutting on the square, and not to the general public. *Smith v. Heath*, 102 Ill. 130, 140.

In an action for malicious prosecution the word "private," as used in an instruction that, if the defendant had no cause of action, but "prosecuted his suit to secure private and ulterior benefits, etc., this was conclusive evidence of malice," did not refer

to individual interests or purposes as distinguished from public, but meant "concealed," and referred to secret purposes, which the suit itself had no tendency to disclose, although it is true, as an abstract proposition, that every suit brought by private parties is for private purposes, and is often for purposes beyond the mere judgment recovered—as to prevent a repetition of the injury, etc.—and therefore the purposes of a suit may properly be both private and ulterior. *Spain v. Hower*, 25 Wis. 625, 630.

## PRIVATE ACT.

A "private act," as defined by Blackstone, "is one which operates only upon particular persons and private concerns, such as the Romans entitled 'senatus decreta' in contradistinction to the 'senatus consulta,' which regarded the whole community; and of these the judges are not bound to take notice unless they be formally shown. Thus to show the distinction the statute, 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years or their lives, is a public act, being a rule prescribed for the whole body of spiritual persons in the nation, but an act to enable the Bishop of Chester to make a lease to A. B. for sixty years is an exception to this rule, it concerning only the parties and the bishop's successors, and is therefore a private act." *Unity v. Burrage*, 103 U. S. 447, 454, 26 L. Ed. 405; *Ex parte Burke*, 59 Cal. 6, 11, 43 Am. Rep. 231.

A "private act" is defined in Burrill's Law Dictionary as one which relates to particular classes or particular persons or places. *Allen v. Hirsch*, 8 Or. 412, 423.

A private bill, act, or law relates only to particular persons or particular classes of men and their private concerns. *Fall Brook Coal Co. v. Lynch*, 47 How. Prac. 520 (citing 1 Bl. Comm. 459, 2 Burrill's Law Dict. 335). A private act has been defined to be an act operating only on particular persons and private concerns. *People v. Palmer*, 35 N. Y. Supp. 222, 225, 14 Misc. Rep. 41; *Allen v. Hirsch*, 8 Or. 412, 415; *People v. Wright*, 70 Ill. 388, 398.

Private statutes are such as relate to, concern, and affect particular persons, or something in which individuals or classes of persons are interested in a way and degree peculiar to them, and not common to the whole community. *State v. Chambers*, 93 N. C. 600, 602.

A private bill "is one relating to any particular place, or to several particular places, or to one or several particular counties." Kent defines a private bill, as "such as concern the particular interest or benefit of certain individuals, or particular classes of men; operating on a particular thing or pri-

vate person." *People v. Chautauqua County Sup'rs*, 43 N. Y. 10, 17.

Private acts are those which concern only a particular species, thing, or person, as acts relating to a particular place, or to one or divers counties. *Bretz v. City of New York* (N. Y.) 3 Abb. Prac. (N. S.) 478, 479.

A private statute relates to or affects a particular person by name, or so that certain individuals or classes of persons are interested in a manner peculiar to themselves and not in common with the entire community. *Sasser v. Martin*, 29 S. E. 278, 281, 101 Ga. 447.

Private or special statutes, says Sedgwick in his work on Statutory and Constitutional Law, relate to certain individuals or particular classes of men. In Smith on Constitutional Construction it is said that "the distinction between public and private statutes is this: A general or public act is a universal rule that regards the whole community, but special or private acts are rather exceptions than rules, being those which operate upon private persons and private concerns." Page 917, § 802. *People v. Wright*, 70 Ill. 388, 398.

"Abbott in his Law Dictionary defines a private act to be an enactment which does not affect the public at large, but bears on individuals only; such as an act settling the title to, or authorizing the sale of a particular parcel of land; an act allowing a person's claim against government and directing payment." Laws 1867, c. 846, incorporating the New York Board of Fire Underwriters, was a public act so far as it authorized the board to provide a fire patrol to be under the control of the fire department while on duty at a fire, with suitable apparatus to save property or life, and giving the patrol power to enter any building on fire or in danger of taking fire; such statute being a delegation of police power. *New York Board of Fire Underwriters v. Metropolitan Lloyds*, 33 N. Y. Supp. 547, 11 Misc. Rep. 646.

The terms "local act" or "private act" in the constitutional provision providing that no private or local bill shall embrace more than one subject, and that shall be expressed in the title, does not apply to an act regulating the amount and manner of paying the officers or any given number of the officers of a county of the state for their official services when such services are rendered in, and form a part of, the administration and execution of the laws of the state, and affect equally the whole citizens thereof who come within their range. *Connor v. City of New York*, 5 N. Y. (1 Seld.) 285-297.

A private act relates to private, and not public, interests, and to individual cases, and not to a whole community. The provi-

sions amending the charter of the city of New York, enacted April 14, 1857, providing that no member of the common council shall receive any compensation for his services, is not a private act within the meaning of Const. art. 3, § 16, providing that no private act shall embrace more than one subject, which shall be expressed in the title, for by the act it was intended to regulate the government of a city containing a large portion of the population of the state. *Phillips v. City of New York* (N. Y.) 1 Hill. 483, 489.

Statutes are public or private. A private statute is one which concerns only certain designated persons, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations. Ann. Codes & St. Or. 1901, § 735; Rev. St. Utah 1898, § 3377.

A private statute is one which concerns only certain designated individuals, and affects only their private rights. Code Civ. Proc. Cal. 1903, § 1898.

The term "private bill," as used in the title on public printing, shall be construed to mean all bills for the relief of private parties, bills granting pensions, and bills removing political disabilities. U. S. Comp. St. 1901, p. 2554.

#### Class laws.

A law which relates to persons or things as a class is general, but when it relates to particular persons or things of a class it is special or private. In re New York Elevated R. Co., 8 Abb. N. C. 401, 417, 422.

A law which should provide for one case only in a proper case should be held to be a general law. It is not required that all general laws shall be equally general. A law legislating for a class is a general law when it is for a class "requiring legislation peculiar to itself in the matter covered by the law." A law relating to particular persons or things as a class is said to be general, while a law relating to particular persons or things of a class is deemed special and private. Whether such laws are to be deemed general laws or special depends very much upon whether classification is appropriate. Certain rules by which the propriety of the classification may be tested have been stated by courts, and have become well established. These rules are applied by the decisions with varying strictness. The main difficulty is in the application of the rules. One rule is, all classification must be based upon substantial distinctions which make one class really different from another. *Johnson v. City of Milwaukee*, 60 N. W. 270, 271, 88 Wis. 383.

A law applicable to a special class of persons is a public and general law, and has

none of the provisions of a private act. *Milwaukee Co. v. Isenring*, 109 Wis. 9, 85 N. W. 131, 53 L. R. A. 635.

**As law.**

See "Law."

**As local law.**

The word "private" as applied to a statute is often, and perhaps generally, used as synonymous with "local." *Kerrigan v. Force*, 68 N. Y. 381, 383.

All local statutes are not private statutes. For example, such as create and regulate counties are local in an important sense, but are not private. A statute forbidding the sale of liquors within two miles of a certain locality is a local statute, but not a private one. *State v. Chambers*, 98 N. C. 600, 602.

**As a record.**

See "Record."

**PRIVATE ACTION.**

Actions are of two kinds—public and private. A private action may be maintained for the enforcement or protection of a private or individual right or redress, or prevention of a wrong done or threatened to the person in his individual character. To maintain it, it must appear that some personal right has been or is about to be invaded, or that the party is entitled to have such right enforced or protected in a court of justice. The suitor must make title in a private capacity to the relief demanded. *Ketchum v. City of Buffalo*, 14 N. Y. (4 Kern) 355, 370.

**PRIVATE ATTORNEY.**

A "private attorney" is an attorney employed by and in the interest of private persons and one not paid out of public funds. He is one who has a special interest in the securing of a conviction, being employed by private persons to prosecute. *State v. Whitworth*, 66 Pac. 748, 751, 28 Mont. 107.

**PRIVATE BANKER.**

A private banker is a person or firm, not a corporation, engaged in banking, without having special privileges or authority from the state. In re *Surety Guarantee & Trust Co.*, 121 Fed. 73, 74, 56 C. C. A. 654 (citing *Perkins v. Smith*, 116 N. Y. 441, 23 N. E. 21); *Sexton v. Home Ins. Co.*, 54 N. Y. Supp. 862, 863, 35 App. Div. 170; *People v. Doty*, 80 N. Y. 225, 228. The term has a definite signification, and is applied only to individuals or to a firm, and does not comprehend corporations. In re *Surety Guarantee & Trust Co. (U. S.)* 121 Fed. 73, 74, 56 C. C. A. 654.

The proper phrase for a banker who exercises in his business no more than the rights and privileges common to all men, as distinguished from a bank or association or person who has taken advantage of the provisions of statutes, and by a compliance with the conditions of them as privileges not natural and common, is not "individual banker"; it is "private banker." He is private in his business, inasmuch as he may conduct it as he pleases within law, and is not subject to visitation or scrutiny by the state; while those who have started a banking business under an enabling statute are public, inasmuch as the public have given them the right, and have the power to demand securities and have reports, and to make inquiry into the business and how it is conducted. *People v. Doty*, 80 N. Y. 225, 233.

Private bankers are declared to be those who carry on the business of banking by receiving money on deposit with or without interest, by buying and selling bills of exchange, promissory notes, gold or silver coin, bonds or stock or other securities, or of loaning money, without being incorporated. Rev. St. Mo. 1899, § 1298.

Private bankers are those who, without being incorporated, carry on the business of banking. Rev. St. Utah 1898, § 384.

**PRIVATE BILL.**

See "Private Act."

**PRIVATE BRIDGE.**

A bridge built for the mere purpose of connecting a private mill with a public highway, or for any other such similar private purpose, but which the public occasionally uses, will not be construed, on account of such use, as necessarily a part of the highway, or as being within the highway, within the meaning of a statute making all bridges in a highway public bridges. *Rex v. Inhabitants of Bucks' County*, 12 East, 192, 203.

**PRIVATE BUSINESS CORPORATION.**

See "Private Corporations."

**PRIVATE CARRIER.**

"Private carriers" are such as carry for hire, and do not come within the definition of a common carrier. *Varble v. Bigley*, 77 Ky. (14 Bush) 693, 703, 29 Am. Rep. 435 (citing *Ang. Carr.* § 46).

"A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward." *Pennewill v. Cullen (Del.)* 5 Har. 238-241.

Private carriers are those who undertake the transportation in a particular instance only, not making it their vocation, nor holding themselves out to the public as ready to act for all who desire their services. *Brown v. New York Cent. & H. R. R. Co.*, 27 N. Y. Supp. 69, 71, 75 Hun, 355 (citing Abb. Law Dict.).

Those who undertake the gratuitous carriage of goods are deemed "private carriers," and held liable only as mandatories; that is, only for losses resulting from gross negligence. *Rogers v. Kennebec Steamboat Co.*, 29 Atl. 1069, 1072, 88 Me. 261, 25 L. R. A. 491.

Private carriers are such as carry for hire but do not come within the definition of a common carrier. *Varble v. Bigley*, 77 Ky. (14 Bush) 698, 703, 29 Am. Rep. 435 (citing Ang. Carr. § 46).

### PRIVATE CHARITY.

A bequest directed to be given in private charity does not create a trust, and cannot be carried out as a general charity, its object being too indefinite to enable the court or crown to execute it as a trust; while, on the other hand, the object being private, it cannot be enforced by the court or crown as a general charity, all charities thus enforceable being necessarily public in nature. The general principle is that the trust must be of such tangible nature that the court can deal with it. When it is mixed up with general moral duty, it is not a subject of jurisdiction of the court. Hence, where a testator devised money to be given "in private charity," such money went to the next of kin. *Ommanney v. Butcher*, Turn. & R. 260, 273.

### PRIVATE CHARTER.

"Private charters" are limitations or restrictions of legislative power, and are binding not only on the legislators who make them, but on their successors ever after. It is a branch of legislation in which the immediate actors touching the subject acted upon exhaust the whole power which has been committed to the legislative department, and thus leave their successors with less of sovereignty than they themselves possessed. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. (7 Pick.) 344, 461.

### PRIVATE CLAIM.

The act (Laws 1885, c. 428) authorizing the board of claims to audit the claims of certain counties for moneys expended in the trial of convicts in the state prison and reformatory for crime committed during their imprisonment does not violate Const. 1846,

art. 3, § 19, providing that the Legislature shall neither audit nor allow any "private claims" against the state, since such claims of the counties are not private claims within the purview of the section. *Cayuga County Sup'rs v. State*, 153 N. Y. 279, 289, 47 N. E. 288, 290.

### PRIVATE CONCERN.

An act of the Legislature appropriating a sum of money for the purchase of certain relics, to be paid on the certificate of three persons named that the relics are in their opinion genuine, and that it is desirable in their judgment that they should be placed in the museum of the state library, is not a provision for arbitration to determine controversies between individuals, or in matters of "private concern" in which all the appraisers are required to act, but was an appointment of appraisers to act between an individual and the state and as a matter of public concern, in which a majority act as the whole when all have met. *People v. Nichols*, 52 N. Y. 478, 481, 482, 11 Am. Rep. 734.

### PRIVATE CONFESSION.

In the Lutheran Church, confession made as a condition precedent to participation by members in the sacrament of the Lord's Supper is "private" when made by each individual privately to a pastor, and is "open" when made publicly by all members in church immediately preceding the reception by them of such sacrament. *Schradi v. Dornfeld*, 52 Minn. 465, 469, 55 N. W. 49, 50.

### PRIVATE CONTEMPT.

Private contempts, usually called "civil contempts," arise out of an injury or wrong done to a party who is a suitor before the court and has established a claim upon its protection. *Schreiber v. Raymond & Campbell Mfg. Co.*, 45 N. Y. Supp. 442, 444, 18 App. Div. 158.

### PRIVATE CONTRACT.

A "private contract" may be regarded as one between individuals only, and affecting only private rights; while a public contract is one to which the state is a party, and which concerns all its citizens. *People v. Palmer*, 14 Misc. Rep. 41, 45, 35 N. Y. Supp. 222.

A contract for state printing awarded to one pursuant to a statute is not a private contract. It related wholly to matters of public concern, and affecting public rights only so far as the statute confers such rights when its provisions are carried out by the officer to whom it is confided to perform them; and hence, in mandamus to compel,

the Secretary of State to give relator the printing, a contention that relator sought to enforce a private contract was without merit. *People v. Palmer*, 35 N. Y. Supp. 222, 225, 14 Misc. Rep. 41.

### PRIVATE CONVERSATION.

The word "private," as used in St. 1870, c. 393, § 1, forbidding husband or wife to testify as to "private" conversations with each other, applies to their conversations in the presence of their children not over 11 years of age, and not shown to have paid attention thereto. *Jacobs v. Hesler*, 118 Mass. 157, 160.

### PRIVATE CONVEYANCE.

Insurance against accident while traveling by public or private conveyance does not include a case where an accident occurs to one while travelling on foot, the words importing traveling by conveyance other than the legs of man. "If a man is carried on another man's back, while possibly he would be held to be traveling by private conveyance, yet it would be a forced and unnatural construction to say that one traveling on foot is traveling by private conveyance." *Ripley v. Railway Passengers' Assur. Co.* (U. S.) 20 Fed. Cas. 823, 825.

An accident policy which provided that insurer should be liable for any accident occurring to the insured while traveling in any private conveyance, meant a vehicle belonging to a private individual. *Ripley v. Passengers' Assur. Co.*, 83 U. S. (16 Wall.) 336, 338, 21 L. Ed. 469.

### PRIVATE CORPORATION.

A private corporation is an artificial person, consisting of an aggregation of individuals united for some legitimate business. *Railroad Tax Cases* (U. S.) 13 Fed. 722, 743.

A private corporation is an association of individuals united for some common purpose, and permitted by the law to use a common name and change its members without a dissolution of the association. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 2 Sup. Ct. 719, 726, 108 U. S. 317, 27 L. Ed. 739; *Pembina Consol. Silver Mining & Milling Co. v. Commonwealth*, 8 Sup. Ct. 737, 741, 125 U. S. 181, 31 L. Ed. 650; *Kansas Pac. Ry. Co. v. Atchinson*, 5 Sup. Ct. 208, 209, 112 U. S. 414, 28 L. Ed. 794; *Schoefield Gear & Pulley Co. v. Schoefield*, 40 Atl. 1046, 1049, 71 Conn. 1; *Santa Clara County v. Railroad Co.* (U. S.) 18 Fed. 385, 402.

Private corporations are associations formed by the voluntary agreement of their members, such as banking, railroading, and

manufacturing companies. *Washingtonian Home of Chicago v. City of Chicago*, 41 N. E. 893, 895, 157 Ill. 414, 29 L. R. A. 798; *Murphy v. Board of Chosen Freeholders of Mercer County*, 31 Atl. 229, 232, 57 N. J. Law (28 Vroom) 245.

Private corporations are all corporations other than those which are public. *Santa Clara County v. Southern Pac. R. Co.* (U. S.) 18 Fed. 385, 402.

A private corporation is a legal person, with power to act as a natural one to the extent that its charter allows it to. *Henderson v. Ogden City Ry. Co.*, 7 Utah, 199, 203, 26 Pac. 286.

Private corporations are such as are instituted for the benefit of certain persons as individuals, or for the purpose of applying private funds or enterprise and skill to the public good. *State v. Heyward* (S. C.) 3 Rich. Law, 389, 408.

Public corporations embrace generally only municipal or political bodies, and private corporations embrace all other associations, irrespective of their character and objects. Private corporations are regarded as springing from contract between the government and the individuals, over which it is generally said the government can exercise no control so long as the contract is faithfully observed by the company. The object of strictly private corporations is to aggregate the capital, the talents, and the skill of individuals to foster industry and encourage the arts. *Swan v. Williams*, 2 Mich. 427, 434.

Corporations are divided into public and private. A bank whose stock is owned by private persons is a "private corporation," although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be applied to all insurance, canal, bridge, and turnpike companies. In all these cases the uses may, in a certain sense, be called public, but the corporations are private, as much so, indeed, as if the franchises were vested in a single person. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 463, 508, 4 L. Ed. 629. See, also, *Putnam v. Ruch* (U. S.) 56 Fed. 416; *Burhop v. City of Milwaukee*, 21 Wis. 256, 259; *Bonaparte v. Camden & A. R. Co.* (U. S.) 3 Fed. Cas. 821. This reasoning applies in its full force to eleemosynary corporations. A hospital founded by a private benefactor is in point of law a private corporation, although dedicated by its charter to general charity. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 463, 508, 4 L. Ed. 629.

Private corporations are corporations created for private, as distinguished from governmental, purposes, and they are not public in contemplation of the law because it



may have been supposed by the Legislature that their establishment would either directly or consequently promote the public interest. *People v. McAdams*, 82 Ill. 356, 361; *Coyle v. McIntyre* (Del.) 30 Atl. 728, 730, 7 Houst. 44, 40 Am. St. Rep. 109; *Downing v. Indiana State Board of Agriculture*, 28 N. E. 123, 125, 129 Ind. 443, 12 L. R. A. 664.

Private corporations are those which have no concern whatever with the duties of government, nor are in any manner bound to perform any act for its benefit, but the only object of which is the personal emolument of its members. *McKim v. Odom* (Md.) 3 Bland, 418.

A corporation is a private one unless the whole interest belongs to the government, or the corporation is created for the administration of political or municipal power. *Rundle v. Delaware & R. Canal Co.* (U. S.) 21 Fed. Cas. 6, 11.

A private corporation is one which is organized for the transaction of its own business and for the furtherance of private ends, and is distinguished from a public or quasi public corporation in that its franchises do not concern any public act, right, or duty. *Corrigan v. Coney Island Jockey Club*, 22 N. Y. Supp. 394, 396, 2 Misc. Rep. 512.

A private business corporation is defined in *Mor. Priv. Corp.* as "an association formed by the agreement of its shareholders, and its identity independently of its members is a fiction." "It is essential to bear in mind distinctly that the rights and duties of an incorporated association are the rights and duties of the persons who compose it, and not of an imaginary being." "The statement that a corporation is an artificial person or entity apart from its members is merely a description in figurative language, or a corporation viewed as a collective body. A corporation is really an association of persons." Where a corporation is chartered to construct and operate a railroad, a lease of its road is a change of its corporate purpose, which, being made by less than a unanimous vote, is invalid against dissenting stockholders, though the right to amend its charter is reserved by the Legislature, and subsequent to its incorporation and prior to the lease a general act is passed authorizing any railroad corporation to lease its road by a two-thirds vote of its stockholders; the grant of the leasing power not having been unanimously accepted by the stockholders. *Dow v. Northern R. R.*, 36 Atl. 510, 511, 67 N. H. 1.

In *Mor. Priv. Corp.* § 381, a private corporation is said to be "in reality a voluntary association formed by agreement of its members for the purposes set forth in their charter. The real and beneficial ownership of everything belonging to an ordinary trading corporation is in the persons who compose it.

The courts of law, however, recognized a corporation only as one body acting in the corporate name. At law a corporation and its stockholders are considered as distinct from each other, and the contractual relations between the stockholders is wholly ignored." A private corporation had four stockholders. Two of them sold their stock to the other two, and gave their notes therefor, executed by them individually and by the corporation by and through them as its officers, which were secured by a mortgage on the property of the corporation, executed in the same way, and reciting that the mortgagors were the only stockholders of the company. Held not to divest the corporate entity of its legal title to the property, nor to impose any obligations on it, since the action of the corporation in becoming a surety was ultra vires. *First Nat. Bank v. Winchester*, 24 South. 351, 352, 119 Ala. 168, 72 Am. St. Rep. 904.

Private corporations are of three kinds: First, corporations for religion; second, corporations for charity or benevolence; and, third, corporations for profit. *Gen. St. Kan.* 1901, § 1247.

Private corporations are formed for the purpose of religion, benevolence, education, art, literature, or profit; and all corporations not public are private. *Rev. St. Okl.* 1903, § 937; *Civ. Code S. D.* 1903, § 408.

The term "private corporation," as used in the chapter relating to private corporations, shall mean a corporation created for the purpose of making a turnpike road, railroad, or canal, for carrying on any branch of manufacture, for mining, for improving navigation of a stream or other waters, for building wharves or storehouses, for building or using steamboats or other vessels, for the purposes of banking or insurance, and other corporations which, from their objects, suppose a division of profits among the stockholders. *V. S.* 1894, 3673.

#### PRIVATE CROSSING.

A "private crossing" of a railroad track is a crossing neither required nor used for any public purpose. *Wabash Ry. Co. v. Williamson*, 3 N. E. 814, 815, 104 Ind. 154.

#### PRIVATE DETECTIVE.

A "private detective" is a detective "engaged by individuals for private protection." *Byrnes v. Mathews*, 12 N. Y. St. Rep. 74, 81.

#### PRIVATE DWELLING.

"Private dwelling," as used in a deed of land providing that the vendee should not erect upon the land any building other than for the use or purpose of a private dwelling, cannot be construed to include a flat house

adapted for the separate residence of three several families. Not only does the term a "private dwelling" by force of the word "dwelling" restrict the character of building by eliminating all buildings for business purposes, such as stores, livery stables, factories, and the like, but it also, by force of the word "private," excludes buildings for residential purposes of public character, such as hotels or general public boarding or community houses. *Skillman v. Smathestur*, 40 Atl. 855, 856, 57 N. J. Eq. 1.

Where a lease provides that the demised premises shall be used strictly as a "private dwelling," the condition is violated by the use of the premises as a public boarding house. *Gannett v. Albree*, 103 Mass. 872, 374.

A building constructed so that it can be occupied by three families living separate and apart is not a private dwelling within the provisions of a covenant not to erect any tenement house or any houses except private dwellings; and whether it was intended to be used by more than one family was immaterial. *Levy v. Schreyer*, 50 N. Y. Supp. 584, 586, 27 App. Div. 282.

Using a house as a day school for girls under 13 for music and dancing is not using the same as a "private dwelling house only" within a lease requiring that the premises be used for such purpose. *Wickenden v. Webster*, 6 El. & Bl. 387, 391.

#### PRIVATE EASEMENT.

A "private easement" is defined to be a privileged service or convenience which one neighbor has of another by prescription, grant, or necessary implication, without profit. *Cleveland, C. & St. L. Ry. Co. v. Munsell*, 94 Ill. App. 10, 11.

#### PRIVATE EXAMINATION.

A certificate of acknowledgment stating that a wife executing a deed was privately examined apart from and out of the hearing of her husband is equivalent to a statement that the wife was examined out of the presence of her husband, as required by statute. *Deery v. Cray*, 72 U. S. (5 Wall.) 795, 798, 18 L. Ed. 653.

The examination of a wife on the execution of a conveyance by her to be a private examination apart from her husband, means an examination apart from the husband, and not apart from all other persons. *Hadley v. Geiger*, 9 N. J. Law (4 Halst.) 225, 233.

"Private," as used in a certificate of acknowledgment to a deed by a married woman that she had executed the same freely and voluntarily, and, having been made acquainted with the contents of the deed on a private

examination, acknowledged that she had executed it freely and voluntarily without any fear or compulsion or undue influence on the part of her husband, implies necessarily that it was without the hearing of her husband. *Muir v. Galloway*, 61 Cal. 498, 506.

#### PRIVATE EXPENSES.

"Private expenses," as used in articles of copartnership, stipulating that during the copartnership each party should be at liberty to withdraw from the joint funds as much only as was necessary for his private expenses, cannot be construed to include the purchase of plate, household furniture, carriages, horses, etc., but means only family expenses, and the reasonable education of children, etc. *Stoughton v. Lynch* (N. Y.) 1 Johns. Ch. 467, 469.

#### PRIVATE FERRY.

A private ferry is one mainly for the use of the owner, and, though he may take pay for ferriage, he does not follow it as a business. His ferry is not open to the public at its demand, and he may or may not keep it going. *Hudspeth v. Hall*, 36 S. E. 770, 773, 111 Ga. 510.

#### PRIVATE HOUSE.

In act approved April 17, 1869, authorizing the registration as citizens for voting purposes "private residents actually residing at a private house," the term "private house" should be construed to include a boarding house, which is for the accommodation only of those who are accepted as guests by the proprietor. Such an establishment is as much a private house as if there were no boarders. *Commonwealth v. Cuncannon* (Pa.) 3 Brewst. 344, 347.

#### PRIVATE INJURY.

See "Private Wrong."

The term "private injury" is synonymous with "private wrong." *Rhobidas v. City of Concord*, 47 Atl. 82, 87, 70 N. H. 90, 51 L. R. A. 381, 85 Am. St. Rep. 604.

#### PRIVATE INSTITUTION.

"Private institutions" are those which are created or established by private individuals for their own purposes, while public institutions are those which are created and exist by law or public authority. Some public benefits or rights may result from the institutions of private individuals or associations. So, also, some private or individual right may arise from public institutions. The only sensible distinction between public and private institutions is to be found

in the authority by which and the purposes for which they are created and exist. Because, therefore, a corporation may fall under the denomination of private corporation in the artificial distinction between public and private corporations, it is none the less a public or political institution. *Bank of Toledo v. Bond*, 1 Ohio St. 622, 643.

#### PRIVATE LAND GRANT.

A private land grant is a grant by a public authority vesting title of public land in a natural person. *United Land Ass'n v. Knight*, 24 Pac. 818, 828, 85 Cal. 448.

#### PRIVATE LAW.

See "Private Act."

#### PRIVATE LEAK.

Private leak is a slight defect in one of the outer planks of a ship which causes a leak. *The Pharos* (U. S.) 9 Fed. 912, 914.

#### PRIVATE NOTE.

The term "private notes" is used to designate notes of individuals or companies, whether incorporated or not. *Young v. Adams*, 6 Mass. 182, 186.

#### PRIVATE NUISANCE.

A "private nuisance" is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. *Veazie v. Dwinel*, 50 Me. 479, 482 (citing 3 Bl. Comm. 215); *Chicago North Shore St. Ry. Co. v. Payne*, 61 N. E. 467, 468, 192 Ill. 239; *Calef v. Thomas*, 81 Ill. 478, 480; *Payne v. Kansas & A. V. R. Co.* (U. S.) 46 Fed. 546, 553; *Lansing v. Smith* (N. Y.) 4 Wend. 9, 30, 21 Am. Dec. 89; *Fox v. Buffalo Park*, 47 N. Y. Supp. 788, 790, 21 App. Div. 321; *Swords v. Edgar*, 59 N. Y. 28, 34, 17 Am. Rep. 295; *Cropsey v. Murphy* (N. Y.) 1 Hilt. 126, 127; *Caldwell v. Knott*, 18 Tenn. (10 Yerg.) 209, 210; *Burditt v. Swenson*, 17 Tex. 489, 502, 67 Am. Dec. 665. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within this definition, and renders the owner or possessor liable for all damages arising from such use. *Lee v. Vacuum Oil Co.*, 54 Hun, 156, 162, 7 N. Y. Supp. 426 (citing 3 Bl. Comm. 216); *Heeg v. Licht*, 80 N. Y. 579, 582, 36 Am. Rep. 654; *Id.*, 8 Abb. N. C. 355, 359.

A private nuisance is an act done unaccompanied by an act of trespass, which causes a substantial prejudice to the hereditaments, corporeal or incorporeal, of another. *Adams, Eq. p. 210. Galbraith v. Oliver* (Pa.) 3 Pittsb. R. 78, 81.

A private nuisance is where one so uses his property as to damage another's, or disturb his quiet enjoyment of it. *Village of Cardington v. Fredericks' Adm'r*, 21 N. E. 766, 767, 46 Ohio St. 442.

Nuisances are private when the injury resulting from them violates only private rights, and produces danger to a few persons only. *Kelley v. City of New York*, 27 N. Y. Supp. 164, 166, 6 Misc. Rep. 516.

A private nuisance is any unwarrantable, unreasonable, or unlawful use of a person of his own property, real or personal, to the injury of another. *Heeg v. Licht*, 80 N. Y. 579, 582, 36 Am. Rep. 654; *Fox v. Buffalo Park*, 47 N. Y. Supp. 788, 790, 21 App. Div. 321.

A private nuisance affects only one person or a determinate number of persons, *Baltzger v. Carolina Midland Ry. Co.*, 32 S. E. 358, 360, 54 S. C. 242, 71 Am. St. Rep. 789; and is the ground for civil proceedings only, *Hundley v. Harrison*, 26 South. 294, 123 Ala. 292.

A private nuisance affects one or more as private citizens, and not as a part of the public, and is ground for a civil suit only. *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 807, 12 S. E. 1085, 1086, 12 L. R. A. 53.

A private nuisance is one that injures only individuals, while public nuisances affect the general public. *Parker v. People*, 111 Ill. 581, 603, 53 Am. Rep. 643.

A private nuisance is one that invades private persons. *State v. Charleston Neck Road Com'rs* (S. C.) 3 Hill, 149, 152.

A public nuisance becomes also a private nuisance as to the person who is specially injured thereby in the enjoyment of his lands. *Kavanagh v. Barber*, 30 N. E. 235, 131 N. Y. 211, 15 L. R. A. 689.

Anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another is a private nuisance. A fat-boiling establishment is a nuisance within the meaning of this rule if it infect the air with noisome smells, or with gases injurious to the health. Nuisances are of two kinds—public or common nuisances and private nuisances. Private nuisances are defined as above. *Cropsey v. Murphy* (N. Y.) 1 Hilt. 126, 127.

The erection or maintaining of anything that is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, constitutes a private nuisance. To live in constant apprehension of death from the explosion of nitroglycerine is certainly an interference with the comfort-

able enjoyment of life. The use of a gas well within 200 feet of the residence of another and his family, and the accumulation of a large amount of nitroglycerine for the purpose of "shooting" such well, by reason of which such residence and the lives of the occupant and family will be endangered, constitutes a private nuisance. *Tyner v. People's Gas Co.*, 131 Ind. 408, 412, 31 N. E. 61, 62.

A nuisance may be both public and private; but where the damage or injury to one is more than to the public, however slight, or where he sustains any special damage not common to all, he may maintain a private action. A house which becomes a place of resort for thieves, drunkards, or other idlers and disorderly persons, who gather there to gratify their depraved appetites, or for any other purpose, for such persons are regarded as dangerous to the peace and welfare of the community, and their presence at any place in considerable numbers is always a just cause of alarm, and a place where liquor is sold in excessive quantities, whereby persons become intoxicated and frequent brawls result therefrom, are disorderly houses, and indictable as nuisances, for no person has a right to carry on for his own gain or amusement any public business calculated to destroy public morals or to disturb the public peace; and, while a license to sell liquor will protect a person from prosecution for such sale, it will not protect him from the prosecution for an abuse of authority whereby he creates a nuisance. *Haggart v. Stehlin*, 35 N. E. 997, 1000, 137 Ind. 43, 22 L. R. A. 577.

Gen. St. p. 541 § 25, provides that "anything which is an obstruction to the free use of property, so as to interfere with its comfortable enjoyment, is a nuisance, and the subject of an action." Such action may be brought by any person whose property is injuriously affected, and the nuisance may be abated as well as damages recovered. A nuisance at common law in its largest sense is defined by Blackstone to be "anything that worketh hurt, inconvenience, or damage." By Greenleaf: "A private nuisance is used to embrace only acts injuriously affecting the lands, tenements, or hereditaments of an individual." In view of these definitions of nuisance, it may be doubted whether, so far as the civil remedy for a private nuisance is concerned, our statute is anything else than declaratory of the common law. But whether or not it would embrace every cause of action which would exist at common law, the case of flowage of land of one person by water, caused by the erection of a dam by another on his own land or that of a third party, although no actual damage be proved, is equally within the statute and the common law. *Dorman v. Ames*, 12 Minn. 451, 461 (Gil. 347, 360, 361).

It is well established by the decisions of the court that interferences with public and common rights create a public nuisance, and that a public nuisance as to the person who is specially injured thereby in the enjoyment of his land becomes also a private nuisance. In the language of Blackstone, a "private nuisance" is anything done to the hurt and annoyance of the lands, tenements, and hereditaments of another, which embraces not a mere physical injury to the realty, but an injury to the owner or possessor as respects his dealing with, possessing or enjoying it. *Ackerman v. True*, 67 N. E. 629, 630, 175 N. Y. 353.

Every nuisance other than a public nuisance is a private nuisance. Civ. Code Idaho 1901, § 2966; Rev. St. Okl. 1903, § 3719; Rev. Codes N. D. 1899, §§ 5057, 5058; Civ. Code S. D. 1903, §§ 2394, 2395; Ballinger's Ann. Codes & St. Wash. 1897, §§ 3084, 3087.

#### Public nuisance distinguished.

Under the technical definition of the common law the term "private nuisance" was chiefly, if not exclusively, applied to such acts as were to the harm or annoyance of the lands, tenements, or hereditaments of another, and a common or public nuisance could ordinarily be prosecuted only by indictment. By way of enlargement of the definition of private nuisance, or by extending the right of private action to cases of common or public nuisance, it is certain that the individual action is not by any means confined to cases which affect the realty. A private nuisance may be any wrongful act which destroys or deteriorates the property of another or interferes with his lawful use or enjoyment thereof, or any act which unlawfully hinders him in the enjoyment of a common or public right, and causes him a special injury. The former is a private nuisance because it violates a private right. The latter is a private nuisance because through the failure of a public right it inflicts a particular injury on a private person. *Kavanagh v. Barber*, 12 N. Y. Supp. 603, 604, 59 Hun. 60. See, also, *Kavanagh v. Barber*, 30 N. E. 235, 131 N. Y. 211, 15 L. R. A. 689.

A public nuisance is a nuisance which annoys such part of the public as necessarily come in contact with it, though at the same time it is a private nuisance to any person who sustains in his person or property any special injury different from that of the public. *Kissel v. Lewis*, 59 N. E. 473, 481, 156 Ind. 233.

The difference between public or common nuisances and private nuisances is plain and palpable—the first being an injury done which affects the whole community, and therefore is not actionable; the second an injury to the property, privileges, or health of

individuals of that community, and is actionable. *Lansing v. Smith* (N. Y.) 4 Wend. 9, 30, 21 Am. Dec. 89.

A private nuisance is defined to be "anything done or omitted to be done contrary to a legal duty from which an injury results to another. There is no difference in principle between a condition which is called a private and one called a public nuisance. One is where the danger is to the individual; the other when it is to a number of individuals or the entire public." *Willcox v. Hines*, 46 S. W. 297, 302, 100 Tenn. 538, 41 L. R. A. 278, 66 Am. St. Rep. 770.

It is well established by the decisions of the court that interferences with public and common rights create a public nuisance, and that a public nuisance as to the person who is specially injured thereby in the enjoyment of his land becomes also a private nuisance. In the language of Blackstone, a private nuisance is anything done to the hurt and annoyance of the lands, tenements, and hereditaments of another, which embraces not a mere physical injury to the realty, but an injury to the owner or possessor as respects his dealing with, possessing or enjoying it. *Ackerman v. True*, 67 N. E. 629, 630, 175 N. Y. 353.

A private nuisance is one that injures only individuals, while public nuisances affect the general public. *Parker v. People*, 111 Ill. 581, 603, 53 Am. Rep. 643.

#### PRIVATE PATH.

A "private path" is a neighborhood road running from one public road to another; from a public place to another public place. *Kirby v. Southern Ry.*, 41 S. E. 765, 776, 63 S. C. 494.

The term "private paths" in a statute speaking of public and private paths and empowering commissioners to make, alter, and keep them in repair, etc., "means roads free and common to all who may choose to make use of them; that is to say, public ways diverging from and running across the principal roads or highways commonly called 'great roads,' and not private paths exclusively appropriated for private purposes. It would be preposterous to suppose the Legislature intended to vest important powers in public commissioners to open, improve, and keep in repair private passages or easements for the particular and exclusive benefit of one or a few individuals." *Ex parte Withers* (S. C.) 3 Brev. 83, 86; *Singleton v. Commissioner of Roads* (S. C.) 2 Nott & McC. 526, 527; *State v. Mobley* (S. C.) 1 McMul. 44, 46.

A "private way" is an individual right, while a "private path" is a neighborhood

road. *Earle v. Poat*, 41 S. E. 525, 530, 63 S. C. 439.

#### PRIVATE PERSON.

43 Geo. III, c. 59, § 5, provided that no bridge thereafter built in any county by or at the expense of any "individual or private person," body politic or corporate, should be deemed a county bridge, unless erected in a substantial or commodious manner under the direction or to the satisfaction of the county surveyor, etc. Held, that trustees appointed by a local turnpike act, were individuals or private persons. *Rex v. Inhabitants of Derby County*, 8 Barn. & Adol. 147, 150, 23 E. C. L. 73, 74.

"Private person," as used in 2 Rev. St. p. 678, § 59, providing that if any clerk or servant of any private person shall embezzle or convert to his own use or take away or secrete with intent to embezzle, he shall be punished, etc., cannot be construed to include the superintendent of the poor of the county, who employs, as required by statute, a person as keeper, for in so employing him and in directing and controlling his services the superintendent acts in no respect as a private individual, but solely in his official character. The whole relations between the superintendent and the keeper are of a public nature, and the latter can in no just sense be regarded, when acting in his capacity as keeper of the poorhouse, as the servant of a private person. *Coats v. People*, 22 N. Y. 245, 246.

#### PRIVATE POND.

"Private pond," within the meaning of acts relating to the taking of fish from any "private pond" improved by the owner or lessee for the propagation of fish, etc., means one which is owned entirely by the person who stocked it with fish. The ownership of a part only of the land covered by water is not sufficient to give the whole water the distinctive character of private. The pond must be treated as an entirety, either whole or none, as private. *Benscoter v. Long*, 27 Atl. 674, 680, 157 Pa. 208; *Reynolds v. Commonwealth*, 93 Pa. 458, 461.

A body of water covering 1,040 acres, 1,000 of which are owned by one party and 40 by another, is not a private pond within the meaning of Act 1895, c. 127, providing that the act which prohibits the destruction or capture of fish except in certain manner shall not apply to private ponds. *Peters v. State*, 36 S. W. 399, 96 Tenn. (12 Pickle) 682, 33 L. R. A. 114.

#### PRIVATE PRESERVE.

The term "private preserve" means a natural pond, of not more than 20 acres, be-

longing to a common owner, or any artificial pond, made solely for the purpose of fish culture." *State v. Theriault*, 70 Vt. 617, 619, 41 Atl. 1030, 1031, 43 L. R. A. 290, 67 Am. St. Rep. 695; V. S. 1894, 4562.

### PRIVATE PROPERTY.

Private property is that which is one's own; something that belongs or inheres exclusively in an individual person. *Scranton v. Wheeler*, 21 Sup. Ct. 48, 59, 179 U. S. 141, 45 L. Ed. 128.

The term "private property," in the constitutional restriction that private property shall not be taken or applied to public use without just compensation, "applies to such property as belongs absolutely to the individual, and of which he has the exclusive right of disposition; property of a specific, fixed, and tangible nature, capable of being held in possession and transmitted to another, as houses, lands, and chattels." *Homochitto River Com'rs v. Withers*, 29 Miss. (7 Cushman.) 21, 32, 64 Am. Dec. 126.

The term "private property," as used in the charter of a water company providing that if, in the location of the works, an injury should be done to "private property," and the parties could not agree on the amount of compensation to be made to the owner, either party might apply to the court to appoint viewers, necessarily includes everything that can be held or owned by private persons. *Lycoming Gas & Water Co. v. Moyer*, 99 Pa. 615, 619.

In the fifth amendment of the Constitution of the United States, declaring that private property shall not be taken for public use, without just compensation, "private property" means "all kinds of private property." *Territory v. Daniels*, 22 Pac. 159, 162, 6 Utah, 288, 5 L. R. A. 444.

The Illinois Constitution forbids the taking or damaging of private property for public use without just compensation. The term "private property," as used therein, is not limited to the tangible subject-matter or corpus of the property, but includes the right of user and enjoyment of it; and, where the impairment or destruction of such right damages the owner of the property in excess of that sustained by the general public by the construction and use of a public improvement, the law gives him an action for such injury. *City of East St. Louis v. O'Flynn*, 19 Ill. App. 64, 66.

The terms "private property" and "the property of individuals," in the constitutional provisions prohibiting the taking of private property for public use, without compensation, etc., were not intended to include money raised by assessment for the purpose of paving streets. Money attempted to be raised for that purpose is not sought to be taken

by virtue of the sovereign right of eminent domain, but in the exercise of the sovereign power of taxation. *Williams v. City of Detroit*, 2 Mich. 560, 566.

The term "private property," in the constitutional provision prohibiting the taking of private property for public purposes without due compensation, includes the franchise of a toll-bridge company, as it is an incorporeal hereditament, which is a species of property. *Enfield Toll-Bridge Co. v. Hartford, N. H. & N. R. Co.*, 17 Conn. 40, 59, 42 Am. Dec. 716.

### Property of private charity.

The property of a private charitable corporation, though charged with the maintenance of a college or other public charity, is "private property" within the meaning and protection of that clause of the Constitution (art. 1, § 19) declaring that private property shall ever be held inviolate. *State v. Neff*, 40 N. E. 720, 724, 52 Ohio St. 375, 28 L. R. A. 409.

### Municipal property.

In discussing the question of whether or not property held by a municipal corporation is private property or public property, the court says: "In one sense, the property was private property; that is, property owned by the corporation for the public use of the inhabitants of the city. The inhabitants of a city, who are in fact the corporators under a charter creating a municipality, are a portion of that general public which constitute a state. And they are also that particular public which constitute a municipality. The municipality may hold property in which all the inhabitants of a state or of a county may be said to have an interest in some respect, but not as owners or proprietors. And it may also hold property in which the inhabitants of the municipality alone may properly be said to have an interest. Both classes of property are public—the one, as to the people of the whole state or county; the other, more particularly, as to the inhabitants of the municipality. It is only in this sense that the words 'public' and 'private' can with propriety be applied to such property when held by a municipality. Although the property held for the municipality is in fact public, as common to all the inhabitants of a city, it nevertheless may justly be said to be private property, as being such property as is exempt from being taken or applied to any other public use by the state, or by authority of the state, without compensation being made." *Coyle v. Gray* (Del.) 30 Atl. 728, 733, 7 Houst. 44, 40 Am. St. Rep. 109.

### Stream.

"The right of private property exists in an individual in relation to streams of wa-

ter exclusively his own, such as springs or small water courses in the interior of his lands, and bounded by them on both sides; and whilst it may exist in reference to public rivers against the interference of private individuals, it cannot be admitted to prevail, as to public rivers and highways used for navigation, against the paramount jurisdiction of the state." *Homochitto River Com'rs v. Withers*, 29 Miss. (7 Cushman) 21, 32, 64 Am. Dec. 126.

The term "private property" includes surface streams, but the rules in reference thereto are very different from those governing subterranean streams. *Roath v. Driscoll*, 20 Conn. 533, 541, 52 Am. Dec. 352.

#### PRIVATE PROSECUTOR.

"Bouvier defines a 'private prosecutor' to be one who prefers an accusation against a party whom he suspects to be guilty. This is a very correct definition, and certainly not broad enough to include a mere witness in the case, who is not shown to have taken any part in setting a prosecution on foot. A party who voluntarily makes an affidavit to procure the issuance of a warrant to arrest a party whom he accuses of crime is properly a prosecutor. So, too, a party who voluntarily procures permission to be sworn and go before a grand jury or the prosecuting attorney to testify as to an alleged crime may be held to be a prosecutor; but a party who merely appears in response to a subpoena issued at the instance of the grand jury or the prosecuting attorney cannot be held or treated as a prosecutor." *State v. Millain*, 3 Nev. 409, 425.

A private prosecutor is one who prefers an accusation against a party whom he suspects to be guilty of an offense against the law. Such person cannot be allowed to try the case as juror if challenged for this cause, nor, under the statute, if he be "related to a private prosecutor within the third degree of consanguinity or affinity." The mere fact that a person has paid or promised to pay money to aid in the prosecution of a person charged with crime is insufficient to constitute such person a "private prosecutor" within the meaning of such statute. *Code Cr. Proc. art. 636; Heacock v. State*, 13 Tex. App. 97, 129.

#### PRIVATE PUBLICATION.

In the case of a private theatrical representation of a play of which no printed copy has been circulated, the exclusion of all, except a few selected for admission, renders the publication a private one. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 199.

#### PRIVATE PURPOSE.

The term "private purpose," in a constitutional provision prohibiting the appro-

priation of money or property for local or private purposes, refers more particularly to a purpose for the benefit of an individual or limited number of men, and a "local purpose" to a purpose for the benefit of the particular place or limited locality. *People v. Allen* (N. Y.) 1 Lans. 248, 256.

#### PRIVATE RESIDENCE.

A camp occupied by a man and his son, which was the only home they had, and which constituted their home for the time being, was a "private residence" within the statute punishing all character of gaming at any place, except at a private residence occupied by a family. *Hipp v. State* (Tex.) 75 S. W. 28, 29, 62 L. R. A. 973.

In ordinary parlance a store, or hotel, or saloon is not a "private residence," and the allegation of gaming in one of these places, in an indictment, of itself contravenes and negatives the idea that it is a private residence, so that the repetition that such a house named is not a private residence would only be putting the allegation in another form. *Hodges v. State*, 72 S. W. 179, 180, 44 Tex. Cr. R. 444.

#### PRIVATE RIGHT OF WAY.

A private right of way serves as a means of accommodation to a limited neighborhood for local convenience. It has been defined to be that right which one man has of going over another's land, and is confined either to the inhabitants of a particular district, or to those occupying or owning certain estates, or it extends to one or more individuals in certain. *City of Chicago v. Borden*, 60 N. E. 915, 918, 190 Ill. 430; *Garrison v. Rudd*, 19 Ill. (9 Peck) 558, 563.

"To every private way there are two essential requisites: First, the terminus a quo, or the point or place from which the grantee is to set out in order to use the way and the terminus ad quem—the place where the way is to end; and, second, that the grantor has the right, not the mere revocable permission, of setting out from the terminus a quo, and proceeding to and entering the terminus ad quem. It is one of the most important of incorporeal hereditaments, in which one man has an interest and a right, though another man is the owner of the soil over which it is claimed. It is simply an easement or a privilege, conferring no interest in the land." *Garrison v. Rudd*, 19 Ill. 558, 563 (citing 1 Crabb, Real Prop.; 2 Bl. Comm. 35; 2 Bouv. Inst. 187).

#### PRIVATE RIGHT.

The term "private rights," under article 17, § 10, of the Constitution, providing that private rights shall not be affected by certain changes made therein, may properly

be confined to such rights, when applied to property, as persons may possess, unconnected with and not essentially affecting the public interest, or growing out of a public institution or society; and therefore, as marriage is intimately connected with a public interest, such provision does not operate to render article 15, § 5, of the Constitution, exempting the property of married women from the debts of the husband, only applicable to married women who are married after the adoption of the said Constitution. *Rugh v. Ottenheimer*, 6 Or. 231, 237, 25 Am. Rep. 513.

#### PRIVATE RIVER OR STREAM.

The term "private rivers" is used to designate rivers in which the tide does not ebb or flow. *Adams v. Pease*, 2 Conn. 481, 484.

The term "private stream," in Act May 5, 1876, which makes fishing in private streams an offense, is not made to include a running stream, flowing from a man's land, by the fact that he stocks the stream with fish. *Reynolds v. Commonwealth*, 93 Pa. 458, 461.

#### PRIVATE ROAD.

A private road is one the soil of which belongs to the owner of the field, and is burdened with a right of way. *Morgan v. Livingston (La.)*, 6 Mart. (O. S.) 19, 231.

Private roads are neighborhood ways not commonly used by other than the people of the neighborhood where they are, though they may be used by any one who may have occasion to do so. *State v. Mobley (S. C.)* 1 McM. 44, 46; *Ex parte Withers (S. C.)* 3 Brev. 83, 85.

A private road is a way from public road to public road, or from the public road over a neck of land toward its extremity, all of which are used by the public. It is distinguished from a public road, which is a way through the state or from town to town. *Singleton v. Commissioner of Roads (S. C.)* 2 Nott & McC. 526, 527.

The term "private road," as used in Misc. Laws, c. 50, §§ 16 and 17, authorizing the establishment of private roads over the land of an individual, without his consent, for the private use of another, means, according to Bouvier, such as are used for private individuals only, and are not wanted for the public generally. Public roads are kept in repair at the public expense, and private roads by those who use them. *Witham v. Osburn*, 4 Or. 318, 321, 18 Am. Rep. 287.

In considering the constitutionality of a law providing for the opening, under the right of eminent domain, of private roads

from the main roads to the residences or farms of individuals, and over land not belonging to the persons to whose residence or farm the road thus opened leads, the Supreme Court of California sustained the law on the ground that the so-called "private roads" were not in fact private. "In accurate contemplation," the court said, "a 'private road' involves a contradiction. The term is unknown to the common law. It has its origin in American legislation. It cannot be regarded as having been employed as a substitute for the word 'way' as used at common law. There was no reason or excuse for such a change in the legal terminology. It must be taken, therefore, as an invention, and as having been put to use originally merely for the purposes of classification—as giving a name to a certain class of roads, differing from another and larger class in respect to the steps to be taken in establishing them in the first instance, and of keeping them in repair afterwards—differences founded upon the just idea that roads, though public, mainly subserving the convenience of particular individuals, should be made a charge upon them instead of the public at large. For the purpose of distinguishing between such roads and those which subserve equally the interests of all, a name for the former was needed, for the legal term 'highway' was applicable to both; hence the terms 'public' and 'private' roads. The latter is not to be understood as being synonymous with 'ways' at common law, but as indicating a particular class of highways or public ways over which any one may pass without committing trespass." *Sherman v. Bulck*, 32 Cal. 241, 252, 91 Am. Dec. 577.

The term "private road," as used in Cal. Pol. Code, § 2692, providing for private or by-roads, designates a particular kind of public road, so that, notwithstanding the somewhat inaccurate language, the use is public. *Monterey County v. Cushing*, 23 Pac. 700, 701, 83 Cal. 507 (citing *Sherman v. Bulck*, 32 Cal. 241, 91 Am. Dec. 577, note).

In *Sherman v. Bulck*, 32 Cal. 241, 91 Am. Dec. 577, the court held that, although the statute denominated a road a "private road," it was in fact and in law a public road, under the control of the government, and open to every one who might have occasion to use it, and declared that: "The phrase 'private road' is unknown in law; all roads are public." But we do not think that this court can say that all roads are public roads in this state. The Legislature has said that all public roads shall be 60 feet wide, and by the law we are considering (Comp. St. 1893, c. 78, § 4752) it is provided that private roads shall be 15 feet wide. Evidently, then, the Legislature has attempted to recognize two classes of roads. *Welton v. Dickson*, 57 N. W. 559, 563, 38 Neb. 767, 22 L. R. A. 496, 41 Am. St. Rep. 771.



A "private road," so called, within Pol. Code, § 2692, authorizing the condemnation of land for private roads, is but a public road by another name, and the term is used by the Legislature merely for the purposes of classification. The Legislature has for such purpose divided roads into public and private, and provides how they may be laid out, established, and maintained. The former are to be laid out and maintained at the expense of the county or road district at large, and are therefore public; the latter at the expense of such people as are more especially and directly interested in them, and therefore called private. But the latter are as much public as the former, for any one can travel them who has occasion to, and no more can be said of the former. *Maderia County v. Raymond Granite Co.*, 72 Pac. 915, 918, 139 Cal. 128.

Private roads are those which are only open for the benefit of certain individuals to go from and to their homes for the service of their lands and for the use of some estates exclusively. Civ. Code La. 1900, art. 706.

#### Byroad

See "Byroad."

#### PRIVATE ROOM.

In construing a statute which prohibits playing cards in a public place, and expressly names taverns and inns as public houses, but declares that a private room in an inn or tavern is not within the meaning of a public place, unless such rooms are commonly used for gaming, the court said: "To make a guest room in a hotel—that is, one appropriated to public use as such—a private room, it must have been taken by a guest or lodger seeking rest for a day or night, or a residence for a time, or one desiring to use it for a temporary habitation; that is, a place of abode. Unless so appropriated by a guest, it is a part of the public house known as tavern or inn. The term 'public house,' as used in the gaming statute, does not mean a place solely devoted to the public, as distinguished from private. A house may be said to be a public house either in respect to its proprietorship or its occupancy and uses, and so a guest room in a hotel is a part of the public hotel or tavern, in that it is for the use of the public business of the house in the entertainment of its guests, and only becomes private after it is appropriated by a guest"—and held that a room in an inn provided for the accommodation of guests, which was engaged temporarily for the purpose of private gaming, and not for a guest's habitation or abode, was not a private room, but a part of the public place. *Comer v. State*, 10 S. W. 106, 107, 26 Tex. App. 509.

#### PRIVATE SALE.

A private sale is a sale without advertisement and public outcry. A sale of a ward's land by order of the court may be either public or private, in the discretion of the court. *Barcello v. Hapgood*, 24 S. E. 124, 125, 118 N. C. 712.

#### PRIVATE SCHOOL.

Under section 11 of the compulsory school law of April 25, 1890, imposing certain duties on all principals and teachers of all schools, public and private, a parochial school is a private school. If a certain number were to meet together and agree that they would hire a teacher and pay him for his services in that school, and no persons should attend that school but their own children, it would be a private school. *Quigley v. State*, 3 O. C. D. 310, 319, 5 Ohio Cir. Ct. R. 638.

#### PRIVATE SEAL.

A private seal may be made in the same manner as a public seal by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. Code Civ. Proc. Cal. 1903, § 1931; Rev. St. Utah 1898, § 3398.

A public seal in this state is a stamp or impression made upon wax, wafer, paper, or any other like substance, upon which a visible and permanent impression can be made. A private seal may be made in the same manner, or it may be made without an impression, by a wafer or wax attached to the instrument, or by a paper attached to it by an adhesive substance, or by a scroll or other sign made with a pen. Ann. Codes & St. Or. 1901, § 764.

#### PRIVATE SECRETARY.

A private secretary, whose duties combined include those of an amanuensis, stenographer, etc., who received dictation and transcribed letters for the president of a corporation, and performed other duties of a similar nature, is held to be a "laborer" within the Georgia statute exempting laborers' wages from garnishment. Calling him a "private secretary," instead of "clerk," does not, says the court, change the principle upon which persons performing similar duties have been held to be laborers. *Abrahams v. Anderson*, 5 S. E. 778, 779, 80 Ga. 570, 12 Am. St. Rep. 274.

#### PRIVATE SECURITY.

The term "private securities" includes a fund provisionally invested for the benefit of a legatee, and bearing interest in his favor, as used in the tax law of 1874, c. 483, § 2, providing that all property, including,

among other things, all debts secured by private securities of every kind, shall be liable to assessment. *Buchanan v. Talbot County Com'rs*, 47 Md. 286, 294.

#### PRIVATE SEWER.

"Private sewers," as defined in a city charter establishing a sewer system, are those built with or without permits, and paid for by the parties constructing the same. *Prior v. Buehler & Cooney Const. Co.*, 71 S. W. 205, 206, 170 Mo. 439.

#### PRIVATE STATUTE.

See "Private Act."

#### PRIVATE STEALING.

"Private stealing" consists in stealing without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away. *Brown v. State (Tex.)* 22 S. W. 24.

#### PRIVATE TABLE.

A stipulation in a lease of certain rooms in a house containing a restaurant, and near several hotels and other restaurants, to "serve a private table" therein, is complied with by an offer to send out for a dinner to a hotel, to be served in such rooms. *Porter v. Merrill*, 124 Mass. 534, 541.

#### PRIVATE THINGS.

See "Things Private."

#### PRIVATE TRUST.

Private trusts are for the benefit of certain designated individuals, in which the cestui que trust is a known person or class of persons. *Doyle v. Whalen*, 32 Atl. 1022, 1025, 87 Me. 414; *Brooks v. City of Belfast*, 38 Atl. 222, 226, 90 Me. 318.

In private trusts, the beneficial interest is vested absolutely in some individual or individuals, who are, or within a certain time may be, definitely ascertained; and to whom, therefore, collectively, unless under some disability, it is, or, within the allowed limit, will be, competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity. *Doyle v. Whalen*, 32 Atl. 1022, 1025, 87 Me. 414.

The requisites of a valid private trust and one for a charitable use are materially different. In the former there must not only be a certain trustee who holds the legal title, but a certain specified beneficiary clearly

identified, or made capable of identification, by the terms of the instrument creating the trust; while it is an essential feature of the latter that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi public character. *Pennoyer v. Wadhams*, 25 Pac. 720, 721, 20 Or. 274, 11 L. R. A. 210 (cited in *Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n [Kan.]* 64 Pac. 33, 37).

#### PRIVATE USE.

A "billiard table for private use" is one kept for the use of the owner and such persons as he may invite to play thereon. *Schmetzer v. State*, 63 Md. 420, 422.

#### PRIVATE WAR.

"Private war" is one between private persons, lawfully exerted by way of defense. It is otherwise unknown in civil society. *People v. McLeod (N. Y.)* 25 Wend. 483, 576, 37 Am. Dec. 328.

#### PRIVATE WATERS.

Private waters are those in which there is no ebb and flow of the tide, and the proprietorship of which is in the individual proprietor. *Cobb v. Davenport*, 32 N. J. Law (3 Vroom) 369, 378.

The term "private waters" is sometimes used in contradistinction to "public waters," to designate nonnavigable waters, the term "public waters" being used to designate navigable waters. *Lamprey v. Metcalf*, 53 N. W. 1139, 1143, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541.

#### PRIVATE WAY.

The distinction between a highway and a private way in England is that the former is the way to a market, a great road common to all passengers; and the latter is such as goes to a church, house, vill, or close, and is not common for all the King's subjects; or it may be like a private way from a meadow or close to a street. *Jones v. Inhabitants of Andover*, 23 Mass. (6 Pick.) 59, 62.

A private way is an incorporeal hereditament of a real nature, entirely different from a common highway. It is the right of going over another man's ground. *Kister v. Reeser*, 98 Pa. 1, 4, 42 Am. Rep. 608.

A "private way" relates to that class of easements in which a particular person, or particular description or class of persons, have an interest or right of way, as distinguished from the general public. *Kripp v.*

Curtis, 11 Pac. 879, 71 Cal. 62. See, also, Earle v. Poat, 41 S. E. 525, 530, 63 S. C. 439.

The phrase "private ways for the use of one or more of the inhabitants," in Gen. St. c. 43, § 59, allowing private ways to be laid out for the use of one or more of the inhabitants, "was not intended to limit the easement or rights created by the way to particular individuals, but to describe them as a class of ways which the selectmen were empowered to lay out in whole or in part. Such a way is not distinguishable in any other respect from a 'town way,' properly so called. The easement or right of passage created by laying it out is not the private right of the individual for whose special accommodation it may have been laid out, nor is it meant exclusively for his individual travel." *Denham v. Bristol County Com'rs*, 108 Mass. 202, 204.

"Private ways," in the Massachusetts system of public ways, are distinguished from "highways" in that the latter "are laid out and may be altered or discontinued by the authorities having jurisdiction through the county, such as the county court, the court of general sessions, and in modern times the county commissioners, while the former are laid out and may be altered or discontinued by the selectmen, with the approval of the town. In other respects they are alike, and equally parts of the system of public ways. The private way known to the modern statutes differs from a town way in the fact that the selectmen may assess the whole or a portion of the damages of laying out, altering, or discontinuing such way upon the individuals for whose use it is laid out or altered, or by whose application it is discontinued. In other respects it is a part of the system of town ways." *Butcher's Slaughtering & Melting Ass'n v. City of Boston*, 30 N. E. 94, 139 Mass. 290.

A private way is a property right in the owner of which he cannot be deprived, regardless of whether he would be injured by the taking. *City of Sarcoxie v. Wild*, 64 Mo. App. 403, 407.

A private way is an incorporeal hereditament. *Whiting v. Dudley* (N. Y.) 19 Wend. 373, 376.

#### **Driveway or crossing.**

The expression "private way" or "cartway," as used in a finding that animals entered on a railroad track at a cartway or private way, means a "driveway," as the latter term is used in Act April 8, 1885, exempting a railroad company from damages for animals killed or injured on the track, if such animals entered the tracks through "wagon and drive ways." *Louisville, N. A. & O. R. Co. v. Etzler*, 21 N. E. 466, 467, 119 Ind. 39.

Acts 1879, c. 183, § 1, making it a misdemeanor for any person to obstruct public highways, "private ways," streets, etc., cannot be construed to include a crossing left by a railroad company fencing its right of way through lands for the owner from one portion of the field to another. *Greer v. Nashville, C. & St. L. Ry. Co.*, 56 S. W. 850, 851, 104 Tenn. 242.

#### **As highway or street.**

See "Highway"; "Street."

#### **Road across one's own land.**

The term "private way," in Gen. St. c. 63, § 28, requiring application to be made within a year for damages for the obstruction of a private way by a railroad corporation, does not apply to a road across one's own land. *Presbry v. Old Colony & N. Ry. Co.*, 103 Mass. 1, 4.

In construing a statute providing for damages against any railway causing injury to any "private way," it was held that a mere path or way made by the owner across his own land was not a private way within the meaning of the statute. "A private way," said the court, "is one laid out by the public authorities for the accommodation of individuals, and at their expense. But when once laid out, the easement is as public as any highways laid out for the accommodation of the public. *Metcalf v. Bingham*, 3 N. H. 459. The same formalities are required by our statute in laying out of private ways as of public. The only difference consists in the payment of the costs and damages. A man cannot have a right of way over his own land independent of his right to the land. He may have a way through his own land at any place he may choose, and may use it from time to time, or abandon it, as he may please, but such a way is not an easement. It is not a 'private way' within the proper and legal acceptance of the term, but a mere path or cartway. *Barker v. Clark*, 4 N. H. 383, 17 Am. Dec. 428. The way, then, which is described in this case is not a private way, such as is contemplated by the statute, but a particular part of the plaintiff's land over which he may usually pass in going from one part of his farm to the other, and to which neither he nor the public had any more right than to all other parts of his farm." *Clark v. Boston, C. & M. R. Co.*, 24 N. H. (3 Fost.) 114, 118.

#### **PRIVATE WHARF.**

A private wharf is a wharf which the owner has constructed and reserves for his private use. *Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 2 Sup. Ct. 732, 738, 107 U. S. 691, 27 L. Ed. 584.

A private wharf is one where the owner has the right to the exclusive use and en-

joyment, or to permit such individuals to enjoy it as he sees proper. Whether a wharf or landing is public or private depends upon the ownership of the soil, the purpose for which it was built, the authority by which it was erected, the uses to which it has been applied, and the nature and character of the structure. *Compton v. Hawkins*, 8 South. 75, 76, 90 Ala. 411, 9 L. R. A. 387, 24 Am. St. Rep. 823.

### PRIVATE WRITING.

See "Public Writing."

Public writings are the written acts, or records of the acts, of the sovereign authority of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country. All other writings are private. *Ann. Codes & St. Or.* 1901, §§ 727, 728.

### PRIVATE WRONG.

Private wrongs are infringements of the private or civil rights belonging to individuals, considered as individuals, and are frequently termed "civil injuries." *Huntington v. Attrill*, 13 Sup. Ct. 224, 228, 146 U. S. 657, 36 L. Ed. 1123; *Tomlin v. Hildreth*, 47 Atl. 649, 651, 65 N. J. Law, 438; *Rhobidas v. City of Concord*, 47 Atl. 82, 87, 70 N. H. 90, 51 L. R. A. 381, 85 Am. St. Rep. 604; *Cullinan v. Burkhard*, 84 N. Y. Supp. 825, 827, 41 Misc. Rep. 321; *Ex parte Hickey*, 12 Miss. (4 Smedes & M.) 751, 783.

#### Public wrong distinguished.

See "Public Wrongs."

### PRIVATEERING.

Piracy distinguished, see "Piracy."

### PRIVIES.

See "Privy—Privy."

### PRIVILEGE.

See "Banking Privileges"; "Coal Privilege"; "Exclusive Privilege, Immunity, or Franchise"; "Full Privilege"; "Mill Privilege"; "Mining Privileges"; "Personal Privilege"; "Privileges and Immunities"; "Right and Privilege"; "Sole Privilege"; "Special Privilege"; "Water Privileges."

Especial privilege, see "Especial."

According to *Jacobs' Law Dictionary*, the original legal meaning of the word "privilege" is exemption of a private man or a

particular corporation from the rigor of the common law. Another definition is exemption from some duty, burden, or attendance. *Bouvier* says a privilege is a particular law which grants a special prerogative to some persons contrary to the common right. *Webster* defines it to be immunity; franchise; right; claim; liberty; special exemption from evil or burden; special enjoyment of good; peculiar benefit or advantage. *Territory v. Stokes*, 2 N. M. 161, 169, 170.

A privilege is a peculiar benefit or advantage; a right or immunity not enjoyed by others or by all; special enjoyment of a good or exemption from an evil. Privilege, among the Romans, was something conferred upon an individual by a private law, and hence it denotes some peculiar benefit or advantage; some right or immunity not enjoyed by the world at large. *Bouvier* says the word "privilege," taken in its active sense, is a particular law, or a particular disposition of the law, which grants certain special prerogatives to some persons contrary to the common right. In its passive sense it is the same prerogative granted by the same particular law. *Lawyers' Tax Cases*, 55 Tenn. (8 Heisk.) 565, 649.

A privilege is a peculiar advantage—an immunity. *North River Steamboat Co. v. Livingston* (N. Y.) 1 Hopk. Ch. 149, 203.

The word "privilege," in common acceptation, means some immunity or advantage. *Moore v. Fletcher*, 16 Me. 63, 65, 33 Am. Dec. 633.

A privilege is a particular and peculiar benefit or advantage enjoyed by a person, company, or class beyond the common advantage of other citizens. *Guthrie Daily Leader v. Cameron*, 41 Pac. 635, 639, 3 Okl. 677.

The word "privilege," according to one definition given by standard lexicographers, means that which one has a legal claim to do; legal power; authority; immunity granted by authority; the investiture with special or peculiar rights. The word is used in this sense in *Rev. St. § 5508* [U. S. Comp. St. 1901, p. 3712], making it criminal for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. *United States v. Patrick* (U. S.) 54 Fed. 338, 348.

In its natural meaning, the word "privilege" may be defined as a right peculiar to an individual or body. *Ripley v. Knight*, 123 Mass. 515, 519; *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 306.

Privileges are special rights belonging to the individual or class, and not to the mass. *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 306.

"Privilege," as used in the constitutional amendment of 1881, prohibiting the Legislature from enacting any special or private law granting any special privilege or franchise whatever, "means, generally, a right or immunity granted to a person either against or beyond the course of the common or general law." *Dike v. State*, 38 N. W. 95, 96, 38 Minn. 366.

A "privilege," in the sense of our revenue laws, is "a power granted to an individual or corporation to do something, or to enjoy some advantage, which is not of common right." 2 Meigs, Dig. c. 1587. Or, in the language of this court, it is "a license or permission to do that which in general is prohibited." *Harrison v. Willis*, 54 Tenn. (7 Heisk.) 35, 44, 19 Am. Rep. 604 (citing *Mabry v. Turner*, 20 Tenn. [1 Humph.] 94, 98).

The word "privilege" in a city ordinance granting to a water company the right and privilege for a term of 25 years of supplying the city and inhabitants thereof with water is evidently not used in the technical sense in which it is used in the civil law, or even under the common law, when used in the sense of priority, but was intended to be given its ordinary signification; meaning a right peculiar to the person on whom conferred, not to be exercised by another or others. *City of Brenham v. Brenham Water Co.*, 4 S. W. 143, 147, 67 Tex. 542.

The words "privileges" and "immunities" are synonymous, or nearly so; and "privilege" signifies a peculiar advantage, exemption, immunity, and "immunity" signifies exemption, privilege. *Van Valkenburg v. Brown*, 43 Cal. 43, 48, 13 Am. Rep. 136.

#### **Acquiring, holding, and disposing of property.**

The term "privilege," as used in the law, providing that no person shall be dis seized of his liberty or privileges except by the law of the land, no doubt includes the right to acquire, hold, and dispose of property, both real and personal. It is nevertheless subject to such restrictions as the government may justly prescribe for a general good. The state may, in the exercise of its police power, and does, regulate and control many professions, pursuits, trades, and employments, and such as are of no real benefit to society, or are hazardous or injurious, it may prohibit under penalties. And a provision of the statute prohibiting the wearing of concealed weapons does not abridge the privilege of any person. *Dabbs v. State*, 39 Ark. 353, 357, 43 Am. Rep. 275.

#### **Appointment of officers.**

Rev. St. 1894, § 5596, providing that three members of the board of examiners (consisting of five practicing dentists) of applications for a license to practice dentistry, shall be

appointed by the Indiana State Dental Association, is not violative of Const. art. 1, § 23, forbidding the granting of privileges which shall not on the same terms equally belong to all citizens, the power to appoint in such cases being a duty rather than a privilege. *Ferner v. State*, 51 N. E. 360, 361, 151 Ind. 247.

#### **Authority or power.**

The word "privileges," as used in Rev. St. 1893, c. 37, § 215a, which provides that the county judges of the several counties, with like privileges as the judges of the circuit courts, may interchange with each other, hold court for each other, and perform each other's duties when necessary or convenient, confers a like authority and power on county judges as previously conferred on circuit judges; in other words, by the use of the word "privileges" the Legislature meant official right or authority. *Pike v. City of Chicago*, 40 N. E. 567, 569, 155 Ill. 656.

A "privilege," as distinguished from a mere power, is a right peculiar to the person or class of persons on whom it is conferred, and not possessed by others. As applied to a corporation, it is ordinarily used as synonymous with a franchise, and means a special privilege conferred by the state, which does not apply to citizens generally of common right, and which cannot be enjoyed or exercised without legislative authority. Corporations usually possess many powers which are not franchises or privileges in that sense. The right of a bank to receive money on general or special deposits, to lend money on securities, to discount or purchase bills, notes, or other evidences of indebtedness, are not franchises or privileges, as the right to do such business belongs to every citizen of common right. *International Trust Co. v. American Loan & Trust Co.*, 65 N. W. 78, 79, 62 Minn. 501.

#### **As commodity.**

See "Commodity."

#### **Corporate rights distinguished.**

In general terms, it may be said that the franchise to construct and operate a street railway, and to levy and to collect remunerative tolls and charges, would be corporate rights, within a statute providing that the Legislature might at any time alter, amend, or repeal the act granting the privileges of construction; but such alteration, amendment, or repeal should not operate as an alteration or amendment of the corporate rights of companies formed under it, while exemption from the customary and uniform operation of the essential powers of the government, like the power to tax and the power of police regulation, must be regarded rather as a privilege or an immunity; and, considering the standard of taxation as

a privilege, the right of the Legislature to change it is undoubted. *Detroit St. Ry. Co. v. Guthard*, 16 N. W. 328, 329, 51 Mich. 180.

#### Creating easement.

See, also, "Easement."

A lease of certain land, with "the privilege of using the well" on the next lot so long as it remains, was not a covenant by necessary implication that the well should remain where its use was not indispensable to the convenient use of the rented premises. *Basserman v. Society of Trinity Church*, 39 Conn. 137.

The use of the word "privilege," in a contract of partition containing the stipulation that one of the parties shall have the privilege of a road through the land of the other so as to enable him to take the nearest road to D., does not show, though construed in connection with the pronoun "him," that the agreement is a mere personal privilege confined to the original grantee, instead of an easement. *Karmuller v. Krotz*, 18 Iowa, 352, 357.

A deed of a certain piece of land occupied by a sawmill, with the "privilege of occupying" the land in front of such mill, means merely an easement, a right to occupy the yard in front of the mill in connection with the mill, and does not convey the land in front. *Cross v. Pike*, 10 Atl. 526, 59 Vt. 324.

#### Exemption.

In our own, as in the Roman jurisprudence, a "privilege" means the exemption of any person or class of persons from the operation of any law. Thus it is settled that the right of a debtor or widow to exemption is a personal privilege. *Commonwealth v. Henderson*, 33 Atl. 368, 172 Pa. 135.

Privilege is a right or immunity not enjoyed by others; an exemption from an evil or burden. Under the Roman law, it denoted some particular benefit not enjoyed by others. Crabbe says it signifies a law made in favor of an individual; it consists of some positive advantage, exemption, or immunity. In its more extended sense it comprehends every prerogative, exemption, and immunity. Abbott defines it to be a right or immunity by way of exemption from the general law. Bouvier defines it as a private law in derogation of common right. Paschal says it is a special right belonging to an individual or class; properly, an exemption from some duty; an immunity from some general burden. Mr. Justice Washburn says that an exemption from taxes is embraced by the general description of "privileges." From these authorities it is seen that a privilege is an exemption and an exemption is a privilege, and where one railroad company is in-

corporated with the rights, powers, and privileges of a pre-existing company, the new company acquired an exemption from taxation guaranteed to the former. *Louisville & Nashville Ry. Co. v. Gaines* (U. S.) 3 Fed. 266, 278.

Privileges are properly exemptions from some general burden, obligation, or duty. *Lonas v. State*, 50 Tenn. (3 Helsk.) 287, 306.

Where an exemption from taxation in a railroad charter granted by the state is made as a "privilege" only, it may be revoked at any time. *Commonwealth v. Chesapeake & O. R. Co.* (Va.) 27 Grat. 344, 346.

The word "privileges," as used in Const. 1834, art. 9, § 7, prohibiting the Legislature from passing any law granting to any individual or individuals rights, privileges, immunities, or exemptions, is used in its restrictive sense, and it does not embrace exemptions. *Wilson v. Gaines*, 68 Tenn. (9 Baxt.) 546, 549.

The term "privilege" includes, in its ordinary definition, an exemption from such burdens as others are subjected to, as the privilege of being exempt from arrest or from taxation. *State v. Betts*, 24 N. J. Law (4 Zab.) 555, 556.

#### Exemption from taxation.

The word "privileges," as used in Act Tenn. April 19, 1866, providing that a railroad company shall be entitled to all the rights and privileges, and subject to all the liabilities, imposed upon another railroad company, includes the privilege of exemption from taxation as to its capital stock, enjoyed by the latter company under the provisions of its charter. Such is the interpretation in a series of deliberate and careful judgments of the Supreme Court of the United States. *State of Tennessee v. Whitworth* (U. S.) 22 Fed. 75, 83 (citing *Philadelphia & W. R. Co. v. Maryland*, 51 U. S. [10 How.] 376, 13 L. Ed. 461; *Tomlinson v. Branch*, 82 U. S. [15 Wall.] 460, 21 L. Ed. 189; *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718, 24 L. Ed. 310; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, 23 L. Ed. 762; *Central R. R. & Banking Co. v. Georgia*, 92 U. S. 665, 23 L. Ed. 757; *Humphrey v. Pegues*, 83 U. S. [16 Wall.] 244, 21 L. Ed. 326; *Atlantic & Gulf R. Co. v. Georgia*, 98 U. S. 359, 360, 25 L. Ed. 185; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. Ed. 860; *Railroad Cos. v. Gaines*, 97 U. S. 697, 711, 24 L. Ed. 1091; *Wilson v. Gaines*, 103 U. S. 417, 26 L. Ed. 401; *Annapolis & Elk Ridge R. Co. v. Commissioner*, 103 U. S. 1, 4, 26 L. Ed. 359; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 252, 3 Sup. Ct. 193, 27 L. Ed. 922).

Immunity from taxation is not included in the word "privileges," as used in an act incorporating a railroad company, and cloth-

ing it with all the rights, privileges, and powers embraced in the charter of another railroad company named. *Nashville, C. & St. L. R. Co. v. Commonwealth*, 30 S. W. 200, 201, 97 Ky. 162; *Wilmington & W. R. Co. v. Alsbrook*, 110 N. C. 437, 14 S. E. 1007; *Nashville, C. & St. L. R. Co. v. Hodges*, 75 Tenn. (7 Lea) 663; *Wilson v. Gaines*, 68 Tenn. (9 Baxt.) 546, 549; *State v. Mercantile Bank*, 95 Tenn. 212, 31 S. W. 989; *Nashville, M. & S. Turnpike Co. v. White*, 92 Tenn. 370, 22 S. W. 75; *Kentucky Cent. R. Co. v. Commonwealth*, 10 S. W. 269, 270, 87 Ky. 661. Contra, see *Humphrey v. Pegues*, 83 U. S. (16 Wall.) 244, 247, 21 L. Ed. 326; *State of Tennessee v. Whitworth*, 6 Sup. Ct. 649, 652, 117 U. S. 139, 29 L. Ed. 833; *State v. Betts*, 24 N. J. Law (4 Zab.) 555, 557; *Natchez, J. & C. R. Co. v. Lambert*, 13 South. 33, 35, 70 Miss. 779; *State Board of Assessors v. Morris & E. R. Co.*, 7 Atl. 826, 834, 49 N. J. Law (20 Vroom) 193; *Knoxville & Ohio R. Co. v. Hicks*, 68 Tenn. (9 Baxt.) 442.

Immunity from taxation must be considered as a personal privilege, not extending beyond the immediate grantee unless otherwise so declared in express terms. As said in *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860: "The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its roads and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them." It is true there are some cases where the term "privilege" has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and we think the better, opinion is that, unless other provisions remove all doubt of the intention of the Legislature to include the immunity in the term "privilege," it will not be so construed. *Pickard v. East Tennessee V. & G. R. Co.*, 9 Sup. Ct. 640, 642, 130 U. S. 637, 29 L. Ed. 785, reversing 24 Fed. 614. See, also, *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 185, 5 Sup. Ct. 813, 29 L. Ed. 121; *Anne Arundel County Com'rs v. Annapolis & E. R. Co.*, 47 Md. 592, 613.

In a grant of a charter to the D. Insurance Company, with all the rights, privileges, and immunities of the B. Company, the words "rights, privileges, and immunities" are certainly full and ample for the purpose of granting an exemption from taxation, but the word "immunity" expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from

taxation is more accurately described as an "immunity" than as a "privilege," although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption. So that, where an act was passed incorporating the W. Insurance Company, giving it all the rights and privileges of the D. Company, the omission of the word "immunities" implied that the W. Company was not to be exempt from taxation. *Phoenix Fire & Marine Ins. Co. v. State of Tennessee*, 16 Sup. Ct. 471, 472, 161 U. S. 174, 40 L. Ed. 660; *Memphis v. Phoenix Fire & Marine Ins. Co.*, 91 Tenn. 566, 19 S. W. 1044.

A decree of court ordering and confirming a sale of the entire property of a railroad, with the rights, privileges, and franchises of the company, vests the purchaser with all the rights, privileges, and immunities appertaining to the franchise by the charter and amendments, and passes to the purchaser an exemption from taxation. *State v. Nashville, C. & St. L. Ry. Co.*, 80 Tenn. (12 Lea) 583, 592.

The New Jersey act of February 9, 1869, validated and confirmed a certain lease and contract by which the Morris & Essex Railroad Company leased their road to the D., L. & W. Railroad Company, and by which it expressly authorizes and empowers the latter company to hold, use, and enjoy the franchises, rights, privileges, and immunities by the lease and contract granted it. Held, that the designation of "privileges and immunities" should be construed as a grant of immunity from taxation, as expressed in a previous statute. *State Board of Assessors v. Morris & E. R. Co.*, 7 Atl. 826, 829, 49 N. J. Law (20 Vroom) 193.

#### Exercise of business requiring license.

The first Legislature after the formation of the Constitution acted on the idea that any occupation which was not open to every citizen, which could only be exercised by a license from some constituted authority, was a "privilege," and it is presumed that this is a correct definition in this application of the term. *French v. Baker*, 36 Tenn. (4 Sneed) 193; *Pullman Southern Car Co. v. Nolan* (U. S.) 22 Fed. 276, 279; *Dun v. Cullen*, 81 Tenn. (13 Lea) 202, 204.

A privilege is the exercise of an occupation or business which requires a license from some proper authority designated by a general law, and not open to all or any one without such license. *Jenkins v. Ewin*, 55 Tenn. (8 Heisk.) 456, 475; *Pullman Southern Car Co. v. Nolan* (U. S.) 22 Fed. 276, 279; *Blaufeld v. State*, 53 S. W. 1090, 1091, 103 Tenn. 593; *Mayor of Columbia v. Guest*, 46 Tenn. (3 Head) 413, 414.

"Privileges," as used in the constitutional provision giving power to the Legislature

to tax merchants and peddlers, etc., are those which cannot be enjoyed without legal authority, which is generally evidenced by license. *Cate v. State*, 35 Tenn. (3 Sneed) 120, 121.

A privilege is a license to do anything which is prohibited by the general law. *Wiltse v. State*, 55 Tenn. (8 Helsk.) 544, 547.

A positive prohibition is not essential, the requirement of a license carrying with it a prohibition to act without it. *Dun v. Cullen*, 81 Tenn. (13 Lea) 202, 204.

It is a power of the Legislature alone to grant privileges and forbid their exercise without a license. Until made a privilege, the occupation of a keeper of a livery stable cannot be taxed as such, any more than can a keeper of a blacksmith shop, or a lawyer's or a doctor's office. *Mayor of Columbus v. Guest*, 40 Tenn. (3 Head) 413, 414.

Const. art. 2, § 28, provides that the Legislature shall have power to tax merchants, peddlers, and "privileges" in such manner as they may from time to time direct. This would seem to indicate that the occupations of merchants and peddlers were not embraced by the word "privilege," but this conclusion does not necessarily follow, and the question must still depend on the definition of the term. The question is whether the occupation of a wholesale grocer could be legally exercised without a license. If not, as it certainly cannot, it is a privilege, and subject to be taxed as such under Act 1851-52, c. 117, § 5, authorizing the county courts to levy taxes to pay county subscriptions to railroads. *French v. Baker*, 36 Tenn. (4 Sneed) 193, 195.

A "privilege" is something that can only be lawfully done by obtaining a license to authorize it, and hence the business of exhibiting a circus, which can only be done by obtaining a license, is taxable as a privilege. *Robertson v. Heneger*, 36 Tenn. (5 Sneed) 257, 258.

Under a statute providing that the rate of taxation on the following privileges shall be as follows, per annum, "among others, commercial agencies, \$100," the conducting of a commercial agency is created a privilege, taxable as such in each county in which an office is kept. *Dun v. Cullen*, 81 Tenn. (13 Lea) 202, 204.

Const. art. 2, § 28, provides that "the Legislature shall have power to tax merchants, peddlers, and privileges in such manner as they may from time to time direct." Construing this section of our Constitution, this court has defined a "privilege" to be whatever the Legislature chooses to declare to be a privilege, meaning thereby that whatever occupation affects the public may be so classed and be taxed as such. *Kurth v. State*, 86 Tenn. 134, 136, 5 S. W. 593; *Nash-*

*ville, M. & S. T. Co. v. White*, 22 S. W. 75, 76, 92 Tenn. 370.

The word "privileges," as used in the act establishing the municipality of the city of Jacksonville, and giving power to levy taxes for revenue purposes upon "all property and privileges taxable by law for state purposes, and to license, tax and regulate auctioneers, retailers of liquors and other avocations, and all other privileges taxable by the state," does not mean such things as are technically privileges, and cannot be exercised except by authority of law, but means other occupations and business of the same kind as those mentioned, and that are taxable by law for state purposes. "In a word, we think the meaning of the Legislature, as shown by the language last referred to, was simply that whatever occupations were subjected to taxation by the state laws might be taxed by the city of Jacksonville under an ordinance or ordinances duly passed, and none other." A market is a franchise or technical privilege, and, under said act, is not taxable by the city for revenue purposes. *City of Jacksonville v. Ledwith*, 7 South. 885, 891, 26 Fla. 163, 9 L. R. A. 69, 23 Am. St. Rep. 558.

Under Const. tit. "Revenue," §§ 1, 2, giving the General Assembly power to tax merchants, peddlers, and privileges, the privileges contemplated are such as cannot be exercised or enjoyed by any citizen or other integral of the whole community without the intervention of some statutory provision granting to or conferring upon one or more individuals the right of doing some particular thing; as, for instance, the right of banking, of keeping a ferry across a navigable water, where it is exclusive; of keeping toll roads, etc. Keeping a billiard table is not a privilege under such clause, and cannot be made one. *Stevens v. State*, 2 Ark. (2 Pike) 291, 305, 35 Am. Dec. 72.

The settled judicial construction, interpretation, and definition of the term "privilege," at the time of the adoption of our Constitution in 1870, in which sense the term was used in that instrument, was "the exercise of an occupation or business which requires a license from some proper authority designated by a general law, and not open to all, or any one, without such license." The essential element of the definition is occupation and business, and not the ownership simply of property, or its possession or keeping it. The tax is on the occupation, business, pursuits, vocation, or calling, it being one in which a profit is supposed to be derived by its exercise from the general public, and not a tax on the property itself, or the mere ownership of it. *Phillips v. Lewis*, 3 Tenn. Cas. 231, 242.

A "privilege," under Const. art. 2, § 28, providing that the Legislature may tax mer-



chants, peddlers, and privileges, is a business, pursuit, or avocation, so that the words, "whether they make a business of it, or not," in Acts 1901, p. 227, c. 128, § 14, providing that any persons exercising any of the enumerated privileges must pay the tax for the exercise thereof, whether they make a business of it or not, are nugatory; and a person who merely casually buys a single note, without seeking the transaction or holding himself out as a dealer therein, is not subject to the privilege tax for shaving notes. *Trentham v. Moore* (Tenn.) 76 S. W. 904, 905.

#### As conveying the fee.

Where the description in a deed of a parcel of land bounded the premises upon one side by "the shore of the sea at high-water mark," and then added the words "including all the privilege of the shore to low-water mark," the fee in the land between high and low water mark passed to the grantee. The word "privilege," although not a very appropriate term to use in describing the owner's title to real estate, may be used without doing very great violence to its legitimate meaning. An estate in fee simple is, in one sense, no more than the privilege of holding land by a certain tenure. Such a holding may be described as a privilege without doing violence to the term. *Dillingham v. Roberts*, 75 Me. 469, 471, 46 Am. Rep. 419.

#### Franchise.

The word "privilege" as applied to a corporation is ordinarily used as synonymous with "franchise." *International Trust Co. v. American Loan & Trust Co.*, 65 N. W. 78, 79, 62 Minn. 501.

"Privilege" is a comprehensive term, and to enter on and occupy lands that form a part of the canal system of the state, by any one, is exercising a privilege, in one sense of that term; and, if this is done without authority from the state, it is exercising a privilege not conferred by law. In considering a statute authorizing proceedings in quo warranto against a corporation whenever it exercised any franchise or privilege not conferred upon it by law, the court said: "The contention that the word 'privilege' was used advisedly by the Legislature, as more comprehensive than 'franchise,' and in a sense broad enough to comprehend a specific grant in respect of public property, is not without reason for its support. If the word 'privilege' was employed as synonymous with 'franchise,' its use was superfluous." *State v. Pittsburg, C. & St. L. Ry. Co.*, 41 N. E. 205, 215, 53 Ohio St. 189.

Where a sale is had under a decree directing a sale of the charter of a corporation, with all its rights and privileges, and the order confirming the sale confirms title in the purchaser to the charter, with all the rights, privileges, and franchises, so much of

the order as confirms title to the franchises is void. *State v. Mercantile Bank*, 95 Tenn. 212, 31 S. W. 989.

#### Lien differentiated.

A "privilege," in admiralty, differs from a lien, and may mean no more than a general priority in the distribution of the debtor's assets. The Underwriter (U. S.) 119 Fed. 713, 715 (citing *The Young Mechanic* [U. S.] 30 Fed. Cas. 873, 875).

A "privilege" is defined by article 2095 of the Civil Code as "a right which the character of the credit gives to a creditor to be preferred to other credits, even mortgages." If not analogous in all respects to "lien," it authorizes a like preference in payment to claims within its scope from the proceeds in court. *The Dolphin* (U. S.) 7 Fed. Cas. 862, 864.

#### Mortgage or pledge.

Under the law of Louisiana, the term "privilege" has a well-defined meaning, different and distinct from the term "mortgage." *Succession of Benjamin*, 2 South. 187, 188, 39 La. Ann. 612.

"Privilege" and "pledge" are totally different things. A privilege is a right which the nature of a debt gives to a creditor, which enables him to be preferred before other creditors—even those who have mortgages—but a pledge is a contract by which a debtor gives something to his creditor as a security for his debts. *Carroll v. Bancker*, 10 South. 187, 194, 43 La. Ann. 1078, 1194.

#### Preference right of creditor.

The term "privilege," in the Roman law, was used to designate a right of priority or satisfaction growing out of the proceeds of the thing in a concurrence of creditors. *The Nestor* (U. S.) 18 Fed. Cas. 9, 13.

A privilege is a right which the nature of a debt gives to a creditor, and entitles him to be paid in preference to others from the proceeds of the thing affected with the lien. Privilege can be claimed only for those debts to which it is expressly granted in the Civil Code. *Labouisse v. Orleans Cotton Rope & Mfg. Co.*, 9 South. 204, 43 La. Ann. 245; *Butchers' Union Slaughterhouse & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughterhouse Co.*, 6 South. 508, 510, 41 La. Ann. 355.

Privilege is a right which the nature of a debt gives to a creditor, and which entitles him to be preferred before other creditors—even those who have mortgages. *Civ. Code La.* 1900, art. 3188.

#### Public privilege.

The word "privilege," in the meaning of the clause of the Constitution providing that "all freemen, when they form a social com-

pact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public service," is a public privilege, and not the exercise or enjoyment of a special privilege. The exclusive right to keep a ferry, and to construct and operate highways, etc.—all such exclusive rights are based on a consideration rendered the public in the discharge of a duty the state was required to perform. The constitutional inhibition was intended to prevent the exercise of some public function, or an exclusive privilege affecting the interests and rights of the public generally, when not in consideration of public service. Lottery grants are mere special privileges acquired under legislative grant, and their validity is not upheld by reason of, or in consideration of, public service. *Commonwealth v. Whippis*, 80 Ky. 269, 274.

#### **Right.**

The word "privilege," as used in a deed conveying certain premises, but excepting and reserving the right and privilege of taking water from a stream, is synonymous with the word "right," and is limited to the use for the convenience of the grantor, his heirs and assigns. *Smith v. Cornell University*, 45 N. Y. Supp. 640, 643, 21 Misc. Rep. 220.

The words "privilege" and "right," when used in statutes, are sometimes synonymous, and are held to be so in the Brooklyn city charter (Laws 1888, c. 583), providing that members of the police force cannot be removed, except for cause, after notice and hearing, and also providing for the appointment of boiler inspectors, who shall possess the same powers and privileges as members of the police force, so that the commissioner has no power to remove such an inspector, except for cause, after notice and hearing. *People v. Hayden*, 30 N. E. 970, 971, 133 N. Y. 193.

#### **Right to exclusive use of label or trade-mark.**

A privilege is a right conferred on some persons to acquire on more favorable terms what all other persons might acquire on less favorable terms. The exclusive right to use the words, figures, and designs contained in labels or trade-marks, given to unions of workmen, constitutes a privilege. *Schmalz v. Wooley*, 39 Atl. 539, 541, 56 N. J. Eq. 649.

#### **PRIVILEGE FROM ARREST.**

The "privilege from arrest," in the Constitution, exempting Senators and Representatives in Congress from arrest during attendance at the session of their respective houses, and in going to and returning from the same, should not be construed in a confined or literal sense. The privilege extends as well to

Delegates from the territories as to Senators and Representatives from the states, and is not only a privilege from arrest, but also from trial. *Doty v. Strong* (Wis.) 1 Pin. 84, 87, 40 Am. Dec. 773.

Under Const. art. 1, § 6, providing that Representatives shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at their respective houses, and in going to and returning from the same, the privilege of all members of Congress of exemption from arrest while going to a session of Congress is limited to a reasonable time. It is not strictly confined to the exact number of days required for the journey, nor will it be forfeited for a slight deviation from the route which is most direct. *Miner v. Markham* (U. S.) 28 Fed. 387, 390.

Const. art. 1, § 6, provides that Senators and Representatives shall be privileged from arrest during their attendance at sessions of their respective houses, and in going to and returning from the same. Held, that the privilege does not extend to 40 days and more before and after a session, but is limited to a reasonable time. *Hoplin v. Jenckes*, 8 R. I. 453, 458, 5 Am. Rep. 597.

One who goes to Washington duly commissioned to represent a state in Congress is privileged from arrest, though it is subsequently decided by Congress that he is not entitled to a seat there; and this privilege continues until he reaches home, if he returns as soon as possible after such decision. Sickness or want of funds is a valid excuse for failure to return immediately after such decision. *Dunton v. Halstead*, 2 Pa. Law J. 237, 238.

The word "privileged," in St. 1849, Comp. St. c. 31, § 73, giving persons privileged from arrest the right to plead such privilege in abatement, is to receive its ordinary and legitimate force, as extending to exemptions from arrest upon peculiar grounds, applying to some particular class of persons, as parties and witnesses, attorneys and counselors, and members of the Legislature and of Congress. That is all that the words of the statute import. It was not intended by "privileged" to include every one not liable to arrest without the filing of an affidavit. *Bank of Vergennes v. Barker*, 27 Vt. 243-245.

#### **PRIVILEGE OF PRE-EMPTION.**

A privilege of pre-emption is the right acquired by occupation of unreserved United States lands without taking any of the steps required by the pre-emption laws, and is neither a legal nor an equitable title. It is only a proffer to a certain class of persons that they may become purchasers if they will. But without payment or an offer to

pay, it confers no equity. A right is conferred by it only when the party has accepted the offer by claiming the benefit of the statute in the manner and within the time required, or by payment. Until there is an offer to do what the pre-emption laws require to be done to initiate and prosecute a pre-emption right, there is no existing claim of the settler to pre-empt which can be completed after his death by his heirs or his administrators. *Buxton v. Traver*, 7 Pac. 450, 451, 67 Cal. 171.

In *Davenport v. Farrar*, 2 Ill. (1 Scam.) 314, 315, Lockwood, J., says that the pre-emption right is a right to purchase at a fixed price, in a limited time, in preference to others. If the purchaser is unable or unwilling to purchase at the price or at the time mentioned in the law, the land can be sold to others, and the pre-emptor turned out of possession, as an intruder. These conditions annexed to his possession show that his interest is only temporary, and hence, where a pre-emptor has obtained no evidence of title, he has no inheritable estate. *Bowers v. Keesecker*, 14 Iowa, 301, 307.

A right of pre-emption is only a right to purchase land pre-empted after occupancy. It is not a claim of title, in any sense, but a naked right to effect a purchase and acquire a title. *Woodward v. McReynolds* (Wis.) 2 Pin. 268, 275.

"Right of pre-emption" means the exclusive right which a person has to purchase a quantity of land belonging to the United States in consequence of having complied with the laws of Congress upon the subject of pre-emption. *Franklin v. Kelley*, 2 Neb. 79, 106.

The term "right of pre-emption" has acquired, in that part of the United States where the public land is situated, a clear and definite signification. It means the exclusive right which a person has to purchase a quantity of land belonging to the United States, in consequence of having complied with the laws of Congress on the subject of pre-emption. The laws have invariably required that, in order to acquire this right, a person must have settled upon the land, or cultivated a portion of it, or done both. A pre-emptor is one who, by settlement upon the public land, or by cultivation of a portion of it, has obtained the right to purchase a portion of the land thus settled upon or cultivated, to the exclusion of all other persons. *Dillingham v. Fisher*, 5 Wis. 475, 480.

#### PRIVILEGE OF RESHIPPING.

The privilege of reshipping reserved in a bill of lading is intended for the benefit of the carrier, but is not designed to limit his responsibility. He continues liable, notwithstanding this clause, by the express

terms of the contract, to deliver the goods safe and in good order; but he is at liberty to do this either in his own boat, or in any other good boat which he may select. *Whitesides v. Russell* (Pa.) 8 Watts & S. 44, 48; *Dunseth v. Wade*, 3 Ill. (2 Scam.) 285, 288; *Little v. Semple*, 8 Mo. 99, 101, 40 Am. Dec. 123.

The phrase "privilege of reshipping," as contained in a bill of lading giving the master of the boat the privilege of reshipping in case of low water, reserves a privilege to the boat, and does not impose upon it an obligation to reship in case of detention on account of low water. *Sturgess v. The Columbus*, 23 Mo. 230, 231; *Broadwell v. Butler* (U. S.) 4 Fed. Cas. 194, 195.

A bill of lading reserving to the carrier the privilege of reshipping confers only the right of transferring the goods shipped to another boat or vessel for the purpose of being transported to the port of destination, and does not authorize a temporary storing of the goods on a wharfbat at the point of reshipment; the carrier's liability not being lessened in regard to delivering the goods at their point of destination. *Carr v. The Michigan*, 27 Mo. 196, 197, 72 Am. Dec. 257.

#### PRIVILEGE OF THE SHORES.

The term "privilege of the shores," as used in St. 1811, c. 56, incorporating the proprietors of certain company lands, and reserving to the township the privilege of the shores, includes the right of the town to take sand and gravel from the beach to repair its highways, if the beach would not be materially affected thereby; the town for several years having let to various persons the right to take seaweed, sand, gravel, and stones from the shores or beaches, and used such sand and gravel to repair its highways. Nor is the natural meaning of the word "privilege," which may be defined as a right peculiar to an individual body, inconsistent with this construction. As applied to the shore of the sea, it is the right to take those things cast upon the shore by the sea. *Ripley v. Knight*, 123 Mass. 515, 518.

#### PRIVILEGE TAX.

Succession tax as, see "Succession Tax."

Privilege taxes are taxes upon the property of corporations, and hence, under a constitutional provision that the property of all corporations for pecuniary profit shall be subject to taxation, an exemption from taxation in the charter of a company does not exempt it from a privilege tax on its franchise. *Gulf & Ship Island R. Co. v. Hewes*, 22 Sup. Ct. 26, 30, 183 U. S. 66, 46 L. Ed. 86.

Privilege taxes are taxes on certain kinds of business, for the carrying on of which

licenses are required, and they are imposed on a great number of callings, trades, etc., among which are merchandising, selling by auction, peddling, cotton brokers, coalyards, inns and taverns, boarding houses, photograph galleries, transient vendors of horses or mules, banks of deposit and of discount, insurance agents, real estate agents, etc. *Adams v. Colonial & U. S. Mortg. Co.*, 34 South. 482, 524, 82 Miss. 263.

The charge imposed by a city on a telegraph company for the privilege of using the streets, alleys, and public places of the city, which was graduated by the amount of such use, is not a privilege tax; the amount paid not being graduated by the amount of the business, and not being a sum fixed for the privilege of doing business, but more in the nature of a charge for the use of property belonging to the city, and which may properly be called rental. *City of St. Louis v. Western Union Tel. Co.*, 13 Sup. Ct. 485, 487, 148 U. S. 92, 37 L. Ed. 380.

### PRIVILEGED COMMUNICATION.

#### Attorney and client.

With reference to privileged communications being inadmissible in evidence, it is a settled rule of common law that if the communication be to one who is at the time professionally employed, and occupies the attitude of a legal adviser, it is privileged, and the seal of silence is on it, subject to be broken by consent of the client only. *Carter v. West*, 19 S. W. 592, 593, 93 Ky. 211. It matters not whether a fee was charged on the lawyer's books, where he had a clear right to charge, and the client expected that he would do so. *Andrews v. Simms*, 33 Ark. 771, 774.

Privileged communications between attorney and client do not extend to extraneous or impertinent communications, and all that a client says to his attorney is not to be rejected as a privileged communication; and it does not reach cases where the matter is not of a private nature, nor where the attorney was directed to plead the fact to which he was called to testify. Privileged communications may lose their privileged character by lapse of time, and what was private at one time may not be private at an after time. Directions to an attorney to make a certain contract are a confidential communication before, but not after, the communication was made; and a solicitor cannot disclose the contents of an answer in equity before it is filed, but may afterwards. *Snow v. Gould*, 74 Me. 540, 543, 43 Am. Rep. 604.

The policy of the law will not allow counsel to make disclosures of confidential communications from his client, but, if the client see fit to be a witness, he makes himself liable to full cross-examination, like any other witness, and his communications to his attorney are not privileged. This is true

even as to defenses in criminal cases. Inhabitants of *Woburn v. Henshaw*, 101 Mass. 193, 200, 3 Am. Rep. 333.

In order for a communication to an attorney to be privileged, so that it cannot be used in evidence, it must be made for the purpose of obtaining professional advice or aid in respect to the particular matter to which it refers. Hence a communication made to an attorney by one party for the purpose of having it made known to the adverse party is not a privileged communication. *Henderson v. Terry*, 62 Tex. 281, 285.

To supply the predicate for secondary evidence to a deed, plaintiff put defendant's attorney on the witness stand, and asked him whether he or defendant had the original deed. The attorney refused to answer, relying on the law of privileged communications. The question asked did not come within the rule of privileged communications. *Zabel v. Schroeder*, 35 Tex. 308, 313.

A communication cannot be considered as privileged because made in professional confidence, unless the person to whom it is made is acting for the time being in the character of a legal adviser of the person who makes it. The communication must also be made for the purpose of obtaining professional advice or aid in the matter to which the communication relates. *Flack's Adm'r v. Neill*, 26 Tex. 273, 275, 276 (citing 1 Greenl. Ev. §§ 239, 240).

The rule as to privileged communications is prescribed in Code, § 3643, and, as applied to a practicing attorney, is as follows: "That he shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice, unless the client waives the privilege." Writings, when confided to an attorney, and when within the rule, are privileged, the same as verbal communications. Communications, to be privileged, must be confidential; that is, communicated in confidence; privately intrusted; secret; in reliance on secrecy. *Webst. Dict.* Under the above section, a letter written by a party in a civil action to one of his attorneys, to whom a copy of the findings had been given, requesting that such copy be sent to said party for the alleged purpose of showing it to another person, was not a confidential communication, necessary and proper to enable the attorney to act, so as to make it privileged. Nor was the copy of the findings returned by such party to his attorney, though a confidential communication, privileged. *State v. Kidd*, 89 Iowa, 54, 56 N. W. 263, 266.

#### Husband and wife.

Under Code, § 4607, providing that a husband or wife cannot be examined as to any

communications made by one to the other during marriage, nor shall they be permitted, after the marriage relation ceases, to reveal any such communication, a widow cannot testify to communications made by her husband to her during their marriage, in an action to set aside the husband's will on the ground of mental incapacity, for the statute absolutely closes the mouth of a husband or wife as to any communication made by the one to the other during marriage. *Hertrich v. Hertrich*, 87 N. W. 689, 690, 114 Iowa, 643, 89 Am. St. Rep. 389.

Letters from a husband, found by the wife's administrator among her papers, which may be used against him in a suit in which he was then interested, were privileged communications. *Bowman v. Patrick* (U. S.) 32 Fed. 368, 369.

#### Minister or priest.

To render a communication to a minister of the gospel or a priest privileged, within the meaning of Code Civ. Proc. § 353, providing that no minister of the gospel or priest shall be allowed, in giving his testimony, to disclose any confidential communication properly intrusted to him in a professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline, it must be received in confidence. By this is not meant that it must be made under the express promise of secrecy, but, rather, that the communication was in confidence, and with the understanding, express or implied, that it should not be revealed to any one. The mere fact that a communication is made to a person who is a priest does not of itself make such communication privileged. To have that effect, it must have been made in confidence of the relation, and under such circumstances as to imply that it should forever remain secret in the breast of the confidential adviser. *Hills v. State*, 85 N. W. 836, 837, 61 Neb. 589, 57 L. R. A. 155.

#### Physician and patient.

At the common law, information gained by a physician or surgeon while in attendance on a patient was not privileged. *People v. De France*, 62 N. W. 709, 712, 104 Mich. 563, 28 L. R. A. 139.

The fact that a physician was called to attend a patient is not a privileged communication. *Sovereign Camp of Woodmen of the World v. Grandon*, 89 N. W. 448, 449, 64 Neb. 39.

#### PRIVILEGED COMMUNICATION (In Libel and Slander).

A privileged communication is defined as one made upon a proper occasion, from a proper motive, and based upon a reasonable

cause. *Conroy v. Pittsburgh Times*, 21 Atl. 154, 156, 139 Pa. 334, 11 L. R. A. 725, 23 Am. St. Rep. 188 (citing *Briggs v. Garrett*, 111 Pa. 404, 414, 2 Atl. 513, 56 Am. Rep. 274).

A defamatory statement made to another in pursuance of some duty, political, social, or personal, is privileged so that an action will not lie, though the statement be false, unless in the last two cases actual malice be proved in addition. *Bacon v. Michigan Cent. R. Co.*, 33 N. W. 181, 184, 66 Mich. 166.

The rule is that a communication made in good faith upon a subject-matter in which the communicating party has an interest, or in reference to which he has a duty, public or private, legal, moral, or social, if made to a person having a corresponding interest, is privileged. *Finley v. Steele*, 60 S. W. 108, 109, 159 Mo. 299, 52 L. R. A. 852; *Sullivan v. Strathan-Hutton-Evans Commission Co.*, 53 S. W. 912, 915, 152 Mo. 268, 47 L. R. A. 859; *Bowsky v. Cimiotti Unhaling Co.*, 76 N. Y. Supp. 465, 466, 72 App. Div. 172; *McCarty v. Lambley*, 46 N. Y. Supp. 792, 794, 20 App. Div. 284; *Marks v. Baker*, 9 N. W. 678, 679, 28 Minn. 162; *Cameron v. Corkran*, 42 Atl. 454, 457, 2 Marv. (Del.) 166; *King v. Patterson*, 9 Atl. 705, 707, 49 N. J. Law (20 Vroom) 417, 60 Am. Rep. 622; *Schulze v. Jalonick*, 44 S. W. 580, 586, 18 Tex. Civ. App. 296; *Merchants' Ins. Co. v. Buckner* (U. S.) 98 Fed. 222, 231, 39 C. C. A. 19; *Hudnell v. Eureka Lumber Co.*, 45 S. E. 532, 533, 133 N. C. 169.

Privileged communications are exceptions to the general rule which implies malice in a libelous publication, and infers some damage. It rests with the party claiming the privilege to show that the cause is brought within the exception. The exception covers cases where a communication is made bona fide upon any subject-matter in which the party making it has an interest, or in reference to which he has a duty, legal, moral, or social, which may fairly be presumed to have led to the communication, when made to a person having a corresponding interest or duty. *Hemmens v. Nelson*, 13 N. Y. Supp. 175, 176, 59 Hun. 620.

A privileged communication is one made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, to a person having a corresponding interest or duty, and which contains matter which, without the occasion upon which it is made, would be defamatory or actionable. The interest must be common to both parties—the person communicating and the recipient of the communication—for example, two customers of the same bank, two directors of the same company, two creditors of the same debtor, two

officers of the same corps, two executors or trustees, an attorney and client, etc., and, to fall within the privilege, the statement must be such as the occasion warrants, and must be made bona fide to protect the private interests both of the speaker and the person addressed. *Sullivan v. Strathan-Hutton-Evans Commission Co.*, 53 S. W. 912, 915, 152 Mo. 268, 47 L. R. A. 859.

A privileged communication is one made bona fide upon any subject-matter in which the party communicating has any interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty, although it contains criminating matter, which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty, or imperfect obligation. *Upton v. Hume*, 24 Or. 420, 33 Pac. 810, 811, 21 L. R. A. 493, 41 Am. St. Rep. 863.

"A communication is privileged, within the rule, when made in good faith, in answer to one having an interest in the information sought; and it will be privileged, if voluntary, if the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information." *Sunderlin v. Bradstreet*, 46 N. Y. 188, 191, 7 Am. Rep. 322; *Locke v. Bradstreet Co.* (U. S.) 22 Fed. 771, 773. See, also, *Erber v. Den* (U. S.) 12 Fed. 526, 530; *Trussell v. Scarlett* (U. S.) 18 Fed. 214, 216.

The occasion that makes a communication privileged is when one has an interest in the matter, or a duty in regard to it, or there is a propriety of utterance, and he makes a statement in good faith to another who has a like interest or duty, or to whom a like propriety attaches to hear the utterance. *John W. Lovell Co. v. Houghton*, 22 N. E. 1066, 116 N. Y. 520, 6 L. R. A. 363.

A privileged communication is one made in a communication, without malice, to a person interested therein, by one who is so interested, or by one who stands in such a relation to the person interested, as to afford a reasonable ground for supposing the motives for the communication innocent, or who is requested by the person interested to give the information. Civ. Code Cal. § 47; *Myers v. Longstaff*, 84 N. W. 233, 236, 14 S. D. 98; *Sesler v. Montgomery* (Cal.) 19 Pac. 686, 687; *Preston v. Frey*, 91 Cal. 107, 111, 27 Pac. 533; *Harris v. Zanone*, 93 Cal. 59, 70, 28 Pac. 845; *People v. Stokes*, 24 N. Y. Supp. 727, 729, 30 Abb. N. C. 200. Such definition necessarily means that, if there be malice, the communication cannot be privileged. *Sesler v. Montgomery* (Cal.) 19 Pac. 686, 687.

To constitute a privileged communication, in the law of libel, it is said, "the law

requires such charges to be made in the honest desire to promote the ends of justice, and not a spiteful or malicious feeling against the person accused, nor with the purpose of obtaining any indirect advantage against the accuser; nor should a serious accusation be made recklessly or wantonly. They must always be warranted by some circumstances reasonably arousing suspicion, and they should not be made unnecessarily to persons unconcerned, nor before more persons, nor in stronger language, than necessary." *Moore v. Thompson*, 52 N. W. 1000, 1001, 92 Mich. 498 (citing *Newell, Defam.* p. 501).

In the case of *Cockayne v. Hodgkisson*, 5 Car. & P. 543, we find it declared by Park, B., that every willful and unauthorized publication injurious to the character of another is a libel, but where the writer is acting on any duty, legal or moral, toward the party to whom he writes, or is bound by his situation to protect the interests of such person, that which he writes under such circumstances is a privileged communication, unless the writer be actuated by malice. *White v. Nicholls*, 44 U. S. (3 How.) 266, 284, 11 L. Ed. 591.

Whether a libel or slander is within the protection accorded to privileged communications depends upon the occasion of the publication or utterance, as well as the character of the communication. *Sunderlin v. Bradstreet*, 46 N. Y. 188, 191, 7 Am. Rep. 322.

There are expressions found in some of the opinions of the courts of the state, which, when closely scrutinized, will be found to be dicta, to the effect that a communication, to become privileged, need not be made by one who rests under some duty to the party to whom the statement is made. These expressions, in our opinion, are opposed to the great weight of authority—especially to the rule announced by the courts of England, which have so frequently construed the common law upon the subject. *Davis v. Wells*, 60 S. W. 566, 567, 25 Tex. Civ. App. 155.

Any communication or statement made in the discharge of a legal or moral duty which may be considered applicable or pertinent to the duty which the party is engaged in discharging is privileged, however injurious it may be to individuals, unless it appears to have been done from a malicious and mischievous design to injure the character of the person to whom it refers. *Viele v. Gray* (N. Y.) 18 How. Prac. 550, 562.

A written communication between private persons concerning their own affairs is prima facie privileged. *Moore v. Manufacturers' Nat. Bank of Troy*, 4 N. Y. Supp. 378, 379, 51 Hun, 472.

A communication, to be privileged, must be made upon a proper occasion, from a proper motive, in a proper manner, and based on

reasonable or probable cause. *Moore v. Leader Pub. Co.*, 8 Pa. Super. Ct. 152, 157; *Coates v. Wallace*, 4 Pa. Super. Ct. 253, 257; *Commonwealth v. Brown*, 1 Pa. Dist. R. 565, 567; *Browning v. Commonwealth (Ky.)* 76 S. W. 19, 20.

It is not sufficient to protect a publication of a transaction from the charge of libel that it contains a correct narrative of what occurred, provided that it contains unwarranted deductions from the facts, tending to defame the party complaining. *Edsall v. Brooks*, 25 N. Y. Super. Ct. (2 Rob.) 29, 34.

When both the party making and the party receiving a communication had an interest in it, it has never been doubted that it was privileged. *Moore v. Manufacturers' Nat. Bank of Troy*, 4 N. Y. Supp. 378, 379, 51 Hun, 472.

#### Classes.

See "Absolutely Privileged"; "Conditionally Privileged Communication"; "Qualified Privilege."

"Privileged communications" are of two kinds: (1) Absolutely privileged, which are restricted to cases in which it is so much to the public interest that the defendant should speak out his mind fully and freely that all actions in respect to the words used are absolutely forbidden, even though it be alleged that they were used falsely, knowingly, and with express malice. This complete immunity obtains only where the public service or the due administration of justice requires it; e. g., words used in debate in Congress and the state Legislatures, reports of military or other officers to their superiors in the line of their duty, everything said by a judge on the bench, by a witness in the box, and the like. In these cases the action is absolutely barred. (2) Qualified privilege. In less important matters, where the public interest does not require such absolute immunity, the plaintiff will recover in spite of the privilege, if he can prove that the words were not used bona fide, but that the defendant used the privileged occasion artfully and knowingly to falsely defame the plaintiff. *Odgers, Sland. & L.* 184. In this class of cases an action will lie only where the party is guilty of falsehood and express malice. *Ramsey v. Cheek*, 13 S. E. 775, 109 N. C. 270.

Privileged communications are of two kinds: First, absolute; second, conditional or qualified. When the communication is absolutely privileged, no action will lie for its publication, no matter what the circumstances under which it was published. When qualified, however, plaintiff may recover if he shows that it was actuated by malice. In determining whether or not the communication was qualifiedly privileged, regard must be had of the occasion and of the relation of

the parties. One may make a publication to his servant or agent without liability, which, if made to a stranger, would be actionable. *Nichols v. Eaton*, 81 N. W. 792, 793, 110 Iowa, 509, 47 L. B. A. 483, 80 Am. St. Rep. 319.

Privileged communications are usually divided into those absolutely privileged and those only conditionally so. By an absolutely privileged publication is meant one which, by reason of the occasion upon which it is made, no remedy is provided for the damages in a civil action for slander or libel. A conditionally privileged publication is the privilege to publish, by speech or writing, whatever a party honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication be not unnecessarily made to others than to those persons whom the publisher honestly believes can assist him in the protection of his own rights, or to those whom he believes will, by reason of the knowledge of the matter published, be better able to assert or protect from invasion either their own rights, or the rights of others intrusted to their guardianship. *George Knapp & Co. v. Campbell*, 36 S. W. 765, 767, 14 Tex. Civ. App. 199.

There are two classes of privileged communications: (1) Those which are absolutely privileged, and for the publication of which an action cannot be maintained, no matter what the motive of the author may be. Within this class are accurate publications of the proceedings of courts of record and legislative bodies, and the statements of judges, witnesses, and jurors, made on trials in courts of record. (2) Communications which are prima facie privileged. Among this class are statements necessary to protect one's private interests—a statement of one having an interest in the subject-matter of the communication, made to another having an interest in the same matter. Prima facie privileged communications are subdivided into two kinds—those which relate to matters of public interest, and those which relate to purely private interests. In case a communication is prima facie privileged, the existence or nonexistence of malice on the part of the defendant is a question of fact. There are two questions involved in the issue whether a communication is prima facie privileged: First. Was the occasion privileged? Second. Did it go beyond what the occasion justified? *Hill v. Durham House Drainage Co.*, 29 N. Y. Supp. 427, 429, 79 Hun, 335.

"By an absolutely privileged communication," says Mr. Townshend in his work on *Slander & Libel*, "is not to be understood a publication for which the publisher is in no wise responsible; but it means a publication in respect of which, by reason of the occasion on which it is made, no reme-

dy can be had in a civil action or libel." Townsh. Sland. & L. p. 248, cited in *Ruohs v. Backer*, 53 Tenn. (6 Heisk.) 405, 19 Am. Rep. 598. There is a class of cases which are absolutely privileged, and depend in no respect for protection on bona fides. The occasion is an absolute privilege, and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion. In this class are embraced judicial proceedings. *Lea v. White*, 36 Tenn. (4 Sneed) 113. In this country, many, and perhaps the majority, of the courts have refused to adopt an absolute and unqualified privilege of a witness, as laid down in the English courts; but it is agreed that a witness is absolutely privileged as to everything said by him having relation or reference to the subject of inquiry before the court, or in response to questions asked by counsel, and presumptively so as to all his statements. *Cooper v. Phipps*, 24 Or. 357, 33 Pac. 986, 22 L. R. A. 836. In the case of *Gardemal v. McWilliams*, 43 La. Ann. 454, 9 South. 108, 26 Am. St. Rep. 195, it is said: "Certain communications are absolutely privileged. This privilege extends to parties, counsel, witnesses, jurors, and judges in a judicial proceeding, to proceedings in the legislative bodies, and to all who in the discharge of public duty, or in the honest pursuit of private right, are compelled to take part in the administration of justice or in legislation." *Cooley v. Galyon*, 70 S. W. 607, 609, 109 Tenn. 1, 60 L. R. A. 139, 97 Am. St. Rep. 823.

▲ conditionally privileged communication is a publication made on an occasion which furnishes a prima facie legal excuse for the making of it, and which is privileged unless some additional fact is shown which so alters the character of the action as to prevent its furnishing a legal excuse. *Cooley v. Galyon*, 70 S. W. 607, 609, 109 Tenn. 1, 60 L. R. A. 139, 97 Am. St. Rep. 823 (citing *Townsh. Sland. & L. p. 248, § 202*).

#### Inference of malice.

A privileged communication is an exception to the rule that every defamatory publication implies malice. *Wagner v. Scott*, 63 S. W. 1107, 1111, 164 Mo. 289.

In the leading case of *Wright v. Woodgate*, 2 Crompt., M. & R. 577, Parke, B., said: "The proper meaning of 'privileged communication' is only this: That the occasion on which the communication was made rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff, and makes it on him to prove that there was malice in fact; that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made." This language was expressly sanc-

tioned by Mr. Justice Daniel in *White v. Nicholls*, 44 U. S. (3 How.) 266, 287, 11 L. Ed. 591, and also in a recent case in the House of Lords—*Jenoure v. Delmege* (1891) App. Cas. 78. *Brown v. Vannaman*, 55 N. W. 183, 185, 85 Wis. 451, 39 Am. St. Rep. 860; *Finley v. Steele*, 60 S. W. 108, 109, 159 Mo. 299, 52 L. R. A. 852.

The term "privileged," as applied to a communication alleged to be libelous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering such evidence of its existence beyond the mere falsity of the charge. *Alabama & V. Ry. Co. v. Brooks*, 13 South. 847, 848, 69 Miss. 168, 30 Am. St. Rep. 528; *Lewis v. Chapman*, 16 N. Y. 369, 372; *Garret v. Dickerson*, 19 Md. 418, 419; *Bacon v. Michigan Cent. R. Co.*, 33 N. W. 181, 184, 66 Mich. 166; *Marks v. Baker*, 9 N. W. 678, 679, 28 Minn. 162; *Sullivan v. Strathan-Hutton-Evans Commission Co.*, 53 S. W. 912, 915, 152 Mo. 268, 47 L. R. A. 859. See, also, *Wright v. Woodgate*, 2 Crompt., M. & R. 573.

The word "privileged," when applied to the law of libel, simply means that the circumstances under which the alleged libelous communication was made were such as to repel the legal inference of malice, and throw on the plaintiff the burden of proving it by extrinsic evidence. *Hinman v. Hare*, 5 N. Y. St. Rep. 504, 517.

The proper meaning of a privileged communication is only this: That the accusation on which the communication was made rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff. *Hudnell v. Eureka Lumber Co.*, 45 S. E. 532, 533, 133 N. C. 169; *Cameron v. Cockran* (Del.) 42 Atl. 454, 457, 2 Marv. 166.

#### Occasion of privilege distinguished.

Confusion sometimes arises between an "occasion of privilege" and a "privileged communication." There may be an occasion of privilege without a privileged communication, but not the latter without the former. This confusion may be avoided by remembering that these phrases are technical terms, used in respect to the evidence by which malice in the defendant—the real issue of fact—is disproved. Where the evidence establishes circumstances which the law says support a duty to make a statement of facts honestly believed to be true, or an honest comment on facts, such circumstances are called an "occasion of privilege"; and when the evidence goes further, and shows that on such occasion the defendant made the communication complained of, in good faith, with honest intent to perform that duty, it is said the evidence has estab-



lished a privileged communication. *Atwater v. Morning News Co.*, 34 Atl. 865, 867, 67 Conn. 504.

**Privileged publication distinguished.**  
See "Privileged Publication."

**Particular kinds of cases.**

Text-writers have enumerated four kinds or classes of privileged communications: First, when the speaker of the alleged slander acted in good faith in the discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interest; second, anything said by a master concerning the character of a servant who has been in his employ; third, words used in legal proceedings; and, fourth, words used in ordinary parliamentary proceedings. *Hess v. Sparks*, 24 Pac. 979, 980, 44 Kan. 465, 21 Am. St. Rep. 300; *Hancock v. Blackwell*, 41 S. W. 205, 207, 139 Mo. 440; *Dillard v. Collins* (Va.) 25 Grat. 343, 351.

A privileged communication is one made (1) in the proper discharge of an official duty; (2) in any legislative or judicial proceeding, or in any other official proceeding authorized by law; (3) in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the opinion; (4) by a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or by anything said in the course thereof. *Civ. Code Mont.* 1895, § 34; *Rev. Codes N. D.* 1899, § 2717; *Civ. Code S. D.* 1903, § 31; *Rev. St. Okl.* 1903, § 3928.

There is a certain class of cases wherein no prosecution for a libel will lie when the matter contained in it is false and scandalous as in a petition to a committee of Parliament; in articles of the peace exhibited to justices of the peace; a presentment of a grand jury; in a proceeding in a regular course of justice; in an exposition of the abuse of a public institution, addressed to the competent authority to administer. The policy of the law here steps in and controls the individual right of redress. The freedom of inquiry, the right of exposing malversation in public men and public institutions to the proper authority, the importance of punishing offenses, and the danger of silencing inquiry and of affording impunity to guilt, have all combined to shut the door against prosecutions for libels in cases of that or of an analogous nature. *Thorn v. Blanchard* (N. Y.) 5 Johns. 508, 530.

A statement made by a member of a borough council in discussing a claim which

was in judgment against the borough, charging claimant with having committed perjury in another matter, foreign to the one under discussion, is not a privileged communication. *McGaw v. Hamilton*, 39 Atl. 4, 5, 184 Pa. 108, 63 Am. St. Rep. 786.

The relation of physician and patient and those in attendance is privileged, and if the physician, in good faith, and without intent to injure, states to the patient that the druggist has made a mistake in filling a prescription, and that he does not understand his business, no action will lie. *Cameron v. Cockran* (Del.) 42 Atl. 454, 457, 2 Marv. 166.

A representation to a bishop or church, having power to hear, examine, and redress grievances, in respect to the character or conduct of a minister of the gospel or a member of the church, is prima facie a privileged communication; and, if made in good faith, an action of slander does not lie against the party presenting it, but, if the representation be false or impertinent—made without probable cause or belief in its truth—the action lies. *O'Donaghue v. McGovern* (N. Y.) 23 Wend. 26, 29.

The phrase "privileged communication," as employed relative to the relation of attorney and client, embraces whatever may be said or written by a party to his attorney, if pertinent and material to the controversy, and can lay no foundation for a private action or a public prosecution. *Gilbert v. People* (N. Y.) 1 Denio, 41, 43, 43 Am. Dec. 646.

A privileged communication may be defined to be a statement or charge defamatory of the character of another, but made under such circumstances as to rebut the legal inference of malice. Defendant was the principal of an institution for the deaf and dumb, and his wife received an indecent circular, believing that it came from a teacher. She consulted with the chairman of the executive committee, and, after a comparison of the circular with the teacher's handwriting, made complaint to the board. Held, that the occasion was privileged, and that defendant was not liable, in the absence of proof of malice, and the burden of showing malice was on plaintiff. *Hemmens v. Nelson*, 34 N. E. 342, 346, 138 N. Y. 517, 20 L. R. A. 440.

If a publication relates to the official conduct of a public officer, or a man in a public capacity, or any subject proper for public investigation, it is privileged. *Commonwealth v. Brown*, 1 Pa. Dist. R. 565, 567.

In an action for slander, where it appeared that the defamatory words were spoken voluntarily, in a spiteful, malicious manner, to a third person, who repeatedly told defendant that he did not want to

hear them, and that the parties had met for the purpose of compromising their troubles, at the plaintiff's request, at the third person's house, and the latter was not retained by either party as counsel or attorney, the evidence failed to show that the statements were privileged communications. *Preston v. Frey*, 91 Cal. 107, 111, 27 Pac. 533.

The mere fact that a letter was written by defendant in answer to inquiries made by another for and in behalf of the father of the girl whom defendant was charged with seducing does not take away the privileged character of the communication. *Rude v. Nass*, 79 Wis. 321, 48 N. W. 555, 557, 24 Am. St. Rep. 717.

Statements made by one to two detectives in regard to the larceny of his wheel were privileged communications, and inadmissible in an action for slander against the owner of the wheel for the purpose of showing malice. *Shinglemeyer v. Wright*, 82 N. W. 887, 890, 124 Mich. 230, 50 L. R. A. 129.

A communication made by a county superintendent of schools, in good faith, and for justifiable motives, communicating to a school board his reasons for revoking the certificate of a teacher employed by them, is a conditionally privileged one. *Rausch v. Anderson*, 75 Ill. App. 526, 536.

#### Same—Comment in public journal.

A privileged communication is a fair comment by a public journal upon a matter of public interest. *Buckstaff v. Viall*, 54 N. W. 111, 113, 84 Wis. 129 (citing *Starkie, Sland. & L.* [Ed. 1877] 332).

A false charge of crime is not a privileged communication merely because made in the defendant's business of publishing a newspaper. *Barnes v. Campbell*, 59 N. H. 128, 129, 47 Am. Rep. 183.

The privilege extended to newspapers by Code Civ. Proc. §§ 1907, 1908, providing that actions for libel cannot be maintained against a newspaper for publishing fair and true reports of judicial proceedings, is founded on grounds of public policy, for the purpose of securing and insuring integrity of the bench, and preserving public confidence in those administering justice, which it was thought might be jeopardized by secret proceedings or hearings; and it would seem to follow logically that the privilege does not attach until an application is made to a magistrate, judge, or court for some judicial action. *Stuart v. Press Pub. Co.*, 82 N. Y. Supp. 401, 407, 83 App. Div. 467 (citing *Cowley v. Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318; *Sutton v. A. H. Belo & Co.*, 64 S. W. 686; *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544).

#### Same—Elections.

Generally a person may in good faith publish whatever he may honestly believe to be true and essential to the protection of his own interests, or the interests of the person or persons to whom he makes the publication, without committing any public offense, though what he publishes may in fact not be true, and may be injurious to the character of others. And every voter is interested in electing to office none but persons of good moral character, and such only as are reasonably qualified to perform the duties of the office. And an article circulated only among the voters of a certain county for the purpose of giving what the writer of the article believed to be truthful information as to a candidate for a county office, and only for the purpose of enabling such voters to cast their ballots more intelligently, was privileged, though the principal matters contained in the article were untrue, in fact, and derogatory to the character of the person concerning whom it was published. *State v. Balch*, 2 Pac. 609, 613, 31 Kan. 465.

The fact that one is a candidate for an office in the gift of the people affords in many instances a legal excuse for publishing language concerning him as such candidate, for which publication there would be no lawful excuse if he did not occupy the position of being a candidate, whether the publication be made by the proprietors of the newspapers, or by a voter or other person having an interest in the election. The conduct and actions of a candidate for office may be freely commented upon, his acts may be canvassed, and his conduct boldly censured; nor is it material that such criticism of conduct should, in the estimate of a jury, be just. The right to criticize the actions or conduct of a candidate is a right on the part of the party making the publication to judge himself of the justness of the criticism. But publication in a newspaper, made either of a public officer, or of a candidate seeking an office, which imputes to him a crime or moral delinquency, is not a privileged communication, either absolute or conditional, but such publication is per se actionable; the law imputing malice to the publisher. *Sweeney v. Baker*, 13 W. Va. 158, 183, 31 Am. Rep. 757; *Myers v. Longstaff*, 84 N. W. 233, 236, 14 S. D. 98.

An elector may freely canvass the character and pretensions of an officer and candidates, but he has no right to calumniate one who is a candidate. If the law sanctioned such a course, it would drive good men from the administration of public affairs, and throw our government into the hands of the worthless and profligate. *Seely v. Blair* (Ohio) *Wright*, 683, 686.

"Privileged communications" are defined by Code, § 2530, as "communications with-

out malice to a person interested therein by one who is also interested." A statement by one elector to another elector that a candidate for the office of alderman was a thief was a privileged communication, within the meaning of the Code. *Ross v. Ward*, 85 N. W. 182, 183, 14 S. D. 240, 86 Am. St. Rep. 746.

A discourse, delivered pending the canvass of an election of a member of Congress, on the decision of a commissioner of the Circuit Court of the United States remanding a fugitive from service, under the fugitive slave law, and upon the exigency and constitutionality of such a law, and containing passages accusing the commissioner of "legal jesuitism," of prejudice and want of feeling, of a partisan and ignoble act, and comparing him to Pilate and Judas, is not a privileged communication. *Curtis v. Mussey*, 72 Mass. (6 Gray) 261, 270.

A defamatory assertion by a public journal against a candidate for public office is not a privileged communication. *Aldrich v. Press Printing Co.*, 9 Minn. 133, 135 (Gil. 123, 125), 86 Am. Dec. 84.

#### **Same—Judicial proceedings.**

Proceedings in a court of justice are absolutely privileged, and will not support an action for libel, even in favor of a person not a party to the suit, as to whom the alleged libelous allegations were false and malicious, and made under color and pretense of a suit without right. *Runge v. Franklin*, 10 S. W. 721, 723, 72 Tex. 585, 3 L. R. A. 417, 13 Am. St. Rep. 833.

An action for a libel cannot be sustained for a proceeding before a court having jurisdiction of the subject-matter, if the process was instituted under probable belief that the matter alleged was true, and with the intention of pursuing it according to the course of the court, even if the matter turns out to be wholly false. *Hill v. Miles*, 9 N. H. 9, 14.

Words spoken by a party or counsel in the course of a judicial proceeding, though they are such as, if spoken elsewhere, would be actionable in themselves, are not actionable, if they are pertinent to the subject of inquiry, and this rule extends to a person who is managing a prosecution before a justice of the peace on a complaint preferred by himself. *Hoar v. Wood*, 44 Mass. (3 Metc.) 193, 198.

A communication made to a state's attorney, whose duty it is to commence and prosecute all criminal prosecutions, by a person who inquires of the attorney whether the fact communicated makes out a case of larceny, is an absolutely privileged communication, and cannot, in a suit against such a person for libel, be testified to by the state's attorney. *Vogel v. Gruaz*, 4 Sup. Ct. 12, 14, 110 U. S. 311, 28 L. Ed. 158.

A statement, otherwise libelous, but made in the course of an inquiry regarding the administration of law, is privileged where it was made in good faith. *Hollis v. Meux*, 69 Cal. 625, 627, 11 Pac. 248, 58 Am. Rep. 574.

#### **Same—Mercantile agency.**

"If a merchant, having an interest in knowing the financial standing of another merchant, whom he proposes to deal with, goes to another and asks him with regard to that person's financial standing, and he honestly answers him what he knows about the person inquired of, even if it should turn out to be false, it is a privileged communication, and an action cannot be founded on it, even though the words themselves are libelous." *Trussell v. Scarlett* (U. S.) 18 Fed. 214, 216.

A communication by a mercantile agency in respect to the character and financial standing of a trader is privileged, when made to those of its patrons who have a special interest in the information communicated; but the publication by a mercantile agency of a notification sent to its subscribers generally, in respect to the plaintiff's standing, is not. *King v. Patterson*, 9 Atl. 705, 707, 49 N. J. Law (20 Vroom) 417, 60 Am. Rep. 622; *Sunderlin v. Bradstreet*, 46 N. Y. 188, 191, 192, 7 Am. Rep. 322.

#### **PRIVILEGED OCCASION.**

Confusion sometimes arises between an "occasion of privilege" and a "privileged communication." There may be an occasion of privilege without a privileged communication, but not the latter without the former. This confusion may be avoided by remembering that these phrases are technical terms, used in respect to the evidence by which malice in the defendant—the real issue of fact—is disproved. Where the evidence establishes circumstances which the law says support a duty to make a statement of facts honestly believed to be true, or an honest comment on facts, such circumstances are called an "occasion of privilege"; and when the evidence goes further, and shows that on such occasion the defendant made the communication complained of, in good faith, with honest intent to perform that duty, it is said the evidence has established a privileged communication. *Atwater v. Morning News Co.*, 34 Atl. 865, 867, 67 Conn. 504.

The term "privileged occasion" is used in the law of libel and slander to designate occasions where, for the sake of common convenience, and in the interest of society, certain publications which would otherwise be libels do not have such effect. These occasions are usually divided into two classes—those absolutely privileged, and those conditionally privileged. In the former case the freedom from liability is said to be absolute or without condition, as contrasted with such freedom in the latter case, where it is said to

be conditioned upon the want or absence of express malice. The first class is an apparently narrow one, and is, speaking generally, strictly confined to legislative proceedings, judicial proceedings in the established courts of justice, acts of state, and acts done in the exercise of military and naval authority. *Blakeslee v. Carroll*, 29 Atl. 473, 475, 64 Conn. 223, 25 L. R. A. 106.

### PRIVILEGED PUBLICATION.

See "Absolutely Privileged"; "Conditionally Privileged Publication."

In speaking of a publication, the nature of which exempts the publisher from an action of libel for matters therein stated, the better term is a "privileged publication," instead of a "privileged communication." Though these terms are often used interchangeably, and as synonymous, the term "privileged communication," in its ordinary signification, has reference to that class of written messages which either entitle or oblige the party to whom they are communicated to withhold the disclosure of matters thereof. Privileged publications are divided into two classes—absolutely privileged, and conditionally or qualifiedly privileged. The term "absolute privilege" has reference to words spoken or written in certain legislative and judicial proceedings, while a conditionally privileged publication takes place where circumstances exist, or are reasonably believed by the defendant to exist, which cast upon him the duty of making a communication to certain other persons, to whom he makes such communication in the bona fide performance of such duty. In slightly different language, it is said that where a person is so situated that it becomes right, in the interest of society, that he should tell to a third person certain facts, then, if he, bona fide and without malice, does tell them, it is a privileged communication. *Coogler v. Rhodes*, 21 South. 109, 112, 38 Fla. 240, 56 Am. St. Rep. 170.

A privileged publication is one made (1) in the proper discharge of an official duty; (2) in any legislative or judicial proceeding, or in any other official proceeding authorized by law; (3) any communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or who is requested by the person interested to give information; (4) by a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or anything said in the course thereof. Civ. Code, § 47. *Hollis v. Meux*, 11 Pac. 248, 250, 69 Cal. 625, 58 Am. Rep. 574.

A privileged publication is one made (1) in the proper discharge of an official duty;

(2) in any legislative or judicial proceeding, or in any other official proceeding authorized by law; (3) in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information; (4) by a fair and true report, without malice, in a public journal, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, or of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued; (5) by a fair and true report, without malice, of the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose, and open to the public, or the publication of the matter complained of was for the public benefit. Civ. Code Cal. 1903, § 47.

A privileged publication is one made (1) in any legislative or judicial proceeding, or any other proceeding authorized by law; (2) in the proper discharge of an official duty; (3) by a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticised. *Rev. St. Okl. 1903, § 2239.*

### PRIVILEGES AND IMMUNITIES.

"Privileges and immunities," as used in the treaty of 1868 between the United States and China (article 6), providing that Chinese subjects visiting or residing in the United States shall enjoy the same privileges and immunities in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation, means those privileges enjoyed under free governments, and includes the right to pursue a lawful employment in a lawful manner, without other restriction than such as equally affects all persons. *In re Tiburcio Parrott* (U. S.) 1 Fed. 481, 505.

The term "privileges and immunities," as used in the federal Constitution (article 4, § 2), declaring that the citizens of each state should be entitled to all the privileges and immunities of citizens in the several states, are confined to those privileges and immunities which are in their nature fundamental, and which belong of right to the citizens of all free governments, and which have been enjoyed at all times by the citizens of the several states which compose the Union, from the time of their becoming free, inde-

pendent, and sovereign. These may be comprehended under the heads of protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. *Corfield v. Coryell* (U. S.) 6 Fed. Cas. 546, 551; *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519, 595, 10 L. Ed. 274; *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 180, 19 L. Ed. 357; *Ward v. Maryland*, 79 U. S. (12 Wall.) 418, 430, 20 L. Ed. 449; *Slaughterhouse Cases*, 83 U. S. (16 Wall.) 36, 76, 21 L. Ed. 394; *State v. Walruff* (U. S.) 26 Fed. 178, 186; *State v. Scougal*, 51 N. W. 858, 860, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756; *Commonwealth v. Milton*, 51 Ky. (12 B. Mon.) 212, 219, 54 Am. Dec. 522; *State v. Gilman*, 10 S. E. 283, 284, 33 W. Va. 146, 6 L. R. A. 847; *Smith v. Moody*, 26 Ind. 299, 302; *Van Valkenburg v. Brown*, 43 Cal. 43, 48, 13 Am. Rep. 216; *Lonas v. State*, 50 Tenn. (3 Helsk.) 287, 306; *Frasher v. State*, 3 Tex. App. 263, 268, 30 Am. Rep. 131.

The "privileges and immunities of citizens of the United States," which the fourteenth amendment of the Constitution provides shall not be abridged by the states, means only such privileges and immunities as belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states of the Union, from the time of their becoming free, independent, and sovereign. What these fundamental rights are, it is not easy to enumerate; the courts preferring not to describe and define them in a general classification, but to decide each case as it may arise. The following, however, have been held to be embraced among them: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject to such restraints as the government may justly prescribe for the general good of the whole. Code 1887, c. 32, § 1, providing that no person without a state license shall keep spirituous liquors in his possession for another, is an impairment of such privileges and immunities, and hence unconstitutional. *State v. Gilman*, 10 S. E. 283, 284, 33 W. Va. 146, 6 L. R. A. 847.

In discussing the meaning of the word "privileges," in Const. art. 4, § 2, providing that the citizens of the states shall be entitled to all the privileges and immunities of citizens in the several states, the court says: "We do not deem it needful to attempt to define the meaning of the word 'privileges.' It is safer and more in accordance with the duty of a judicial tribunal to leave its meaning to be determined in each case upon a view of the particular rights asserted and

denied therein. It is sufficient for this case to say that rights attached by the law to contracts by reason of the place where such contracts are made, wholly irrespective of the citizenship of the parties, cannot be deemed privileges of a citizen, within the meaning of the Constitution." *Conner v. Elliott*, 59 U. S. (18 How.) 591, 593, 15 L. Ed. 497.

The words "privileges and immunities," in the constitutional declaration that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, relate to the rights of persons, place, or property. A privilege is a peculiar right—a private law conceded to particular persons or places. Among the privileges of the citizens of every city is that of exemption from the law of alienage, though not born in the state; but every body of private persons has the franchise and immunity of enjoying estates in succession, and hence a devise or bequest cannot be defeated on the ground that the beneficiary is a citizen or a corporation of another state than the testator. *Magill v. Brown* (U. S.) 16 Fed. Cas. 408, 428.

The words "privileges and immunities," in the clause of the federal Constitution providing that the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states, have been treated as synonymous with "right." In *Corfield v. Coryell* (U. S.) 6 Fed. Cas. 546, Mr. Justice Washington, speaking of these words, says: "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union." *Brittle v. People*, 2 Neb. 198, 239, 240.

The privileges and immunities of citizens include all those fundamental privileges and immunities which belong essentially to the citizens of every free government, among which are the right of protection; the right to pursue and obtain happiness and safety; the right to pass through and reside in any state for purposes of trade, agriculture, professional pursuit, or otherwise; to claim the benefit of the right of habeas corpus; to institute and maintain actions of any kind in the courts of the state, and to take, hold, and dispose of property, either real or personal. These rights are different from the concrete rights which a man may have to a specific chattel or a piece of land, or to the performance by another of a particular contract, or to damages for a particular wrong, all of which may be invaded by individuals. *Butchers' Union Slaughterhouse, etc., Co. v. Crescent City Live Stock Landing, etc., Co.*, 4 Sup. Ct. 652, 658, 111 U. S. 746, 28 L.

Ed. 585; *Lonas v. State*, 50 Tenn. (3 Helsk.) 287, 306.

The words "privileges and immunities" are of very comprehensive meaning, but it will be sufficient to say that the clause in the Constitution unmistakably procures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes than are imposed by the state on its own citizens. *Ward v. Maryland*, 79 U. S. (12 Wall.) 418, 430, 20 L. Ed. 449.

As the term "privileges and immunities" is used in federal and state Constitutions guarantying to the citizens of the several states all the privileges and immunities of the citizens of the several states, it means the right to be protected in life and liberty, and in the acquisition of property, under equal and impartial laws which govern the whole community. This puts the state upon its true foundation—a society for the establishment and administration of general justice to all, equal and fixed, recognizing individual rights, and not impairing them. In *re Lowrie*, 9 Pac. 489, 498, 8 Colo. 499, 54 Am. Rep. 558.

"Privileges and immunities," as used in the Constitution of the United States, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, plainly imports, according to the best usages of our language, something more than those ordinary rights of personal security and property which by the courtesy of all civilized nations are extended to the citizens or subjects of other countries while they reside among them. *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 331.

The fourteenth amendment of the federal Constitution, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, is comprehensive, and includes all rights appertaining to the person as a citizen of the United States. *Coger v. Northwest Union Packet Co.*, 37 Iowa, 145, 155.

The word "privilege," as used in the federal Constitution, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, signifies a peculiar advantage, exemption, or immunity—such privileges as would be common or the same in every state. *Douglas v. Stephens*, 1 Del. Ch. 465, 476.

When the provision of Const. art. 4, § 2, that the citizens of each state are entitled to

all the privileges and immunities of citizens of the several states, has been under consideration, the courts have manifested a disposition not to attempt to define the words, but, rather, to leave their meaning to be determined in each case upon a view of the particular rights asserted or denied therein. *McCready v. Virginia*, 94 U. S. 391, 395, 24 L. Ed. 248.

The Supreme Court of the United States has distinguished the privileges and immunities of the citizens of the United States from those which appertain to citizens of the state. To the latter class belong all those fundamental civil rights, for the security and establishment of which organized society is instituted; and these remain, with certain exceptions expressly established by the federal Constitution, and subject to the exclusive control and authority of the state, free from all federal restraint. On the other hand, privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, and the laws and treaties made in pursuance thereof. These alone are placed under federal protection. *State ex rel. Walker v. Judge*, 1 South. 437, 440, 39 La. Ann. 132.

There are two classes of privileges attached to an American citizen, to wit: (1) Those which he has as a citizen of the United States; and (2) those which he has as a citizen of the state where he resides, as a member of society. *Ex parte Kinney* (U. S.) 14 Fed. Cas. 602, 605.

The fourteenth amendment to the federal Constitution, in providing that no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, meant that all citizens, wherever domiciled, must be given equal protection under the laws, and in the enjoyment of the privileges, which belong as of right to each individual citizen. *People v. Gallagher*, 93 N. Y. 438, 447, 45 Am. Rep. 232.

#### Action by states.

The provision of the fourteenth amendment to the Constitution of the United States that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States relates to such privileges and immunities as the citizen enjoys as such citizen, and does not cover and extend to the rights which he enjoys, not as a citizen of the United States, but as a citizen of a state. *Maxwell v. Dow*, 20 Sup. Ct. 448, 454, 176 U. S. 581, 44 L. Ed. 597; *In re Taylor*, 48 Md. 28, 31, 30 Am. Rep. 451.

Const. U. S. art. 4, § 2, was intended to confer on the citizens of the several states a

general citizenship, and communicate all the privileges and immunities which a citizen of the same state would be entitled to under like circumstances. *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 270, 33 L. Ed. 538. It means equality of privileges and immunities between citizens of the several states. *Downham v. Alexandria*, 77 U. S. (10 Wall.) 173, 175, 19 L. Ed. 929.

In an action by mandamus to compel the admission of negro children to a district school, the court, in considering that part of the fourteenth amendment of the Constitution of the United States providing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," said: "This clause does not refer to citizens of the state. It embraces only citizens of the United States. It leaves out the words 'citizens of the state,' which is so carefully used, and used in contradistinction to 'citizens of the United States,' in the preceding sentences. It places the privileges and immunities of citizens of the United States under the protection of the federal Constitution, and leaves the privileges and immunities of citizens of the state under the protection of the state Constitution." *Cory v. Carter*, 48 Ind. 327, 349, 350, 17 Am. Rep. 738. See, also, *State v. McCann*, 21 Ohio St. 198, 210.

The privileges and immunities secured to citizens in each state of the several states by that clause of the Constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states are those which are common to the citizens in the latter states under their Constitutions and laws, by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured the citizens of other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation except by the permission, express or implied, of those states. The special privileges which they confer must therefore be enjoyed at home, unless the assent of other states to their enjoyment therein be given. *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 180, 19 L. Ed. 357; *List v. Commonwealth*, 12 Atl. 277, 279, 118 Pa. 322.

This clause of the Constitution does not profess to control the power of state governments over the rights of their own citizens. Its intent and purpose was to declare to the several states that whatever those rights, as you grant or establish them for your own citizens, or as you limit or qualify them or impose restrictions on their exercise, the same—neither more nor less—shall be the measure of the rights of citizens of other states within your jurisdiction. But it was never the purpose of such provision of the Constitution

to transfer the security and protection of all the civil rights embraced within the dominion of privileges and immunities of citizens of the states from the states to the federal government. *Crandall v. Nevada*, 73 U. S. (6 Wall.) 35, 36, 18 L. Ed. 744, 745; *Frasher v. State*, 3 Tex. App. 263, 268, 269, 30 Am. Rep. 131.

The expression "privileges and immunities," as used in Const. U. S. art. 4, § 2, should be construed as designing protection against discrimination against nonresidents in favor of residents, but cannot operate as a limitation upon the inherent authority of the respective states over their own citizens, and is never construed as a restriction on the Legislatures of the several states in regard to contracts between their own citizens, or the remedies proper for the enforcement of those contracts. The words "privileges and immunities" imply that a citizen going from one state to another shall be entitled to the privileges and immunities of a citizen of the state to which he goes, but they do not absolve him from the duties and obligations of a citizen of the state to which he belongs, and from which he went. As long as a citizen belongs to a state, he owes it obedience; and, as between states, that state in which he is domiciled has jurisdiction over his person and his personal relations to every citizen of the state; and hence a court of state of which a person is a resident may restrain him from maintaining attachment proceedings in another state. *Keyser v. Rice*, 47 Md. 203, 211, 28 Am. Rep. 448.

#### Attendance on public school.

"Privileges or immunities," within the meaning of the fourteenth amendment of the federal Constitution, securing the privileges and immunities of citizens of the United States, does not include the privilege accorded to the youth of a state by the law of the state of attending the public schools maintained at the expense of the state, and therefore no person can lawfully demand admission as a pupil in any such school because of the mere status of citizenship. *Ward v. Flood*, 48 Cal. 36, 49, 17 Am. Rep. 405.

The establishment of separate schools for the exclusive use of the colored race is not an abridgment of the privileges and immunities preserved by the fourteenth amendment of the federal Constitution. The history of the amendment is familiar to all. At the time of the adoption, the colored race had been emancipated from the condition of servitude, and made citizens. It was apprehended that in some of the states antipathy between the races would cause the dominant race, by unfriendly legislation, to abridge the rights of the other, and deny to them equal privileges and protection of the laws. To guard the previously subject race from the effect of such discrimination, these pro-

visions are made a part of the fundamental law of the land. Their object has been defined by Mr. Justice Strong, in *Ex parte Virginia*, 100 U. S. 339, 344, 25 L. Ed. 676, where it is said that "one great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of the states." The same learned judge, in *Strauder v. West Virginia*, 100 U. S. 303, 306, 25 L. Ed. 664, also says: "It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give that race the protection of the general government in that enjoyment when it should be denied by the states." In the nature of things, there must be many social distinctions and privileges remaining unregulated by law, and left within the control of the individual citizen, as being beyond the reach of the legislative functions of government to organize or control. *People v. Gallagher*, 98 N. Y. 438, 446, 45 Am. Rep. 232.

In considering the fourteenth amendment of the Constitution of the United States, forbidding any state to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," in an action of mandamus by a negro to compel the admission of his children to a certain public school—a school exclusively for colored persons having been established by the proper authorities—the court said: "The clause has no application to this case, for all the privileges of the school system of this state are derived solely from the Constitution and laws of the state." *State v. McCann*, 21 Ohio St. 198, 209, 210. See, also, *Cory v. Carter*, 48 Ind. 327, 349, 17 Am. Rep. 788.

#### Business regulations.

The use of the phrase "privileges and immunities," in the federal Constitution, plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state in the Union for the purpose of engaging, and, when there, of engaging, in lawful trade, commerce, or business, without molestation. The business of peddling, which is itself a lawful business, cannot be regulated by the state so as to discriminate against citizens of the United States. It is a privilege to be enjoyed on equal footing with citizens of the state. *State v. Montgomery*, 47 Atl. 165, 167, 94 Me. 192, 80 Am. St. Rep. 386.

A city ordinance making it an offense for any one to carry on a laundry business within the habitable portion of a city is violative of the constitutional provision that no state shall make or enforce any law which

shall abridge the privileges and immunities of citizens of the United States. The *Stockton Laundry Case* (U. S.) 26 Fed. 611, 613.

#### Civil service.

Civil Service Act March 20, 1895, providing that the subordinates of city officers shall be chosen from persons selected by civil service commissioners after an examination as to their qualification, does not abridge the privileges or immunities of citizens, in violation of the federal Constitution, on the ground that it allows only persons applying therefor to obtain an office, and does not permit public officers to select the assistants necessary to performance of their official duties. *People v. Loeffler*, 51 N. E. 785, 793, 175 Ill. 585.

#### Elective franchise.

The term "privileges and immunities" includes the elective franchise, as regulated and established by the laws and Constitution of the state in which it is to be exercised. *Lonas v. State*, 50 Tenn. (3 Helak.) 287, 306.

A state statute denying the franchise to women is not unconstitutional, under that clause of the Constitution declaring that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States. *United States v. Anthony* (U. S.) 24 Fed. Cas. 829, 830.

The right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the fourteenth amendment to the federal Constitution, and that amendment does not add to these privileges and immunities. It simply furnishes additional guaranty for the protection of such as the citizen already had. *Minor v. Happersett*, 88 U. S. (21 Wall.) 162, 170, 22 L. Ed. 627.

#### Exemption from taxation.

Under an act of the Legislature, the state loaned its bonds to a railroad corporation which by its charter was exempt from taxation; and the act preserved a right, in pursuance of which a subsequent act was passed, providing for the enforcement of the state's lien in a court which was expressly empowered to determine all questions touching the rights of the state and all other parties in a proceeding instituted by the state against the corporation. It was adjudged that a sale of the property and franchises of the corporation should vest the purchasers with all the rights, privileges, and immunities held by the corporation. The purchaser was entitled to immunity from taxation conferred upon the corporation by its charter. *Knoxville & O. R. Co. v. Hicks*, 68 Tenn. (9 Baxt.) 442.

The words "rights, privileges, and immunities," in a charter, are full and ample



for the purpose of granting an exemption from taxation. *Phoenix Fire & Marine Ins. Co. v. Tennessee*, 16 Sup. Ct. 471, 472, 161 U. S. 174, 40 L. Ed. 660; *Memphis v. Phoenix Fire & Marine Ins. Co.*, 19 S. W. 1044, 1045, 91 Tenn. (7 Pickle) 566.

Act Feb. 9, 1869, validating and confirming a certain lease and contract of a railroad, which expressly authorized and empowered the lessee to have, hold, use, enjoy, and exercise the property, things, franchises, immunities, rights, powers, and privileges acquired under its lease, will be construed to include an immunity from taxation conferred on the lessor by Act March 23, 1865. *State Board of Assessors v. Morris & E. R. Co.*, 7 Atl. 826, 834, 49 N. J. Law (20 Vroom) 193.

The words "privileges and immunities," as used in Act Feb. 19, 1890, authorizing a railroad to sell absolutely all of its property, together with rights, privileges, and immunities, and authorizing the company and another named railroad company to consolidate, give to the consolidated company all of the privileges of the railroad sold, including its exemption from taxation. *Natchez, J. & C. R. Co. v. Lambert*, 13 South. 33, 35, 70 Miss. 779.

The words "privileges and immunities," as used in Act Feb. 22, 1871, incorporating a railroad company, and investing it with all the privileges, rights, and immunities of another railroad company, whose road it had bought at judicial sale, did not carry exemption from taxation conferred by statute on the road purchased. *Kentucky Cent. R. Co. v. Commonwealth*, 10 S. W. 269, 87 Ky. 661.

#### **Fisheries.**

Fisheries in tide waters of a state are under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is, in effect, nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship. The citizens of one state are not invested by this clause of the Constitution with any interest in the common property of the citizens of another state, so as to give them the right to plant oysters in the tide waters of another state. *McCready v. Virginia*, 94 U. S. 391, 395, 24 L. Ed. 248.

#### **Heirship.**

A wife is not, strictly speaking, an heir of her husband, though she is generally spok-

en of as such; and the statute which provides that the widow shall not be entitled to an interest in lands conveyed by the husband, when the wife at the time of the conveyance was a nonresident, is not repugnant to the fourteenth amendment, as depriving the wife of any privilege or immunity, where, under the general statutes of the state, the property of the husband belongs as exclusively to him, as the wife's property is exclusively her own, and neither has any vested interest in, or control over, the property of the other. The immunities and privileges referred to in the federal Constitution would not, at any rate, relate to such a claim made by the widow. Those terms mean that all citizens of the United States shall have the right to acquire property and hold it, and this property shall be protected and secured by the laws of the state in the same manner as the property of the citizens of the state is protected. The privilege of voting or of acting as administrator may be withheld until after persons have resided within the state a reasonable time, without violating the Constitution, and it is not violated by laying an attachment against the property of the debtor without an undertaking. This and many other distinctions do not fall within the privileges and immunities of general citizenship. *Buffington v. Grosvenor*, 27 Pac. 137, 139, 46 Kan. 730, 13 L. R. A. 282.

#### **Inheritance tax.**

Under Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to the privileges and immunities of citizens in the several states, and Rev. St. U. S. § 1978 [U. S. Comp. St. 1901, p. 1262], providing that all citizens of the United States shall have the same right in every state as is enjoyed by the white citizens thereof to inherit property, the provision of the collateral inheritance tax law (Act March 23, 1893), as amended by St. 1897, c. 77, making a distinction between resident and nonresident relations, and excluding nonresident relations from its exceptions, is invalid. In re *Stanford's Estate*, 54 Pac. 259, 261, 126 Cal. 112, 45 L. R. A. 788.

#### **Institution of actions.**

The word "privilege," as used in the federal Constitution, while not precisely and comprehensively defined, includes the right to employ remedies for the collection of debts, the recovery of property, and the enforcement of rights. *Lippman v. People*, 51 N. E. 872, 874, 175 Ill. 101.

The term "privileges and immunities," as used in Const. U. S. art. 4, § 2, includes the right to institute actions; but a decree of a state court restraining citizens of that state from prosecuting attachment suits in another state, brought in order to evade the laws of the first state, is not in violation of

such section of the Constitution. *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 270, 33 L. Ed. 538.

Under Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, a citizen of one state may maintain an action in the courts of another state wherever a citizen of the latter might do so. The fact that a plaintiff and defendant are both nonresidents of the state where the action is brought, and are both citizens of the state where the cause of action arose, will not authorize the court to refuse to entertain the action, where jurisdiction of the defendant is obtained. One of the privileges and immunities is the right to bring and maintain an action in the courts of a state. *Eingartner v. Illinois Steel Co.*, 68 N. W. 664, 666, 94 Wis. 70, 34 L. R. A. 503, 59 Am. St. Rep. 859.

#### Marriage regulations.

Marriage is a privilege belonging to persons as members of society, and as citizens of the state in which they reside, and may be abridged at the will of the state in which they reside. *Ex parte Kinney* (U. S.) 14 Fed. Cas. 602, 605. A statute prohibiting a white person from marrying a negro, and inflicting a penalty on the white person, but none on the negro, was not in violation of the fourteenth amendment of the federal Constitution. *Ex parte Francois* (U. S.) 9 Fed. Cas. 699, 700; *State v. Jackson*, 80 Mo. 175, 177, 50 Am. Rep. 499; *Ex parte Kinney* (U. S.) 14 Fed. Cas. 602, 605.

#### Political privilege.

Bill of Rights, § 2, providing that no special privileges or immunities shall ever be granted by the Legislature which may not be altered, revoked, or repealed by the same body, means privileges or immunities of a political nature. It means that no political privilege or immunity from any political duty—any duty from the individual to the public—can be granted by the Legislature, which may not be altered or revoked by that body. They are such duties as those of serving in the militia, as jurors, filling offices, etc. A franchise involving matters of pecuniary interest, or a privilege in respect to property, cannot in a just sense be called a political privilege. It touches no duty which a citizen, as such, owes to the state. *Atchison St. Ry. Co. v. Missouri Pac. Ry. Co.*, 3 Pac. 284, 286, 31 Kan. 661.

#### Practice of law in state courts.

The right to practice law in the courts of a state is not one of the privileges and immunities guaranteed by the fourteenth amendment to the federal Constitution. *Ex parte Lockwood*, 14 Sup. Ct. 1082, 1083, 154 U. S. 116, 38 L. Ed. 929; *Bradwell v. Illinois*, 83 U. S. (16 Wall.) 130, 134, 21 L. Ed. 442.

A law of a state providing that the right of admission to the bar is limited to white male citizens above the age of 21 years is not contrary to the fourteenth amendment. *In re Taylor*, 48 Md. 28, 31, 30 Am. Rep. 451.

#### Priority of claims.

The provision of the Tennessee act of March 19, 1877 (Laws 1877, c. 31, § 5), that, on the insolvency of a foreign corporation carrying on business in the state, "creditors who may be residents of this state shall have a priority in the distribution of assets over all simple-contract creditors being residents of any other country or countries," must be construed as using the word "residents" as meaning the same as "citizens"; and, as applied to creditors who are residents and citizens of other states, the provision is in contravention of section 2, art. 4, of the Constitution of the United States, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. A corporation of another state, however, is not a citizen, within the meaning of such constitutional provision, and cannot invoke its protection. *Blake v. McClung*, 19 Sup. Ct. 165, 172 U. S. 239, 43 L. Ed. 432.

#### Right to be served with process.

The right to be exempt from a personal judgment for a money demand without the service of process being one founded on principles of natural justice, and one of the fundamental privileges and immunities of every citizen, recognized as such by the laws of Kentucky with respect to its own citizens, is one of the privileges and immunities of every citizen, as guaranteed by Const. U. S. art. 4, § 2, subd. 1, declaring that the citizens of each state shall be entitled to all the privileges and immunities of the several states. Therefore Civ. Code Prac. Ky. § 51, subsec. 6, which provides that in an action against an individual residing in another state, engaged in business in Kentucky, the summons may be served on the manager or agent of such person in charge of such business in this state, does not confer jurisdiction to render a personal judgment against defendant. *Moredock v. Kirby* (U. S.) 118 Fed. 180, 181.

#### Sale of intoxicating liquors.

The term "privileges and immunities of citizens of the United States," within the meaning of the fourteenth amendment of the federal Constitution, forbidding the abridgment thereof, does not include the right to sell intoxicating liquors. *Bartemeyer v. State of Iowa*, 13 Am. Law Reg. (N. S.) 220, 222; *In re Hoover* (U. S.) 30 Fed. 51.

Where the political power of a state, for the safety of its people, takes the responsibility of saying that certain occupations are hurtful and will not be permitted within the

boundaries, unless that declaration is so unreasonable as to be outside the domain of law, the occupation so stigmatized is no longer a right, privilege, or immunity, within the meaning of the Constitution. *In re Hoover* (U. S.) 30 Fed. 51.

The constitutional guaranty of equal privileges and immunities means equality of privileges and immunities between citizens of the several states, and it has no application to a case where beer manufactured in a state is taxed under the ordinances of a city within such state imposing a license tax on dealers in beer or ale. *Downham v. Alexandria*, 77 U. S. (10 Wall.) 173, 175, 19 L. Ed. 929.

Code 1887, c. 32, § 1, providing that no person, without a state license, shall keep spirituous liquors in his possession for another, is an impairment of the privileges and immunities of a citizen, and hence unconstitutional. *State v. Gilman*, 10 S. E. 283, 284, 33 W. Va. 146, 6 L. R. A. 847.

#### Travel in public conveyance.

The privilege to use for local travel any public conveyance is, in general, a right which belongs to a person as a citizen of a state, and not as a citizen of the United States; and the denial of that privilege, except where it is charged in the pleadings and proved to have been on account of race, color, etc., does not subject to the penalties of Act Cong. March 1, 1875, c. 114, 18 Stat. 335 [U. S. Comp. St. 1901, p. 1260], entitled "An act to protect all citizens in their civil and legal rights," and which seeks to inflict penalties for the violation of rights held by citizens of the United States. *Cully v. Baltimore & O. R. Co.* (U. S.) 6 Fed. Cas. 946, 947.

#### Trial by jury.

A trial by jury in a suit at common law in a state court is not a "privilege or immunity" of natural citizenship, which the states are forbidden by the fourteenth amendment to abridge. *Walker v. Sauvinet*, 92 U. S. 90, 91, 23 L. Ed. 678.

The course of procedure and mode of trial in both civil and criminal cases in the state courts are matters of state regulation, and a change in the procedure, such as a jury of 8, instead of 12, which does not deprive the citizen of recourse to due process of law, does not infringe any privilege or immunity pertaining to his national citizenship. *Maxwell v. Dow*, 20 Sup. Ct. 448, 454, 176 U. S. 581, 44 L. Ed. 597.

#### PRIVILEGES OF MILL.

Where at the time of a conveyance of a mill, together with its "privileges and appurtenances," the grantor was the owner of all

the land flowed by the dam, the grantee, under the phrase "privileges and appurtenances," took the right to conduct the dam so as to raise the same height of water as the grantor had been accustomed to raise previous to the grant, provided that is was necessary for the useful operation of the mill. *Hathorn v. Stinson*, 10 Me. 224, 234, 25 Am. Dec. 228; *Daniels v. Citizens' Sav. Inst.*, 127 Mass. 534, 535; *Smith v. Moodus Water Power Co.*, 35 Conn. 392, 401.

The conveyance of a mill, or of a mill privilege, or of the privilege of the mill, will operate to convey the land occupied for the purpose, unless there be in the conveyance something indicating a different intention. *Farrar v. Cooper*, 34 Me. 394, 397.

#### PRIVILEGIUM CLERICALE.

See "Benefit of Clergy."

#### PRIVITY—PRIVY.

The term "privity" denotes mutual or successive relationship to the same right of property. *Union Nat. Bank v. International Bank*, 14 N. E. 859, 861, 123 Ill. 510; *Challis v. City of Atchison*, 25 Pac. 228, 45 Kan. 22; *Hunt v. Haven*, 52 N. H. 162, 169; *Mygatt v. Coe*, 26 N. E. 611, 613, 124 N. Y. 212, 11 L. R. A. 646; *Coan v. Osgood* (N. Y.) 15 Barb. 583, 588; *Trolan v. Rogers*, 34 N. Y. Supp. 836, 838, 88 Hun. 422; *Williams v. Barkley*, 58 N. E. 765, 768, 165 N. Y. 48; *Norton v. Keogh* (N. Y.) 42 Hun. 611, 613; *Strayer v. Johnson*, 1 Atl. 222, 225, 110 Pa. 21; *Litchfield v. Crane*, 8 Sup. Ct. 210, 211, 123 U. S. 549, 31 L. Ed. 199; *Lichty v. Lewis* (U. S.) 63 Fed. 535, 536; *Pennington v. Hunt* (U. S.) 20 Fed. 195, 196; *Metropolitan St. R. Co. v. Gumby* (U. S.) 99 Fed. 192, 198, 39 C. C. A. 455; *School Dist. of City of Sedalia v. De Weese* (U. S.) 100 Fed. 705, 713; *Bate Refrigerating Co. v. Gillett* (U. S.) 30 Fed. 685, 687; *Bailey v. Sundberg* (U. S.) 49 Fed. 583, 586, 1 C. C. A. 387; *McDonald v. Gregory*, 41 Iowa, 513, 516; *McConnell v. Poor*, 84 N. W. 968, 969, 113 Iowa, 133; *Crispen v. Hannavan*, 50 Mo. 415, 418; *State ex rel. National Subway Co. v. City of St. Louis*, 46 S. W. 981, 985, 145 Mo. 551, 42 L. R. A. 113; *Ahlers v. Thomas*, 56 Pac. 93, 94, 24 Nev. 407, 77 Am. St. Rep. 820; *Morris v. Murphey*, 22 S. E. 635, 95 Ga. 307, 51 Am. St. Rep. 81; *Latine v. Clements*, 3 Ga. (3 Kelly) 426, 430; *Newman v. Home Ins. Co.*, 20 Minn. 422, 426 (Gil. 378, 386); *Douthitt v. MacCulsky*, 11 Wash. 601, 610, 40 Pac. 186, 189; *Hummel v. First Nat. Bank*, 32 Pac. 72, 76, 2 Colo. App. 571; *Johnston v. Duncan*, 67 Ga. 61, 70; *Park v. Ensign*, 71 Pac. 230, 231, 66 Kan. 50; *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 465, 480; *Simpson v. Simpson*, 16 Ill. App. (16 Bradw.) 170, 175; *Dailey v. Kinsler*, 53 N. W. 973, 975, 35 Neb. 835.

One of Webster's definitions of "privity" is private knowledge; joint knowledge with another of a private concern; cognizance implying a consent or concurrence. *Lord v. Goodall, etc., S. S. Co. (U. S.) 15 Fed. Cas. 884, 887.*

Privity only exists because of the relationship between the parties or because of the derivative character of their title. *Hummel v. First Nat. Bank, 32 Pac. 72, 76, 2 Colo. App. 571.*

The ground of privity is property, not personal relation. *Bailey v. Sundberg (U. S.) 49 Fed. 583, 586, 1 C. C. A. 387.*

The doctrine of estoppel, as applicable to the different classes of persons in privity, applies to them under one and the same principle, to wit, that a party claiming through another is estopped by that which estopped that other respecting the same subject-matter. *Trolan v. Rogers, 84 N. Y. Supp. 836, 838, 88 Hun, 422.*

Privy means a privity in estate, a property right acquired from the lessee by contract or inheritance. *Shew v. Call, 26 S. E. 33, 34, 119 N. C. 450, 56 Am. St. Rep. 678.*

Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], providing that the liability of the owner of any vessel for any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board such vessel, or for any loss, damage, or injury for collusion, forfeiture, etc., done without the "privity or knowledge" of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending, means "a personal participation of the owner in some fault or act of negligence causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself, of a contemplated loss or of a condition of things likely to produce or contribute to the loss, without adopting appropriate means to prevent it." *Lord v. Goodall, etc., S. S. Co. (U. S.) 15 Fed. Cas. 884, 887.*

The term "privity," as used in Rev. St. § 4283 [U. S. Comp. St. 1901, p. 2943], is not employed in any of the technical senses of the common law, but implies knowledge, and something more, in that it conveys the idea of a special or particular knowledge, or of such cognizance as implies active consent or concurrence. *Quinlan v. Pew (U. S.) 56 Fed. 111, 122, 5 C. C. A. 438.*

By Act Cong. 1851 (9 Stat. 635, § 1), it is enacted that the owner of a ship shall not be liable for fire loss, "unless such fire is caused by the design or neglect of such owner." Section 3 provides that an owner shall not be liable for any loss occasioned or incurred without the "privity or knowledge" of such owners, beyond the amount of the interest of

such owner of such ship for freight then pending. Held, that the similarity of the conditions of liability expressed by the words "design or neglect" and "privity or knowledge," being so striking, renders it improbable that the first section is modified by the third, so as to render the owner liable to only the extent of his interest for freight for a fire occurring by his "design or neglect," but without his "privity or knowledge"; for if the fire occurred by design it would certainly be with his "privity or knowledge," and if it occurred by his gross negligence it would be very near to "privity or knowledge." The true construction is to apply the third section to losses other than by fire, thus leaving the owner responsible for all the loss occasioned by fire occurring by his "design or neglect." *Knowlton v. Providence & N. Y. S. S. Co., 53 N. Y. 76, 84.*

"Privity or knowledge of the owner," as used in Rev. St. § 4238 [U. S. Comp. St. 1901, p. 2943], which provides that the liability of the owner of any vessel for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board such vessel, etc., done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not in any case exceed in amount the value of the interest of such owner in such vessel and the freight then pending, includes, when the owner is a corporation, the privity or knowledge of the managing officers of such corporation; but it does not include privity or knowledge of a wrecking master employed by the agent of the underwriter, to whom the vessel had been abandoned by its former owner, so as to make the underwriter liable for the negligence of the wrecking master beyond the value of the vessel; nor does it include the privity or knowledge of the master of the vessel. *Craig v. Continental Ins. Co., 12 Sup. Ct. 97, 99, 141 U. S. 638, 35 L. Ed. 886.*

"One definition of 'privity,' as an adjective, is 'admitted to the participation of knowledge with another of a secret transaction; secretly cognizant; privately knowing.' As a noun, 'a partaker,' etc." *Lord v. Goodall, etc., S. S. Co. (U. S.) 15 Fed. Cas. 884, 887.*

"Privies," as defined by Bouvier, "are persons who are partakers or have an interest in any action or thing, or any relation to another." *Lord v. Goodall S. S. Co. (U. S.) 15 Fed. Cas. 884, 887.*

Privies are those whose relationship to the same right of property is mutual and successive. *Strayer v. Johnson, 1 Atl. 222, 225, 110 Pa. 21.*

"Privies" are said to be persons connected together, or having a mutual interest in the same action or thing, by some relation other than that of actual contract between

them. *Woodward v. Jackson*, 85 Iowa, 432, 435, 52 N. W. 358.

Privies are those which have mutual or successive relationship to the same right of property or subject-matter, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, or judgment creditors, or purchasers from them with notice of the facts. *Henry v. Woods*, 77 Mo. 277, 281.

The word "privity," as defined by Webster, sometimes means "admitted to the participation of knowledge with another of a secret transaction." This is nearly the sense in which the word is used in *Slade's St. c. 32, § 7*, providing that any of the parties to a fraudulent and deceitful conveyance of goods, etc., who, being privy thereto, shall justify the same to be made, had, or executed bona fide and on good consideration, etc. It means a knowledge of a secret fraudulent transaction in which he who has the knowledge was a party. *Edgell v. Lowell*, 4 Vt. 405, 413.

Privity may be of blood, in law, or in estate. *Strayer v. Johnson*, 1 Atl. 222, 225, 110 Pa. 21; *Johnston v. Duncan*, 67 Ga. 61, 70.

Privies are classified according to the manner of this relationship: First, in estate, as donor and donee, lessor and lessee, and joint tenant; second, in blood, as heir and ancestor, and coparceners; in representation, as executor and administrator; and in law, as where the law, without privity of blood or estate, casts land upon another as by escheat. *Ablers v. Thomas*, 56 Pac. 93, 94, 24 Nev. 407, 77 Am. St. Rep. 820; *Coan v. Osgood* (N. Y.) 15 Barb. 583, 588; *Metropolitan St. R. Co. v. Gumby*, 99 Fed. 192, 198, 39 C. C. A. 455.

The books mention five kinds of privies: Privies of blood, such as the heir to the ancestor; privies in representation, such as executors or administrators to the deceased; privies in estate, between donor and donee, lessor and lessee; privies in respect of contract; and privies on account of estate and contract together. *Tinkham v. Borst* (N. Y.) 24 How. Prac. 246, 247.

"Privies" are defined to be "those who are partakers of or have an interest in any action," and are of three kinds—in blood, in law, and in estate. An assignee of a judgment is a privy of his assignor only in regard to the judgment, and is not bound by an adjudication in an action between the assignor, as purchaser of the land covered by the lien of such judgment, and a third person. *Hart v. Bates*, 17 S. C. 35, 41.

"Privies" are defined to be those who partake or who have an interest in any action or thing in relation to another. Privies are often divided into four classes, namely,

privies in blood, privies in estate, privies in law, and privies in deed. *Harrington v. Harrington*, 3 Miss. (2 How.) 701, 717.

#### In action or judgment.

In *Bigelow, Estop.* p. 142, it is said that, "to make a man a privy to an action, he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase of a party subsequent to the action, or he must hold the property subordinately." *Seymour v. Wallace*, 80 N. W. 242, 243, 121 Mich. 402.

By "privies," within the meaning of the rule that any one privy to the record is entitled to a writ of error, is meant heirs, executors, administrators, terre-tenants, or those having an interest in the remainder or reversion, or one who is made a party by the law. *Anderson v. Steger*, 50 N. E. 665, 666, 173 Ill. 112 (citing 7 Enc. Pl. & Prac. 857).

A privy to a judgment or decree is one whose succession to the rights of property thereby affected occurs after the institution of the suit and from a party thereto. *Orthwein v. Thomas*, 21 N. E. 430, 435, 127 Ill. 554, 4 L. R. A. 434, 11 Am. St. Rep. 159.

The word "privity," as applied to judgments and decrees of courts, means one whose interest has been legally represented at the time. *McMullin v. Brown* (S. C.) 2 Hill, Eq. 457, 460; *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 465, 485.

The ground on which persons standing in privity to the litigating party are bound by the proceeding to which he is a party is that they are identical with him in interest. *Williams v. Barkley*, 58 N. E. 765, 768, 165 N. Y. 48; *Hunt v. Haven*, 52 N. H. 162, 169; *Pennington v. Hunt* (U. S.) 20 Fed. 195, 196.

Personal representatives, heirs, devisees, legatees, assignees, voluntary grantees, judgment creditors, or purchasers from them with notice, are included within the term "privies" as that word is used in the statement of the rule that a judgment is binding on parties and privies. *State ex rel. Kane v. Johnson*, 27 S. W. 399, 402, 123 Mo. 43; *Id.* (Mo.) 25 S. W. 855, 857; *State ex rel. National Subway Co. v. City of St. Louis*, 46 S. W. 981, 985, 145 Mo. 551, 42 L. R. A. 113; *Newman v. Home Ins. Co.*, 20 Minn. 422 (Gil. 378, 386).

#### In blood.

A privy in blood is one who derives his title to the property in question by descent. *Orthwein v. Thomas*, 21 N. E. 430, 435, 127 Ill. 554, 4 L. R. A. 434, 11 Am. St. Rep. 159.

#### In contract.

The term "privity," used with respect to contract, implies a connection, mutuality of will, and interaction of parties. The pri-

privity essential to a contract must proceed from the will of the parties, though there may be a privity by operation of law where no privity of contract exists. *Woods v. Ayres*, 39 Mich. 345, 350, 33 Am. Rep. 396.

To constitute either an express contract or one by implication, the parties must occupy toward each other a contract status, and there must be that connection, mutuality of intention, and interaction of parties generally expressed, though not very clearly, by the term "privity." *Van Buren Ry. Div. v. Lamphear*, 20 N. W. 590, 593, 54 Mich. 575.

Privity of contract is the relation that exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant in respect to the matter sued on. *Hartley v. Phillips*, 47 Atl. 929, 935, 198 Pa. 9.

#### **In estate.**

Privity of estate is defined as identity of title to an estate; the relation which subsists between a landlord and his tenant. *Society of Denomination Called Christians v. Varney*, 54 N. H. 376, 377.

Privity of estate is that which exists between lessor and lessee, tenant for life and remainderman, or reversioner, etc., and their respective assignees, and between joint tenants and copartners. *Hartley v. Phillips*, 47 Atl. 929, 935, 198 Pa. 9.

The term "privity in estate" denotes mutual or successive relation to the same right of property. In the state of New York it is said that privity in estate, within the meaning of the law of tenure, seldom arises, except between the lessor and the successors of his lessee, or when the covenantor retains a residuary interest in the land. *Mygatt v. Coe*, 26 N. E. 611, 613, 124 N. Y. 212, 11 L. R. A. 646.

A privity in estate is one who derives his title to the property in question by purchase. *Orthwein v. Thomas*, 21 N. E. 430, 435, 127 Ill. 554, 4 L. R. A. 434, 11 Am. St. Rep. 159.

A privity in estate is a successor to the same estate, not to a different estate in the same property. *Pool v. Morris*, 29 Ga. 374, 382, 74 Am. Dec. 68.

A privity in estate is any person who must necessarily derive his title to property in question from a party bound by the judgment, return, etc., subsequently to such judgment, return, etc. *Allan v. Hoffman*, 2 S. E. 602, 606, 83 Va. 129; *Dickinson v. Lovell*, 35 N. H. 9, 16; *Hunt v. Haven*, 52 N. H. 162, 169; *Coleman v. Davis* (Tex.) 36 S. W. 103.

To constitute one person a privity in estate to another, such other must be a predecessor in respect to the property in question,

from whom the privy derives his right or title; a mutual or successive relationship. *Patton v. Pitts*, 80 Ala. 373, 376.

Privity exists between two successive holders, when the later takes under the earlier, as by descent, or by will, grant, or voluntary transfer of possession. *Sherin v. Brackett*, 30 N. W. 551, 552, 36 Minn. 152.

Privies, within the meaning of the rule that a judgment of ejectment binds the parties and their privies, and estops them from denying that the plaintiff was entitled to the possession of the premises at the time of its rendition, are those who enter under the defendant in ejectment, or in collusion with him. *Satterlee v. Bliss*, 36 Cal. 489, 514.

"Privity implies succession. He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title, and thus takes it with the burden attending it." *Boughton v. Harder*, 61 N. Y. Supp. 574, 576, 46 App. Div. 352.

Privies are those so connected with the parties in estate as to be identified with them in interest, and consequently affected by them in the litigation, so as to render the judgment *res judicata* as to them. *Hartford Fire Ins. Co. v. King*, 73 S. W. 71, 73, 31 Tex. Civ. App. 636.

#### **Of possession.**

To establish privity of possession between successive adverse holders of real property, the later occupant must enter on the prior one, and must obtain his possession either by purchase or deed from the prior one. When the possession is actual, it may be commenced in parol, without deed or writing, and it may be transferred or passed from one occupant to another by parol bargain and sale, accompanied by delivery. All that the law requires is that the possession of the property, where it is actual, shall be continuous. *Vance v. Wood*, 29 Pac. 73, 75, 22 Or. 77.

To establish "privity of possession," necessary to show adverse possession, the later occupant must enter under the prior one—must obtain his possession either by purchase or descent. *Shuffleton v. Nelson* (U. S.) 22 Fed. Cas. 45, 47.

#### **Assignor and assignee.**

The term "privity" means mutual or successive relationship through the same rights of property. The executor is in privity with a testator, the heir with the ancestor, the assignee with the assignor, the donee with the donor, and the lessee with the lessor. If the rights of two parties have been determined respecting a particular subject, and the subject-matter of the suit is afterwards assigned, the assignee takes it affected by the prior adjudication, and may avail himself

of its advantages, and is subject to its burdens. *McDonald v. Gregory*, 41 Iowa, 513, 516.

Where, in a prior action between defendant and plaintiff's assignor, a tax certificate was held invalid, and the land declared exempt from taxation under a private act, plaintiff, assignee of another certificate on the same land, and of a cause of action for trespass accruing thereunder, from the holder of the certificate which was declared void, is in privity with his assignor and bound by the former adjudication. *Grunert v. Spalding* (Wis.) 78 N. W. 606, 615.

#### **Husband and wife as to dower interest.**

A wife, as respects her dower, is not in privity with her husband in any transactions, subsequent to the concurrence of marriage and seisin, to which she is not a party. *Tibbetts v. Langley Mfg. Co.*, 12 S. C. 465, 480.

#### **Mortgagor and mortgagee.**

There is no such privity of estate between a mortgagor and mortgagee as will bind the latter by acts affecting the title subsequent to the execution of the mortgage. *Parker v. Moore*, 59 N. H. 454, 457.

#### **Executor or administrator and testator or intestate.**

There is always privity between executors and administrators and their testator or intestate. *Latine v. Clements*, 3 Ga. (3 Kelly) 426, 430.

Privies in law are designated as privies in representation, as executor and testator, or administrator and intestate. There is privity between a testator and his executor. If the executor resigns, the successive representative stands as the representative of the testator; for the successor has the same power which the original representative had. Both the original and the successive representative of a testator, being in privity with a common testator, are also in privity with each other. *Johnston v. Duncan*, 67 Ga. 61, 70.

Where a son never had any interest in his father's estate, but only a mere possibility of inheriting a portion of it, and died before his father, he never sustained to the estate such relation as would bring him into privity with his own children, who inherited it, not through him, but directly through their grandfather, and they were not bound by a release executed by the son of all claim or right which he had or might thereafter acquire in the estate, in consideration of a transfer to him by his father of certain lands. *Simpson v. Simpson*, 16 Ill. App. (16 Bradw.) 170, 175.

In respect to privity in estate, the executor, as devisee and legatee, is bound by

any adjudication against testator in respect to any property devised or bequeathed by the will, but in respect to no other. *Gouraud v. Gouraud* (N. Y.) 3 Redf. Sur. 262, 269.

#### **Grantor and grantee.**

Generally speaking, a person is said to be in privity when he is so connected with any person in an estate and right or liability as to be affected in like manner. Where a remote grantor and warrantor, on notice from the grantee that he would be held liable on his covenants of warranty, appears and defends in the grantee's name an action against the grantee for partition, an appeal from a decision adverse to the grantee cannot be dismissed by the grantee. *Ladd v. Kuhn*, 56 N. E. 671, 672, 154 Ind. 313.

#### **Infant and parent.**

No privity exists between an infant, claiming damages for his pain and suffering from a personal injury, and his mother, claiming damages for the loss of his services resulting from the same injury. Therefore testimony in an action by an infant, claiming damages for his pain and suffering, is not admissible, the witness having died in the meantime, in a subsequent action against the same defendant by the infant's mother, claiming damages for the loss of his services. *Metropolitan St. R. Co. v. Gumby* (U. S.) 99 Fed. 192, 198, 39 C. C. A. 455.

#### **Master and owner of vessel.**

The master of a vessel is not in privity with her owner, within the rule that binds privies, as well as parties, to the estoppel of a judgment. *Bailey v. Sundberg* (U. S.) 49 Fed. 583, 586, 1 C. C. A. 387.

#### **Principal and agent.**

Privity is a relation which creates obligation. Where an agent is employed by several principals, the common employment creates a relation and privity between the principals such as will sustain an action for money had and received by one against another to recover moneys belonging to the former, paid over by the agent to the latter. *Hathaway v. Town of Cincinnati*, 62 N. Y. 434, 447.

#### **Principal and surety.**

A contract of suretyship imposes no duty upon the sureties to defend their principals. It gives the principals no right to represent their sureties, and gives one surety no authority to charge his fellows by either his knowledge or his conduct. Privity in law involves the right of representation, and certainly the principal, in an action against him alone, cannot represent the surety. As was said in *Giltinan v. Strong*, 64 Pa. (14 P. F. Smith) 242, 244, the privity of a surety with his principal is in the contract alone, and

not in the action. *Park v. Ensign*, 71 Pac. 230, 231, 66 Kan. 50, 97 Am. St. Rep. 352.

Privity in law involves the right of representation. A judgment against a contractor for damages for a breach of contract is not *res judicata* against the surety on his bond, where the bond did not stipulate that the surety should be bound by such a judgment, and he was not a party or privy to the action, though he had notice thereof and was the attorney for the contractor. *McConnell v. Poor*, 84 N. W. 968, 969, 113 Iowa, 133.

#### **Purchaser.**

A purchaser of personal property which had been assessed for taxes, but before any lien for the taxes had attached, is not a privy of the seller, so as to bar an action of replevin against the tax collector to recover such property seized by him for the delinquent taxes. *Tousey v. Post*, 52 N. W. 57, 58, 91 Mich. 631.

#### **Purchaser at sheriff's or treasurer's sale.**

A purchaser at sheriff's sale, for example, is in privity to the defendant's title. Under these principles a purchaser at treasurer's sale is in privity to the title, if any, that is divested by the sale and passes to him. *Strayer v. Johnson*, 1 Atl. 222, 225, 110 Pa. 21.

#### **Successive administrators.**

Successive administrators are not privies in legal contemplation, and a judgment in favor of an administrator is not a bar to an action against his successor by the same plaintiff for the same cause. *Hummel v. First Nat. Bank*, 32 Pac. 72, 76, 2 Colo. App. 571.

#### **Successor in office.**

A judgment on the merits against the defendant, an overseer of highways, for the removal under color of his office of a fence situated on plaintiff's land, the sole defense being the existence of an alleged public road at the locus in quo, is, in the absence of fraud, a bar to a subsequent proceeding by the successor in office of the former in behalf of the public to restrain the threatened obstruction of such alleged highway, in which the rights of the parties depend on the facts put in issue in the former action. *Holsworth v. O'Chander*, 68 N. W. 334, 335, 49 Neb. 42.

#### **Tenants in common.**

Tenants in common are not in privity with each other, so as to admit of either binding or estopping the other by any acts or admissions without the consent of the other. *Coan v. Osgood* (N. Y.) 15 Barb. 583, 588.

#### **Wife of tenant.**

A married woman, who is in possession of land with her husband, who is the grantee's tenant, is not estopped to question the title of the grantee, as she is not a privy in estate under her husband, nor a tenant of the grantee. *Shew v. Call*, 26 S. E. 33, 34, 119 N. C. 450, 56 Am. St. Rep. 678.

#### **PRIVY EXAMINATION.**

The words "privy examination of the wife," as found in Acts 1889, c. 389, providing that no deed by husband and wife, in which the privy examination of the wife is certified as prescribed, shall be deemed invalid because of duress or undue influence, unless the grantee had notice of or participated in the same, mean that the married woman must have been, both as a matter of fact and in a manner sufficient under the requirements of the law, examined privately, and that she must have acknowledged that she signed the deed of her own free will and without compulsion, etc. *Benedict v. Jones*, 40 S. E. 221, 222, 129 N. C. 470.

#### **PRIVY VERDICT.**

A privy verdict occurs when the judge hath left or adjourned the court, and the jury, being agreed, in order to be delivered from their confinement, obtain leave to deliver their verdict privily to the judge out of court, which privy verdict is of no force unless affirmed by a public verdict given openly in court, wherein the jury may vary from the privy verdict. *Kramer v. Kister*, 40 Atl. 1008, 1009, 187 Pa. 227, 44 L. R. A. 432 (citing 3 Bl. Comm. 377); *Willard v. Shaffer* (Pa.) 6 Phila. 520; *Peart v. Chicago, M. & St. P. Ry. Co.*, 5 S. D. 337, 341, 58 N. W. 806, 807; *Young v. Seymour*, 4 Neb. 86, 89.

A privy verdict is one given out of court, before any of the judges of the court, so called because it ought to be kept secret from each of the parties before it is affirmed by the court. Co. Litt. 227b, 392. It is so called because what is found thereby ought to be kept secret until a verdict is given in the open court. Bac. Abr. tit. "Verdict," B. The very essence of a privy verdict is its secrecy from the knowledge of the parties, and a verdict given and received in the public courtroom, the judge on the bench, the clerk in his place, in the presence of the officers of the court, the parties, and the bystanders, and recorded by the clerk in the presence of the jury who gave it, the parties and all the persons present, is not a privy verdict. *Barrett v. State*, 1 Wis. 175, 180.

By the recognized practice it is within the discretion of the trial judge to permit the jury to make a sealed verdict. When a juror dissents from a sealed verdict, there is



a necessary choice of evils—a mistrial, or a verdict finally delivered under circumstances that justly subject it to suspicion of coercion or improper influences. *Kramer v. Klster*, 40 Atl. 1008, 1009, 187 Pa. 227, 44 L. R. A. 432.

Under the common law the jury, after the evidence had been submitted to them, must be kept together in some convenient place until they have agreed. They may, in cases between party and party, give a verdict, and, if the court has risen, give a privy verdict before any of the judges of the court, and the next morning they may affirm or alter their privy verdict, and that which is given in court shall stand. In criminal cases involving life or member, the jury can give no privy verdict, but they must always give it in court. After the verdict is recorded the jury cannot vary from it; but before it has been recorded they may vary the same. The separation of a jury after a sealed verdict had been agreed upon in a case of misdemeanor does not constitute a cause for a new trial. *Commonwealth v. Heller* (Pa.) 5 Phila. 123, 124.

A verdict is either privy or public, and a privy verdict is where the judge has left or adjourned the court, and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court. Such a verdict is of no force, unless afterwards affirmed by a public verdict given openly in the court, whereat the jury may vary from the privy verdict; so that a privy verdict is indeed a mere nullity, and it is held that a sealed verdict partakes of all the characteristics of a privy verdict, and is no verdict in itself, but must be affirmed by the jury in open court. *Young v. Seymour*, 4 Neb. 86, 89.

## PRIZE.

See "Offering Prize."

A "purse, prize, or premium" is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, and, if he abide by his offer, he must lose it and give it over to some of those contending for it. *Harris v. White*, 81 N. Y. 532, 539. And the term does not include betting on horse races. *Morrison v. Bennett*, 52 Pac. 553, 557, 20 Mont. 560, 40 L. R. A. 158.

The term "prize" is used to designate the reward in a lottery, which the lucky person or persons will receive. *Long v. State*, 22 Atl. 4, 5, 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268.

Under St. 1884, c. 277, entitled "An act to prevent the sale or exchange of property

under the inducement that a gift or prize is to be a part of the transaction," and prohibiting a sale upon any representation that anything other than what is specifically stated to be the subject of the sale is to be delivered, it is held that the sale of packages of tobacco, under a promise to give a photograph to each purchaser of a package, is not within the prohibition of the statute, though the purchaser is allowed to select his photograph from among a number. *Commonwealth v. Emerson*, 42 N. E. 559, 165 Mass. 146.

### Bet or wager distinguished.

A prize is ordinarily something offered by a person for the doing of something by others in a contest in which he himself does not enter. He has not a chance of gaining the thing offered, and, if he abides by his offer, he must lose it, and give it to some one of those who contest for it. It is a reward or recompense for some act which is done, and the distinction between it and a bet or wager is clear, as with them there must be two parties, and it is known before the happening of the event that one of them must win or lose, and it is also a stake on a certain event, not merely a reward or recompense for some act which is done. *People v. Fallon*, 39 N. Y. Supp. 865, 869, 4 App. Div. 82 (citing *Alvord v. Smith*, 63 Ind. 58; *Porter v. Day*, 71 Wis. 296, 37 N. W. 259; *Delier v. Plymouth Agricultural Soc.*, 57 Iowa, 481, 10 N. W. 872).

The distinction between a bet or wager and a premium or purse is thus given in *Harris v. White*, 81 N. Y. 532: "A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one, or some one, of them on the happening in the future of an event at the present uncertain; and the stake is the money or thing thus put on the chance. There is in that this element that does not enter into a modern purse, prize, or premium, viz.: that each party to the former gets a chance of gain from the others and takes a risk of loss of his own to them. The purse, prize, or premium is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, and, if he abide by his offer, that he must lose it, and give it over to some of those contending for it, is reasonably certain." Competing for premiums offered by an association for horse races is not competing for bets or wagers, and therefore an agreement between two owners of horses to pool all premiums and stake moneys awarded on their horses, and to divide the same equally, is valid. *Hankins v. Ottinger*, 47 Pac. 254, 255, 115 Cal. 454, 40 L. R. A. 76.

**PRIZE (In Admiralty).**

The words "prize and capture," as used in Act Aug. 6, 1861, declaring that property used for insurrectionary purposes shall be the lawful subject of prize and capture, are not to be taken in their ordinary sense as referring exclusively to captures on waters and maritime prizes, but refer as well to property taken on land. *Union Ins. Co. v. United States*, 73 U. S. (6 Wall.) 759, 763, 18 L. Ed. 879; *United States v. Athens Armory* (U. S.) 24 Fed. Cas. 878, 880.

In its technical sense "prize" means maritime captures only; ships and cargoes taken by ship. *United States v. Athens Armory* (U. S.) 24 Fed. Cas. 878, 880.

The word "prize" is often used, not only in common parlance, but in the decrees of appellate courts, to signify any goods the subject of marine capture. *Groning v. Union Ins. Co.* (S. C.) 1 Nott & McC. 537, 539.

The word "prize" is generally used as a technical term to express a legal capture. *Miller v. The Resolution*, 2 U. S. (2 Dall.) 1, 3, 1 L. Ed. 263.

The question of prize or no prize is essentially a question of title. Enemy property, or property found so engaged in an unfinished voyage of illicit trade with the enemy as to be quasi hostile, is liable to condemnation; property not in that predicament is not. Cotton picked up at sea by a cruiser of the United States, under circumstances showing that it had recently been abandoned there by an enemy or by a neutral engaged in breaking the blockade of an enemy's port, is rightly proceeded against as a prize, rather than a derelict. In *re Seventy-Eight Bales of Cotton* (U. S.) 21 Fed. Cas. 1100, 1101.

The term "good and lawful prize" does not necessarily imply that the goods were enemy's property; but, in an action on a policy of insurance containing a covenant of neutrality, a condemnation by a foreign court of admiralty is conclusive evidence of a breach of the covenant. *Groning v. Union Ins. Co.* (S. C.) 1 Nott & McC. 537, 540.

The term "prize," in maritime law, includes a vessel captured while engaged in piratical aggression, although the only ground on which a libel for prize can be sustained is that of a state of war, as a state of universal war is presumed to have been declared by a pirate against commerce and human kind at large, which requires no reciprocal declaration from any nation. *The City of Mexico* (U. S.) 28 Fed. 148, 150.

As soon as a war is declared, all the property of the enemy or his subjects, wherever found, whether on land or water, is lawful prize. *Johnson v. Twenty-One Bales of Merchandise* (U. S.) 13 Fed. Cas. 855, 861.

"Capture" and "prize" are not convertible terms; and for the subject of capture to be made prize for the benefit of the captors, the taking must meet the conditions imposed by the United States statute, entitled "prize." *United States v. Dewey*, 23 Sup. Ct. 415, 417, 188 U. S. 254, 47 L. Ed. 463.

**Salvage.**

Salvage should be regarded in the light of compensation, and not in the light of prize. The latter is more like a gift of fortune, conferred without regard to the loss or sufferings of the owner, who is a public enemy; while salvage is the reward granted for saving the property of the unfortunate. The courts should be liberal, but not extravagant; otherwise, that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril. *The Elena G.* (U. S.) 61 Fed. 519, 520.

**PRIZE COURT.**

The prize court is the division of the admiralty court which has jurisdiction over prizes taken from a foreign power in time of war. *Percival v. Hickey* (N. Y.) 18 Johns. 257, 292, 9 Am. Dec. 210.

A prize court is in fact a court of all the nations in the world, because all persons in every part of the world are concluded by its sentence in cases clearly coming within its jurisdiction. *Penhallow v. Doane*, 3 U. S. (3 Dall.) 54, 91, 1 L. Ed. 507.

A prize court is a court having jurisdiction to adjudicate upon captures made at sea in time of war, and to condemn the property captured, if such a decree be proper. "Prize courts are not instituted to determine civil and private rights, but for the purpose of trying judicially the lawfulness of captures at sea according to the principles of public international law, with the double object of preventing and redressing wrongful captures, and of justifying the rightful acts of the captors in the eyes of other nations. The ordinary course of proceeding in prize causes is wholly different from those which prevail in municipal courts of common law or equity in the determination of questions of property between man and man. In *Lindo v. Rodney*, 2 Doug. 613, Lord Mansfield said the act of a prize court is to suspend the property to condemnation, to punish every sort of misbehavior in the captors, to restore instantly if there do not appear a sufficient ground, and to condemn finally if the goods really are a prize. From the necessity of the case, and in order to interrupt as little as may be the exercise of the belligerent duties of the captors, and the voyage and trade of the captured vessel, if neutral, the proceedings are summary. The libel is filed

as soon as possible after the prize has been brought into the court of the government of the captors, and does not contain any allegation as to title, nor even set forth the grounds of condemnation, but simply prays that the vessel may be forfeited to the captors as lawful prize of war. The law of nations presumes and requires that in time of war every neutral vessel shall have on board papers showing her character, and officers and crew able to testify to facts establishing her neutrality. The captors are, therefore, required immediately to produce to the prize court the ship's papers, and her master, or some principal officer, or crew, to be examined on oath and without communication with or instruction by counsel. *The Aline and Fanny, Spinks, Prize Cas.* 322; *United States v. The Sir William Peel*, 72 U. S. (5 Wall.) 517, 18 L. Ed. 696. The proceedings of a prize court being in rem, its decree, as is now universally admitted, is conclusive to the world as to all matters decided and within its jurisdiction. *Williams v. Armroyd*, 11 U. S. (7 Cranch) 423, 3 L. Ed. 392. For the vessel is condemned as prize and sold by order of the court, the decree of condemnation and sale is conclusive evidence of the lawfulness of the capture and of the title of the purchaser, but if, as is usual, it does not state the ground of condemnation, it is not even conclusive that the vessel is enemy's property; for it may have been neutral property, condemned for resisting a search or attempting to enter a blockaded port, and of consequence this sentence, being only conclusive of its own correctness, leaves the fact of real title open to investigation. *Malley v. Shattuck*, 7 U. S. (3 Cranch) 458, 488, 2 L. Ed. 498; *Cushing v. Laird*, 2 Sup. Ct. 196, 201, 107 U. S. 69, 27 L. Ed. 391.

### PRIZE FIGHT.

The term "prize fight" is defined in the *Century Dictionary* as a pugilistic encounter or boxing match for prize or wager. The term "prize fight," as used in the statute, providing that whoever engages as principal in any prize fight shall be imprisoned, etc., is used in its ordinary signification of a fight for a prize or reward, and includes all fights of that character, however conducted, and whether witnessed by many or by few people. *Seville v. State*, 49 Ohio St. 117, 131, 30 N. E. 621, 15 L. R. A. 516.

A prize fight is defined by Webster as a contest in which the combatants fight for a reward or wager. An instruction, in a prosecution of persons charged with prize fighting under a statute, that the words "prize fight," as used in the statute, mean a fight or physical contest between two parties for a prize or reward, is erroneous, if by it the court gave the jury to understand that it need not be a fight, but that a physical con-

test for a prize or reward was punishable under the statute. There are many physical contests which are not only not punishable, but altogether permissible. It is a fight only that the statute reaches. Wrestling, fencing, boxing, and numberless other matches, in which the physical powers are employed by men in friendly contests with each other, are not punishable. It must be fighting; and the word "fight" implies, perhaps, the use of violence for the purpose of inflicting injury. *State v. Purtell*, 56 Kan. 478, 480, 481, 43 Pac. 782.

A fight in the nature of a prize fight is one in which there is an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded, and there must be an intention to inflict some degree of bodily harm on the contestant. *People v. Taylor*, 56 N. W. 27, 28, 96 Mich. 576, 21 L. R. A. 287.

Prize fighting simply means fighting for a prize or reward, and any contest in which the fighters are offered or promised a prize or reward to be paid to the victor or either of them is a prize fight, within the meaning of the law making such contests unlawful. The particular features of the contest cannot remove it from the prohibition of the statute; any fight for a reward being a prize fight, without regard to whether the combatants do or do not wear gloves, how they are clothed, or what rules govern the contest. *State v. Olympic Club*, 15 South. 190, 193, 46 La. Ann. 935, 24 L. R. A. 452.

To constitute prize fighting, under How. St. § 9306, providing that any person who shall be a party to or engaged in a prize fight shall be punished, etc., there must have been an expectation of reward to be gained by the contest or competition, either to be won from the contestant or to be otherwise awarded, and there must have been an intent to inflict some degree of bodily harm upon the contestant. *People v. Taylor*, 96 Mich. 576, 579, 58 N. W. 27, 28, 21 L. R. A. 287.

A physical contest without weapons between two individuals for the purpose of entertainment, where those present each contributed one dollar to compensate the contestants, and where one of the men was knocked down once or twice, was a "ring or prize fight," though the fighting space was not marked off by ropes into a ring of 16 or 24 feet. *People v. Finucan*, 80 N. Y. Supp. 929, 930, 80 App. Div. 627.

### Boxing or sparring match.

A prize fight is a contest in which the combatants fight for a reward or wager, and an instruction that a prize fight means a fight or physical contest between two par-

ties for a prize or reward is erroneous, since the word "fight" implies a purpose to use violence for the purpose of inflicting injury, and it is a question for the jury as to whether a sparring or boxing match with gloves is a prize fight. *State v. Purtell*, 43 Pac. 782, 783, 56 Kan. 479 (citing *State v. Burnham*, 53 Vt. 445, 48 Am. Rep. 801; *People v. Taylor*, 56 N. W. 27, 96 Mich. 576, 21 L. R. A. 287).

#### **Glove contest distinguished.**

See "Glove Contest."

#### **As public fighting.**

"Prize fighting," as used in Act Miss. March 7, 1882, making it unlawful for any persons to engage in prize fighting, means fighting in public places, or places to which the public, or some part of it, is admitted as spectators. The act intended to be prohibited is that which is public in character, and tends to disturb the peace and the quiet of the community in which it occurs, and to debase, not only the participants, but others, who are admitted as spectators. A private contest between individuals, whether amateurs or professional fighters or boxers, though it be for a prize or wager, would not be a prize fight within the meaning of the statute. *Sullivan v. State*, 7 South. 275, 276, 67 Miss. 346.

A prize fight is an exhibition contest of pugilists for a stake or reward. It is a pugilistic encounter or a boxing match for a prize or wager. Prize fighting is a phrase in common use, and when it is said that one in pursuance of a previous arrangement and appointment with another did unlawfully engage as principal in a fight with that other with their fists for a wager, there is by one of ordinary understanding no mistaking the nature of the act. Such an act is at once understood to mean a pugilistic encounter for a prize or a reward. Hence the information alleging such facts sufficiently alleges that the parties engaged in a prize fight. *State v. Patton*, 64 N. E. 850, 851, 159 Ind. 248.

#### **PRIZE GOODS.**

Prize goods are defined to be goods taken on the high seas, *jure belli*; taken out of the hands of the enemy. *The Adeline*, 13 U. S. (9 Cranch) 244, 274, 3 L. Ed. 719.

#### **PRIZE LAW.**

The law of prize is a law of war, which is to be exercised at the order of the executive, and not upon the principles of policy or equity; and while prize courts, where questions of doubt arise, yield as far as possible to the claims of humanity and respect for personal rights, yet they cannot be controlled by such considerations. By the prize law, as

accepted at the present time, war vessels of a belligerent had the right, in the absence of any declaration of exemption by the political power, to capture wherever and whenever found afloat anything which belongs to or is the property of the enemy. Whenever it is claimed that an exemption is made by proclamation or ordinance, the burden of proof is on the claimant to show that the particular case comes within the exemption. *The Buena Ventura* (U. S.) 87 Fed. 927, 929.

#### **PRIZE LOGS.**

"Prize logs," as used in Sp. Acts 1835, c. 590, incorporating a log-driving company, and providing that all logs denominated "prize logs" shall be the property of the company, means those logs to which, from the loss of all distinguishing marks or evidence of property, no title can be established by any claimant. *Kennebec Log Driving Co. v. Burrill*, 18 Me. (6 Shep.) 314, 318.

#### **PRIZE MONEY.**

Prize money is, strictly speaking, a matter of bounty, and not of right, and no one has an absolute right to it before adjudication; yet, unless the government, acting through the proper department, has clearly manifested an intention to revoke the grant or alter the mode of distribution, it is to be awarded and distributed according to the laws in force and the facts existing at the time of the capture. *United States v. Steever*, 5 Sup. Ct. 765, 769, 113 U. S. 747, 28 L. Ed. 1133.

#### **PRIZE TICKETS.**

An agreement to pay a note in prize tickets means to pay in available tickets; not such as have lost their validity, but tickets on which the holder would be entitled to demand and receive the prizes drawn to their respective numbers. *City Bank of Baltimore v. Smith* (Md.) 3 Gill & J. 265, 275.

#### **PRO.**

The use of the word "pro," in the signature of a note signed by A., pro B., indicates that A. is signing the note on behalf of B. It shows that A. is to be considered the promisor. *Long v. Colburn*, 11 Mass. 97, 98, 6 Am. Dec. 160.

#### **PRO INTERESSE SUO.**

See "Examination pro Interesse Suo."

#### **PRO RATA—PRORATE.**

The verb "prorate" is derived from the words "pro rata," and has become a part of the common English tongue, with all the

characteristics of such a part of speech, and is thus defined: "To divide or distribute proportionally; to assess pro rata." *Rosenberg v. Frank*, 58 Cal. 387, 405.

The term "proportion" is synonymous with "pro rata." *Hager v. McDonald* (U. S.) 65 Fed. 200, 202 (citing *Black, Law Dict.* p. 944, tit. "Pro Rata").

"Pro rata cost of tuition," as used in Acts 1886, c. 24, § 45, providing that pupils residing outside of certain school districts may attend the schools therein on the payment of the actual pro rata cost of tuition for all such children, means such proportionate part of the entire tuitions in such school as the number of outside pupils bear to the whole number attending these schools. *State v. Hamilton*, 10 South. 57, 69 Miss. 116.

In an accounting for settlement of an estate showing a balance due the executors, it was agreed that such matter should be submitted to arbitration. The articles of submission provided that the arbitrators "shall find what is due the estate by each heir by including the pro rata for each, which we promise to pay to present date." Held, that by "pro rata" was meant the proportion which each devisee was to pay of the claims against the estate. *Cross v. Cross*, 17 N. J. Eq. (2 C. E. Green) 288, 291.

"Pro rata" means according to a measure which fixes proportions. It has no meaning unless referable to some rule or standard. As used in a will providing that, in the event of testator's wife's death, the income given to her should thereafter be payable to his children, respectively, pro rata, following a paragraph in the will fixing the proportions of the income which each of testator's children should take, the words "pro rata" are not to be regarded as equivalent in meaning to the words "per capita," but refer to the measure or standard previously fixed. *Brombacher v. Berking*, 39 Atl. 134, 135, 56 N. J. Eq. 251.

A testator bequeathed to three sisters of the full blood a certain sum each, and to two sisters of the half blood a certain sum each, and to a trustee for the daughters of another sister a certain amount, and then bequeathed the residue of his estate to be divided pro rata between his sisters and the children mentioned in the specific bequests. It was held that the sums mentioned in the first bequests furnished the rate or proportion referred to by the term "pro rata," and that the residuum should be distributed between the several legatees in the proportion existing between the special bequests to them. The court in the course of its opinion said: "The particular question presented here is what effect is to be given to the words 'pro rata' in the residuary clause. \* \* \* This expression is of very common use. So

frequent is and has been its employment in daily intercourse among all classes of men that it may almost be said to have become a part of our vernacular. From it the verb 'prorate' has been derived and become a part of the common English tongue, with all the characteristics of such a part of speech. This verb is found used in the appropriate modes and tenses, with participles, and is thus defined: 'To divide or distribute proportionately; to assess pro rata.' The words 'pro rata' have a defined and well-understood meaning. They are defined as follows by the two most famous lexicographers of our time: Webster defines them as follows: 'Latin, pro rata (sc. parte), according to a certain part; in proportion.' Worcester thus defines them: '(L.) According to the rate. (Com.) In proportion.' The word 'rata' is the participle of the Latin word 'reor.' Its principal parts are thus given in Ainsworth's English-Latin Dictionary: 'Reor, rerī, ratus'—meaning, according to the same authority, 'to suppose, judge, deem, or think; to imagine.' It is urged that the words 'pro rata' mean a proportion, a fixed rate, established according to a rule, and that that rule is fixed by the statute of distributions; that this rule would fix the proportion according to which a division should be made, and thus the distribution or division would be per stirpes, according to the statute, into six parts, each of which would be a sister's share. This would lead to a division according to which each of the sisters would get a sixth, and the nieces the remaining sixth, or one-eighteenth each. We see no grounds whatever for such a construction. It seems to us conjectural, fanciful and untenable. \* \* \*. The contention is also put forth that 'pro rata' though it means 'proportionally, according to proportion,' and is not a synonym for 'equally,' yet a pro rata division constantly results in an equal division, and that, since a pro rata division so results, therefore the division to be made of the residuary estate in this case must be into eight equal parts or shares, of which each of the persons named in the residuary clause is to have one part or share. This, as we understand it, is the contention of the learned counsel for the nieces; but he admits it to be equal or unequal according to the standard fixing the proportion of the division. If it be admitted that the standard fixing the proportion of the division is the number of persons mentioned in the residuary clause, then the conclusion contended for follows. We see no reason to conclude that a division into eight shares was intended." *Rosenberg v. Frank*, 58 Cal. 387, 404, 406, 407, 408.

A provision in an assignment for the benefit of creditors that the surplus, after paying the preferred creditors, shall be paid pro rata to all the other creditors, means that the whole amount of unpaid debts shall be paid if there are sufficient assets for that

purpose. *Taylor v. Stevens* (N. Y.) 7 How. Prac. 415.

An agreement of two persons with a third to prorate the loss or gain in the value of certain shares of stock at the end of a certain time was construed to mean to divide the loss or gain, not between the two parties on the one side, but between them and the party with whom they contracted, and thus it was held that the two were jointly liable for one-half the loss. *Penniman v. Stanley*, 122 Mass. 310, 317.

The phrase "pro rata per cent.," in a provision in a contract that one of the parties is to receive from the other pro rata per cent. of moneys which the one shall pay to certain creditors of the other, was construed as equivalent to rate per cent. *Raymond v. Rhodes*, 135 Mass. 337, 338.

A "pro rata interest" in a mortgage is the right to share pro rata in whatever security the mortgage affords, and if several notes of a series secured by mortgage are assigned with no agreement as to priority, a proportionate interest in the mortgage passes with the notes, and one note stands upon the same footing as the other. *Bartlett v. Wade*, 66 Vt. 629, 631, 632, 30 Atl. 4.

## PRO TEMPORE.

See "Judge pro Tem."

If the standing clerk of a military company be absent, and another be appointed pro tempore, this is a sufficient specification of the term of his office; it being understood to continue during the absence of the standing clerk. *Cutter v. Tole*, 3 Me. (3 Greenl.) 38.

## PROBABILITY.

See "Balance of Probabilities."

A probability of the existence of a thing or condition is created when there is more evidence in favor of its existence than against it. *State v. Jones*, 20 N. W. 470, 472, 64 Iowa, 349; *Williams v. State*, 12 South. 808, 98 Ala. 22.

The term "probability" implies consideration of probative facts. *Gilmore v. State*, 13 South. 536, 538, 99 Ala. 154.

Probability is the state of a thing being probable. *Bain v. State*, 74 Ala. 38, 39 (quoting *Webst. Dict.*; *Worcest. Dict.*). As used with respect to preponderance of evidence, it means having more evidence for than against; supported by evidence which inclines the mind to belief, but leaves some room for doubt. *Howard v. State*, 18 South. 813, 816, 108 Ala. 571.

"Probability," as used in a requested instruction in a criminal prosecution that the jury should acquit if there is a probability of defendant's innocence, is at least equivalent to a reasonable doubt of his guilt. *Shaw v. State*, 28 South. 390, 392, 125 Ala. 80 (citing *Henderson v. State*, 25 South. 236, 120 Ala. 360; *Karr v. State*, 106 Ala. 1, 17 South. 328; *Winslow v. State*, 76 Ala. 42).

Probability means likelihood, appearance or resemblance of truth, and, in ordinary language, implies doubt, so that to instruct a jury that they may act on probabilities means that they may act on less than convincing evidence, or without the moral certainty required by law, and is erroneous. *People v. O'Brien*, 62 Pac. 297, 299, 130 Cal. 1 (citing *People v. Dilwood*, 94 Cal. 89, 29 Pac. 420).

"All the dictionaries give different definitions of 'probability.' One of Worcester is 'likelihood in the occurrence of events, in the doctrine of chances, or the quotient obtained by dividing the number of favorable chances by the whole number of chances.' The one of Webster is 'a likelihood; appearance of truth; that state of the case or question of fact which results from superior evidence or preponderance of arguments on one side, inclining the mind to receive it as the truth, but leaving some room for doubt.' It therefore falls short of moral certainty, but produces what is called opinion. Demonstration produces certain knowledge, proof produces belief, and probability opinion." *Brown v. Atlanta & C. Air Line R. Co.*, 19 S. C. 39, 59.

### Proof distinguished.

There is a difference between "probability" and "proof." The object of both words is to express a particular effect of evidence, but proof is the stronger expression. An instruction that the jury must determine their verdict, not from conjecture, but from probability, is not erroneous. *Brown v. Atlanta & C. Air Line R. Co.*, 19 S. C. 39, 59.

## PROBABLE.

As used in a question to a physician, in an action for personal injuries, as to what in his opinion would be the probable effects of the wounds on the future health of the injured party, "probable" means the same as "likely." *O'Brien v. New York, N. H. & H. R. Co.*, 13 N. Y. Supp. 305, 59 Hun, 623.

"Probable" means having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt. *Bain v. State*, 74 Ala. 38, 39 (citing *Webst. Dict.*).

"Probable" is defined as having more evidence for than the contrary, or as having

more evidence for than against, and hence, as used in an instruction that the jury were to determine from the evidence whether such disability would probably continue, the use of the word "probable" is not erroneous, as implying a bare preponderance of the evidence. *Bailey v. City of Centerville*, 78 N. W. 831, 833, 108 Iowa, 20.

In a prosecution for murder, the court instructed that, if the evidence went no further than to show that the fact that defendant was insane was possible or merely probable, it was not sufficient, but should go further, and overcome the presumption of sanity, was held erroneous; the court saying it was made probable to the jury that the defendant was so far insane as not to be accountable for his acts and should have been acquitted. Worcester defines "probable" as having more evidence than the contrary. Webster defines it as having more evidence for than against. It was sufficient if the evidence of insanity preponderated. *State v. Jones*, 64 Iowa, 349, 350, 14 N. W. 911, 914.

By saying, in an instruction on a trial for murder, that if the evidence goes any further than to show that insanity was possible, or even probable, it is not sufficient, the word "probable" is used as understood in common parlance, and means, from the definition of lexicographers, that there is more evidence of insanity than against it, or better reason to believe the defendant insane than to believe him sane. *State v. Thiele*, 94 N. W. 256, 257, 119 Iowa, 659 (citing *State v. Trout*, 74 Iowa, 545, 38 N. W. 405, 7 Am. St. Rep. 499; *Kelch v. State*, 55 Ohio St. 146, 45 N. E. 6, 39 L. R. A. 737).

#### As likely.

The use of the word "probable," instead of the word "likely," in a hypothetical question is immaterial; the two words meaning precisely the same. *O'Brien v. New York, N. H. & H. R. Co.*, 13 N. Y. Supp. 305, 59 Hun, 623.

#### Possible distinguished.

Things or results which are only possible cannot be spoken of as either "probable or natural," for the latter are those things or events which are likely to happen, and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or regularity as to become a matter of definite inference. *Scott v. Allegheny Valley Ry. Co.*, 33 Atl. 712, 713, 172 Pa. 646 (citing *South Side Pass. Ry. Co. v. Trich*, 11 Atl. 627, 117 Pa. 390, 2 Am. St. Rep. 672).

#### PROBABLE CAUSE.

The "probable cause" which will justify a refusal to perform a marriage contract be-

cause of the woman's unchastity is supported by evidence which inclines the mind to believe. It is not a mere suspicion. It is something that is proved, not fully, but has more evidence for than against it. *Kelley v. Highfield*, 14 Pac. 744, 756, 15 Or. 277.

"Probable cause," as applied to a case of seizure by customs officials of goods for nonpayment of duties, does not mean prima facie evidence, or evidence which in the absence of exculpatory proof would justify condemnation. It means less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion. This is its legal sense. *United States v. One Sorrel Horse* (U. S.) 22 Vt. 655, 657, 27 Fed. Cas. 315, 316 (citing *Locke v. United States*, 11 U. S. [7 Cranch] 339, 3 L. Ed. 364).

Probable cause, on an issue whether an attachment was sued out without probable cause, has been defined to be "belief founded on reasonable grounds"; in other words, the issue would be whether the acts and conduct of the defendant in the attachment were such as would warrant the belief that the attachment would lie. *Freymark v. McKinney Bread Co.*, 55 Mo. App. 435, 437.

"Probable cause," which will sustain a privileged communication, is a reasonable ground of suspicion, supported by circumstances sufficient to warrant a cautious man in believing that the party is guilty of the offense. *Coates v. Wallace*, 4 Pa. Super. Ct. 253, 257.

#### For appeal.

Pen. Code, § 1243, in providing that an appeal to the Supreme Court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases the execution is stayed upon filing with the clerk of the court in which the conviction was had a certificate of the judge of such court or of a justice of the Supreme Court that in his opinion there is "probable cause for the appeal," but not otherwise, means only that there is presented a case that is debatable, a case that is not clearly and palpably frivolous and vexatious, a case upon which there may be an honest difference of opinion, and is not equivalent to "probable ground for reversal of the judgment." In re *Adams*, 22 Pac. 547, 548, 81 Cal. 163.

#### For arrest.

The meaning of the expression "probable cause," as used in the federal Constitution, declaring that no warrants shall issue but upon probable cause, is that there is a probability that a crime has been committed by the person named in the warrant. Of this probability the court or magistrate issuing the warrant must be satisfied by facts supported by oath or affirmation. The facts

which are stated upon oath must induce a reasonable probability that all the acts have been done which constitute the offense charged. *United States v. Boling* (U. S.) 24 Fed. Cas. 1189, 1192.

Under Const. art. 3, § 7, prohibiting the issuance of a warrant to seize any person without "probable cause," reduced to writing and supported by oath, the phrase "probable cause" is properly construed to embrace acts embodied in a complaint or information charging an offense on information and belief. *State v. Shafer*, 66 Pac. 463, 464, 26 Mont. 11.

The phrase "probable cause" does not mean a positive cause. An indictment imports only probable cause, and probable cause is sufficient ground of an indictment by a grand jury. A party may be arrested and tried on a complaint made before a justice of the peace under oath, charging him on the information and belief of the complainant with unlawfully spearing fish in violation of Laws 1883, c. 89, § 1. *State v. Davie*, 22 N. W. 411, 412, 62 Wis. 305.

"Probable cause," as used in Const. U. S. Amend. art. 4, providing that no warrant shall issue but upon probable cause, supported by oath, etc., does not mean actual and positive cause. *State v. Davie*, 22 N. W. 411, 412, 62 Wis. 305.

The probable cause, supported by oath or affirmation, to authorize the issuance of a warrant for arrest, under Const. U. S. Amend. 4, is the oaths or affidavits of those persons who of their own knowledge depose to the facts which constitute the offense. An oath to an information in the form that accuser, "being duly sworn, says all the statements and averments in the foregoing information are true as he verily believes," is insufficient. As said in *Vannatta v. State*, 31 Ind. 210: "A verdict that the defendant is guilty as charged would amount to nothing. It would only show that the district attorney believed that the offense had been committed." *United States v. Tureaud* (U. S.) 20 Fed. 621, 623, 624.

"Probable cause," as used in Const. art. 6, § 26, providing that the warrant for arrest for trespass can only issue on a showing under oath of the "probable cause," does not mean "good reason to believe," but the facts must be sworn to. *Meddaugh v. Williams*, 12 N. W. 34, 35, 48 Mich. 172.

An affidavit for a complaint of a violation of Rev. St. § 5426 [U. S. Comp. St. 1901, p. 3669], which alleged that defendant did, for the purpose of registering himself as a voter, unlawfully use a certain certificate of citizenship, knowing that such certificate had been unlawfully issued or made, without stating how such use was unlawful, or how the certificate had been unlawfully issued or

made, did not show probable cause for the issuance of a warrant within the fourth amendment of the federal Constitution. In *re Coleman* (U. S.) 6 Fed. Cas. 49, 54.

#### In civil proceedings.

As respects a criminal prosecution, probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. *Mutatis mutandis*, this definition is applicable to civil prosecutions, and as to them "probable cause" may be defined as such reasons, supported by facts and circumstances, as will warrant a cautious man in the belief that his action and the means taken in the prosecution of it are legally just and proper. *Burton v. St. Paul, M. & M. Ry. Co.*, 22 N. W. 300, 301, 33 Minn. 189.

Probable cause for the prosecution of a civil suit consists of such facts as lead to the inference that the party was actuated by an honest and reasonable conviction of the justice of the suit. *Stansell v. Cleveland*, 64 Tex. 660, 663.

"Probable cause," as used in an action for the wrongful and malicious suing out of a judgment, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting consciously, impartially, reasonably, and without prejudice, to believe that some one of the grounds for suing out the writ of attachment existed; and in deciding upon the existence of probable cause the person's belief in the existence of the ground for the attachment cannot be considered, nor the existence of such facts as might have influenced his judgment, but the test is the effect they might have upon the judgment of an ordinarily prudent and reasonable man. *Alsop v. Lidden*, 30 South. 401, 403, 130 Ala. 548.

In an action by a firm for damages for falsely and maliciously attaching their property, an instruction that probable cause for the attachment would be such cause as business men generally of care and prudence would act on under like circumstances; that neglect to pay the debt, or mere carelessness in the conduct of their business, would not justify the belief that they were about to dispose of their property with intent to defraud their creditors; that probable cause to believe this must be based upon competent evidence; that, unless they found that the defendants had probable cause to believe the matters charged in the affidavit, there was no probable cause for issuing the writ; that, if they did not find a probable cause, they must also find malicious motives—was not erroneous, but fairly submitted the question of probable cause. *Brand v. Hinchman*, 36 N. W. 664, 669, 68 Mich. 590, 13 Am. St. Rep. 362.



**In relation to prizes and seizures.**

The District Courts of the United States have original exclusive jurisdiction in questions of prize, and are authorized to decree restitution when the capture is wrongful, and, if it is made without probable cause, may decree damages and costs against the captors. The term "probable cause" means less than evidence which would justify condemnation, and in all cases of seizure has a fixed and well-known meaning. They import a seizure made under circumstances which warrant suspicion. The capture of a ship is justifiable where the circumstances are such as would warrant a reasonable ground of suspicion that she was engaged in illegal traffic. To adopt a harsher rule, and hold that the captors must decide for themselves the merits of each case, would involve perils which few would be willing to encounter. *The Thompson*, 70 U. S. (3 Wall.) 155, 162, 18 L. Ed. 55.

"Probable cause," as applied to a seizure under Rev. St. § 970 [U. S. Comp. St. 1901, p. 702], of property for an alleged violation of the neutrality laws, according to its general acceptance, means less than evidence that would justify condemnation, and in all cases of seizure has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. *Locke v. United States*, 11 U. S. (7 Cranch) 339, 348, 3 L. Ed. 364; *United States v. The City of Mexico* (U. S.) 25 Fed. 924, 925.

"Probable cause," as used in Rev. St. § 909 [U. S. Comp. St. 1901, p. 679], providing that, in suits or informations brought when any seizure is made pursuant to any act regulating the collection of duties on imports, the burden of proof shall be on such claimant, provided that probable cause is shown for such prosecution, does not mean evidence which would justify the condemnation, but evidence of a seizure made under circumstances which warrant suspicion. *United States v. 3,880 Boxes* (U. S.) 12 Fed. 402, 403; *United States v. One Sorrel Horse* (U. S.) 22 Vt. 655, 656, 27 Fed. Cas. 315.

Under Acts 1799, c. 128, relative to the collection of revenue and the seizure of fraudulent entries, and providing in section 71 that in actions, suits, or informations brought, where any seizure shall be made pursuant to the act, if the property be claimed by any person in any such case, the burden of proof shall lie upon such claimant, but only where probable cause is shown for the prosecution, it is held that "probable cause" must in this connection mean reasonable ground of presumption that the charge is or may be well founded. *Wood v. United States*, 41 U. S. (16 Pet.) 342, 348, 366, 10 L. Ed. 987.

"Probable cause" is synonymous with "reasonable cause," as used in Act 1799, pro-

viding that a district attorney and customs collector shall not be liable to an action for the seizure of goods for which they had a reasonable cause, and means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a ground existed for the seizure, or such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that such ground existed. *Stacey v. Emery*, 97 U. S. 642, 645, 24 L. Ed. 1035.

If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient. *Stacey v. Emery*, 97 U. S. 642, 645, 24 L. Ed. 1035 (cited in *United States v. City of Mexico*, 25 Fed. 924).

A doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact. *United States v. One Sorrel Horse* (U. S.) 22 Vt. 655, 656, 27 Fed. Cas. 315.

**PROBABLE CAUSE (In Malicious Prosecution).**

The expression "probable cause" has about the same signification in the law that it has in common parlance, and it is not certain that any attempt to elucidate it does not tend to mystify. *Dwyer v. Testard*, 65 Tex. 432, 434.

The term "probable cause," as used with reference to an action for malicious prosecution, means a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. *Munns v. De Nemours* (U. S.) 17 Fed. Cas. 993, 995; *Widmeyer v. Felton* (U. S.) 95 Fed. 926, 930; *Chicago, B. & Q. R. Co. v. Kriski*, 46 N. W. 520, 525, 30 Neb. 215; *Ross v. Langworthy*, 14 N. W. 515, 517, 13 Neb. 492; *Tucker v. Cannon*, 44 N. W. 440, 441, 28 Neb. 196; *Turner v. O'Brien*, 5 Neb. 542, 544; *Fry v. Kaessner*, 66 N. W. 1126, 1128, 48 Neb. 133; *Rider v. Murphy*, 66 N. W. 837, 838, 47 Neb. 857; *Hiatt v. Kinkaid*, 45 N. W. 236, 241, 28 Neb. 721; *Diers v. Mallon*, 46 Neb. 121, 128, 64 N. W. 722, 50 Am. St. Rep. 598; *Burton v. St. Paul, M. & M. Ry. Co.*, 22 N. W. 300, 301, 33 Minn. 189; *Boyd v. Mendenhall*, 55 N. W. 45, 53 Minn. 274; *Gilbertson v. Fuller*, 42 N. W. 203, 204, 40 Minn. 413; *Cole v. Curtis*, 18 Minn. 182, 195 (Gil. 161, 171); *Smith v. Maben*, 42 Minn. 516, 517, 44 N. W. 792; *Shannon v. Jones*, 13 S. W. 477, 478, 76 Tex. 141; *Landa v. Obert*, 45 Tex. 539, 544; *Bear Bros. v. Marx*, 63 Tex. 298, 302; *Foshay v. Ferguson* (N. Y.) 2 Denio, 617, 619; *Willard v. Holmes*, 21 N. Y. Supp. 998, 999, 2 Misc. Rep. 303;

Farrell v. Friedlander, 18 N. Y. Supp. 215, 218, 63 Hun, 254; Hall v. Suydam (N. Y.) 6 Barb. 83, 86; Sprague v. Gibson, 17 N. Y. Supp. 685, 686, 63 Hun, 626; Carl v. Ayers, 53 N. Y. 14, 17; Wilson v. King, 39 N. Y. Super. Ct. (7 Jones & S.) 384, 387; Limbeck v. Gerry, 39 N. Y. Supp. 95, 97, 101, 15 Misc. Rep. 663; Rhodes v. Brandt (N. Y.) 21 Hun, 1, 3; Anderson v. How, 22 N. E. 695, 696, 116 N. Y. 336; McCarthy v. De Armit, 99 Pa. 63, 69; Ritter v. Ewing, 34 Atl. 584, 585, 174 Pa. 341; Fugate v. Millar, 19 S. W. 71, 109 Mo. 281; State v. Grant, 79 Mo. 113, 135, 49 Am. Rep. 218; Stubbs v. Mulholland, 67 S. W. 650, 659, 168 Mo. 47; Johnson v. Miller, 47 N. W. 903, 904, 82 Iowa, 693, 48 N. W. 1081, 31 Am. St. Rep. 514; Shaul v. Brown, 28 Iowa, 37, 50, 4 Am. Rep. 151; Boyd v. Cross, 35 Md. 194, 197; Cooper v. Utterbach, 37 Md. 282, 289; Bowen v. Tascoe, 36 Atl. 436, 437, 84 Md. 497; Stansbury v. Fogle, 37 Md. 369, 381; Torsch v. Dell, 41 Atl. 903, 905, 88 Md. 459; Thelin v. Dorsey, 59 Md. 539, 545; Hooper v. Vernon, 21 Atl. 556, 557, 74 Md. 136; Gonzales v. Cobliner, 8 Pac. 697, 701, 68 Cal. 151; Davie v. Wisher, 72 Ill. 262, 264; Palmer v. Richardson, 70 Ill. 544, 546; Ross v. Innis, 35 Ill. 487, 505, 85 Am. Dec. 373; Sandoz v. Veazle, 30 South. 767, 772, 106 La. 202; Rich v. McNerny, 15 South. 663, 667, 103 Ala. 345, 49 Am. St. Rep. 32; Wilson v. Bowen, 31 N. W. 81, 83, 64 Mich. 133; Lancaster v. McKay, 45 S. W. 887, 889, 103 Ky. 616; Vinal v. Core, 18 W. Va. 1, 29, 30, 31.

Probable cause is a reasonable ground of suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in believing the party is guilty of the offense. *Ruffner v. Hooks*, 2 Pa. Super. Ct. 278, 282. The word "cautious" has sometimes been inadvertently substituted for the word "prudent," but the substance of all definitions is a reasonable ground for belief. The belief must be that of a reasonable and prudent man, and all that can be required of him is that he shall act as a reasonable and prudent man would be likely to act under the circumstances. There is at least a shade of difference in the meaning of the words "cautious" and "prudent." The former sometimes suggests the idea of timidity, or, as Webster gives its secondary meaning: "Overprudent; fearful; timorous." A man is cautious chiefly as the result of timidity. *McClafferty v. Philp*, 24 Atl. 1042, 1043, 151 Pa. 86, 30 Wkly. Notes Cas. 539, 540.

Probable cause for prosecution for crime is the existence of a state of facts sufficient to cause an ordinarily careful and prudent man to believe the accused guilty. Knowledge of the innocence of the person charged with crime, acquired by the prosecutor after the institution of criminal proceedings, will not show a want of probable cause in the institution of the prosecution. *Fox v. Smith* (R. I.) 55 Atl. 698, 699.

The probable cause which constitutes a defense to an action for malicious prosecution is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. *Wheeler v. Nesbitt*, 65 U. S. (24 How.) 544, 551, 16 L. Ed. 765; *Brewer v. Jacobs* (U. S.) 22 Fed. 217, 229; *Stamper v. Raymond*, 62 Pac. 20, 21, 38 Or. 16; *Cooper v. Otterbach*, 37 Md. 282, 289; *Stansbury v. Fogle*, 37 Md. 369, 381; *Hartshorn v. Smith*, 30 S. E. 666, 667, 104 Ga. 235; *Hicks v. Brantley*, 29 S. E. 459, 461, 102 Ga. 264; *Flackler v. Novak*, 63 N. W. 348, 350, 94 Iowa, 634; *Smith v. Munch*, 68 N. W. 19, 20, 65 Minn. 256; *Walker v. Camp*, 19 N. W. 802, 804, 63 Iowa, 627; *Barron v. Mason*, 31 Vt. 189, 197; *Dempsey v. State*, 11 S. W. 372, 373, 27 Tex. App. 269, 11 Am. St. Rep. 193 (citing *Ramsey v. Arrott*, 64 Tex. 320, 322; *Glasgow v. Owen*, 69 Tex. 167, 6 S. W. 527; *Gabel v. Weisensee*, 49 Tex. 131); *Thompson v. Beacon Valley Rubber Co.*, 16 Atl. 554, 557, 56 Conn. 493; *Lancaster v. McKay*, 45 S. W. 887, 889, 103 Ky. 616, 623; *Gann v. Varnado*, 25 South. 79, 84, 51 La. Ann. 370; *Halstead v. Nelson* (N. Y.) 36 Hun, 149, 156; *Herbener v. Crossan* (Del.) 55 Atl. 223, 224.

Probable cause, in criminal cases, as defined by this court, is such a state of facts known to the prosecutor, or such information received by him from sources entitled to credit, as would induce a man of ordinary caution and prudence to believe, and did induce the prosecutor to believe, that the accused was guilty of the crime alleged, and thereby caused the prosecution. *Kansas & T. Coal Co. v. Galloway*, 74 S. W. 521, 524, 71 Ark. 351 (citing *Hitson v. Sims*, 69 Ark. 439, 64 S. W. 219).

Probable cause means the existence of such a state of facts as would warrant a reasonable man in the belief of the guilt of accused of the offense charged. *Stricker v. Pennsylvania R. Co.*, 37 Atl. 776, 778, 60 N. J. Law, 220; *Mosley v. Yearwood*, 19 South. 274, 275, 48 La. Ann. 334.

Probable cause, in actions for malicious prosecution, is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts, that the person charged with a crime is guilty of the crime charged against him. *Thorp v. Carvalho*, 36 N. Y. Supp. 1, 3, 14 Misc. Rep. 554.

Probable cause for a criminal prosecution is understood to be such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives. *Cecil v. Clarke*, 17 Md. 508, 524 (citing 2 Greenl. Ev. § 454); *Cooper v. Utterbach*, 37 Md. 282, 318; *Ulmer v. Leland*, 1 Me. (1 Greenl.) 135, 137, 10 Am. Dec. 48; *Tompson v. Mussey*,

3 Me. (3 Greenl.) 305, 311; *McLeod v. McLeod*, 73 Ala. 42, 45; *Harris v. Woodford*, 57 N. W. 96, 97, 98 Mich. 147; *Potter v. Seale*, 8 Cal. 217, 220.

The defendant's belief, based upon reasonable grounds, in the plaintiff's guilt at the time the prosecution was begun, constitutes probable cause, which will exonerate defendant in an action for damages for malicious prosecution. *Staley v. Turner*, 21 Mo. App. 244, 254.

*Vinal v. Core*, 18 W. Va. 2, defines probable cause to be a state of facts actually existing, known to the prosecutor personally or by information derived from others, which in the judgment of the court would lead a reasonable man of ordinary caution, acting conscientiously upon these facts, to believe the party guilty. *Brady v. Stiltner*, 21 S. E. 729, 730, 40 W. Va. 239. See, also, *Clabourne v. Chesapeake & O. R. Co.*, 33 S. E. 262, 265, 46 W. Va. 363; *Moore v. Large* (Ky.) 46 S. W. 508, 509.

Probable cause means a state of facts which would lead a man of ordinary prudence and discretion to entertain an honest belief in the guilt of the accused. *Tucker v. Cannon*, 44 N. W. 440, 441, 28 Neb. 196; *Tucker v. Cannon*, 49 N. W. 435, 436, 32 Neb. 444; *Mitchell v. Wall*, 111 Mass. 402, 497.

Probable cause "is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person arrested is guilty." *Bacon v. Towne*, 58 Mass. (4 Cush.) 217, 238; *Brown v. Willoughby*, 5 Colo. 1, 10; *Messman v. Ihlenfeldt*, 62 N. W. 522, 523, 89 Wis. 585; *Eggett v. Allen*, 82 N. W. 556, 557, 106 Wis. 633; *Id.*, 96 N. W. 803, 805, 119 Wis. 625; *Harpham v. Whitney*, 77 Ill. 32, 42; *Leyenberger v. Paul*, 12 Ill. App. (12 Bradw.) 635, 637; *George v. Johnson*, 49 N. Y. Supp. 203, 205, 25 App. Div. 125; *McLeod v. McLeod*, 73 Ala. 42, 45; *Enders v. Boisseau*, 27 South. 546, 548, 52 La. Ann. 1020; *Cohn v. Sidel*, 53 Atl. 800, 805, 71 N. H. 558 (citing *Eastman v. Keasor*, 44 N. H. 518, 520; *Woodman v. Prescott*, 65 N. H. 224, 19 Atl. 999); *Kalaukoa v. Henry*, 11 Hawaii, 430, 434; *Pennsylvania Co. v. Weddle*, 100 Ind. 138, 142 (citing *Bacon v. Towne*, 58 Mass. [4 Cush.] 217).

The probable cause which will justify a prosecution and be a defense to an action for malicious prosecution, or for arrest and imprisonment, is such a state of facts and circumstances as will lead a man of ordinary caution, prudence, and good conscience, impartially, reasonably, and without prejudice, upon the facts within his knowledge, to believe that the accused is guilty. *Clement v. Major*, 29 Pac. 19, 1 Colo. App. 297; *Id.*,

44 Pac. 776, 777, 8 Colo. App. 86; *Murphy v. Hobbs*, 5 Pac. 119, 127, 7 Colo. 541, 49 Am. Rep. 366; *Cole v. Curtis*, 16 Minn. 182, 194 (Gil. 161); *Owens v. New Rochelle Coal & Lumber Co.*, 55 N. Y. Supp. 913, 914, 38 App. Div. 53; *Heyne v. Blair*, 62 N. Y. 19; *Scott v. Dennett Surpassing Coffee Co.*, 64 N. Y. Supp. 1016, 1017, 51 App. Div. 321; *Zimmerman v. Knox*, 8 Pac. 104, 106, 34 Kan. 245; *Atchison, T. & S. F. R. Co. v. Watson*, 15 Pac. 877, 880, 37 Kan. 773; *Casey v. Sevaton*, 16 N. W. 407, 408, 30 Minn. 516.

Probable cause is a belief by the prosecutor in the guilt of the accused, based upon circumstances sufficiently strong to induce such a belief in the mind of a reasonable and cautious man. *Sharpe v. Johnston*, 76 Mo. 660, 670; *McGarry v. Missouri Pac. Ry. Co.*, 38 Mo. App. 340, 352.

Anything which will create in the mind of a reasonable man the belief that a felony exists and that the party charged is in some way concerned in it is probable cause. *Braveboy v. Cockfield* (S. C.) 2 McMul. 270, 274, 39 Am. Dec. 123.

"Probable cause" does not depend upon mere belief, however sincerely entertained, because, if that were so, any citizen would be liable to arrest and imprisonment without redress, whenever any person, prompted by malice, saw fit to swear that he believed the accused was guilty of the crime charged. The law, therefore, has imposed an additional ground, viz., such knowledge of facts as would induce a reasonable man to believe that the accused was guilty. *Ross v. Langworthy*, 14 N. W. 515, 517, 13 Neb. 492.

Probable cause may be defined as such reasons, supported by facts and circumstances, as will warrant a cautious man in the belief that his action and the means taken in prosecuting it are legally just and proper. *Burton v. St. Paul, M. & M. Ry. Co.*, 22 N. W. 300, 301, 33 Minn. 189.

The probable cause which will constitute a defense in an action for malicious prosecution must appear deducible in point of law from the facts that have existed in the defendant's mind at the time of his proceedings. *Ball v. Rawles*, 28 Pac. 937, 93 Cal. 222, 27 Am. St. Rep. 174.

Probable cause, sufficient to warrant a prosecution, means such a state of facts and circumstances as would induce men of ordinary prudence and conscience to believe the charge to be true. *Driggs v. Burton*, 44 Vt. 124, 146.

Probable cause consists of a belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation. *Firer v. Lowery*, 59 Mo. App. 92, 96.

Probable cause for a criminal prosecution is such a state of facts or appearances as are sufficient to induce a reasonable probability that the crime has been committed. *Ex parte Morrill* (U. S.) 35 Fed. 261.

That reasonable and probable cause which will relieve a prosecutor from liability in an action for malicious prosecution is a belief by him in the guilt of the accused, based on circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man; and the question is not whether the defendant believes that he had probable cause, nor is it alone whether there was in fact probable cause, but the question is, did the defendant believe the plaintiff guilty, and did he have reasonable grounds for so believing? *Van-sickle v. Brown*, 68 Mo. 627, 635.

The words "probable cause" have come to have a fixed meaning, when applied to an action for malicious prosecution. They mean reasonable ground for believing the party guilty; such reasons and such circumstances as would be satisfactory and convincing to right reason. If these grounds exist, and are brought to the notice of the prosecutor, and he acts upon them, he will be justified; so that, on the question of probable cause, it is not a sufficient justification that the accused is in fact guilty, but in addition to that the prosecutor must believe in his guilt and must have reasonable ground for such belief. *Wanser v. Wyckoff* (N. Y.) 9 Hun, 178, 179.

There is a want of probable cause when one institutes a prosecution without reasonable grounds for believing the party guilty. Reasonable grounds are such as would warrant an impartial and candid mind, exercising ordinary care, caution, and discrimination, in believing a party guilty. *Humphries v. Parker*, 52 Me. 502, 505; *McGurn v. Brackett*, 33 Me. 331, 332.

Probable cause, which constitutes a defense to an action for malicious prosecution, exists when the facts are of such a character as will warrant a man of ordinary care and prudence in filing a complaint. *Bank of Miller v. Richmond*, 89 N. W. 627, 628, 64 Neb. 111.

It was not erroneous to tell the jury, in general terms, in an action for malicious prosecution, what the law meant by a want of probable cause, when such instruction was accompanied by other instructions as to what facts would constitute a want of probable cause in the case on trial. *Jonsen v. Kennedy*, 58 N. W. 122, 124, 39 Neb. 313.

It may be broadly stated that what amounts to probable cause in cases of malicious prosecutions will amount to such reasonable grounds for suspicion of felony as

will justify and require an officer to make an arrest. *Kirk v. Garrett*, 35 Atl. 1089, 1091, 84 Md. 383.

#### Actual guilt or innocence.

Where the facts known to the prosecutor, or the information received by him from sources entitled to credit, are such as to justify the belief in the mind of a person of reasonable intelligence and caution that the accused is guilty of the crime charged, and the prosecution is induced thereby, such a state of facts constitutes probable cause, though it may subsequently appear that the accused is innocent. *Hays v. Blizzard*, 30 Ind. 457, 459, 460.

The question of probable cause does not turn on the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence. The want of probable cause cannot be inferred upon expressed malice, but malice may be inferred in the want of probable cause. *Hall v. Suydam* (N. Y.) 6 Barb. 83, 86.

Probable cause does not depend upon the guilt or innocence of the accused, but upon the fact whether a crime has been committed. *Baldwin v. Weed* (N. Y.) 17 Wend. 224; *Bacon v. Towne*, 58 Mass. (4 Cush.) 217, 218. A person making a criminal accusation may act upon appearances, and if the apparent facts are such that a discreet and prudent person would be led to the belief that a crime had been committed by the person charged, he will be justified, though it turns out that he was deceived, and that the party accused was innocent. *Carl v. Ayers*, 53 N. Y. 14, 17.

It is wholly immaterial whether the party was guilty or not, if the facts known to the defendant, and only known to him, were such as would warrant a cautious man in believing the party was guilty. *Thelin v. Dorsey*, 59 Md. 539, 545.

#### Advice of counsel.

Where the prosecutor submits the facts to an attorney, who advises that they are sufficient, and acts on this advice in good faith, such advice is often called "probable cause," and is a defense to an action of malicious prosecution; but in strictness the taking advice of counsel and acting thereon rebuts the inference of malice arising from want of probable cause. *Emerson v. Cochran*, 4 Atl. 498, 500, 111 Pa. 619. See, also; *McLeod v. McLeod*, 73 Ala. 42, 45; *Messman v. Iblenfeldt*, 62 N. W. 522, 523, 89 Wis. 585.

Proof that proceedings were instituted in reliance, in good faith, on the advice of competent legal counsel, received upon full statement to him of the facts known to the prosecutor, or which he has reason to

suppose existed, constitutes probable cause. *Gilbertson v. Fuller*, 42 N. W. 203, 204, 40 Minn. 413; *Thompson v. Beacon Valley Rubber Co.*, 16 Atl. 554, 557, 56 Conn. 493; *Hall v. Suydam* (N. Y.) 6 Barb. 83, 88.

Probable cause is legally defined as constituting a defense to an action for malicious prosecution, and must be the honest, unbiased opinion of a reputable lawyer, with knowledge of the facts; and when it is shown that such advice was not sought in good faith, for the protection of the public, it is not a defense, and the attention of the jury should be called to it by a proper instruction. *Clement v. Major*, 44 Pac. 776, 777, 8 Colo. App. 86.

#### **Apparent state of facts.**

Probable cause is also defined as a deceptive appearance of guilt arising from facts and circumstances misapprehended and misunderstood so far as to produce belief. *Smith v. Ege*, 52 Pa. (2 P. F. Smith) 419, 421; *State v. Grant*, 79 Mo. 113, 135, 49 Am. Rep. 218.

"Probable cause may be defined to be that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as the given case renders convenient and proper, and which would induce a reasonably intelligent man to believe the accused person had committed, in a criminal case, the crime charged, and, in a civil case, that a cause of action existed." *Lacy v. Mitchell*, 23 Ind. 67; *Lawrence v. Leathers*, 68 N. E. 179, 181, 81 Ind. App. 414.

Probable cause is a deception or appearance of guilt arising from facts and circumstances misapprehended or misunderstood so far as to produce belief in the guilt of the accused. *Seibert v. Price* (Pa.) 5 Watts & S. 438, 439, 40 Am. Dec. 525.

#### **Conjecture or suspicion.**

In discussing "probable cause" such as will justify an arrest the court said: "Public policy requires that a person shall be protected who in good faith and upon reasonable grounds causes an arrest upon a criminal charge, and the law will not subject him to liability therefor. But a groundless suspicion, unwarranted by the conduct of the accused or by facts known to the accuser when the accusation is made, will not exempt the latter from liability to an innocent person for damages for causing his arrest." *Carl v. Ayers*, 53 N. Y. 14, 17; *Sprague v. Gibson*, 17 N. Y. Supp. 685, 686.

To show probable cause in an action for malicious prosecution the facts proved must be such as would reasonably induce an impartial and reasonable mind to suspect that the party prosecuted had committed the offense charged; but mere suspicion or con-

jecture does not amount to probable cause. To constitute probable cause for a prosecution for theft, it is not sufficient that such circumstances existed as would cause suspicion and belief that the party prosecuted had taken the articles alleged to be stolen; the taking of an article not being necessarily synonymous with the stealing of it. *Stone v. Stevens*, 12 Conn. 219, 230, 30 Am. Dec. 611.

Probable cause cannot be based upon mere conjecture, but it may be founded on suspicion when supported by circumstances which would authorize a reasonable man to entertain a belief in the guilt of the person charged. *Turner v. O'Brian*, 5 Neb. 542, 544.

Probable cause has been defined to be a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. *Smith v. Liverpool & London & Globe Ins. Co.*, 40 Pac. 540, 542, 107 Cal. 432.

#### **Conviction or acquittal.**

As evidence of probable cause, a conviction by verdict and judgment is as convincing, and therefore ought in law to be as high and conclusive, although vacated by appeal, as if it stood unreversed and in full force. It sanctions the prosecution in its origin and progress through that court, and is the highest evidence, namely, a judicial sentence of record, that apparently the accused was guilty. *Hartshorne v. Smith*, 30 S. E. 666, 667, 104 Ga. 235.

The acquittal of the defendant in a criminal action is no evidence of want of probable cause. *Cullen v. Hanisch*, 89 N. W. 900, 904, 114 Wis. 24.

The mere letting fall a prosecution does not raise an implication of want of probable cause. *Cockfield v. Braveboy* (S. C.) 2 McM. 270, 274, 39 Am. Dec. 123.

#### **Failure to make inquiry.**

A person in instituting a criminal prosecution is justified in acting on the assumption that others who have given him information told the truth, unless there are facts or circumstances to put him on inquiry. *Widmeyer v. Felton* (U. S.) 95 Fed. 926, 930.

It has been held not sufficient to establish the want of probable cause that the defendant might, by the use of proper deliberation, care, and inquiry, have ascertained that the crime alleged had not been committed. *Cole v. Curtis*, 16 Minn. 182, 194 (Gil. 161).

When information is given one, upon which he institutes a criminal prosecution, and he at the time knows that upon inquiry of certain persons it may be ascertained that no offense has been committed, and there is no difficulty in making, nor other reasons

for not making, such inquiry, he is to be charged, on the question of probable cause, with knowledge of such facts as he would have learned had he made the inquiry. *Boyd v. Mendenhall*, 55 N. W. 45, 53 Minn. 274.

An instruction that if one person rashly and hastily causes the arrest and prosecution of another for a crime which has not been committed, and which, by the use of proper deliberation, care, and inquiry, he could have ascertained had not been committed, the assurance of the former, however strong, that the latter was guilty, is not sufficient evidence of the probable cause, was properly refused, since one may rashly and hastily cause the arrest and prosecution of another for a crime which has not been committed, and which, by the use of proper diligence, care, and inquiry, he could have ascertained had not been committed, and yet have proper cause for the prosecution. He may have been induced to prosecute by the willful misconduct or the procurement of the supposed defendant. And if he proceeded with ordinary care and prudence and without malice, he is not responsible for the want of proper cause, though he did not use proper or sufficient deliberation. *McGurn v. Brackett*, 33 Me. 331, 332.

#### **Good faith or malice.**

Both malice and absence of probable cause must exist concurrently to make a case of malicious prosecution, and it is mainly a question of entire good faith and reasonable belief. *Messman v. Ihlenfeldt*, 62 N. W. 522, 523, 89 Wis. 585 (citing *Newell*, Mal. Pros. p. 246, § 12); *Spain v. Howe*, 25 Wis. 625, 629. Good faith is an essential element. *Harris v. Woodford*, 57 N. W. 96, 97, 98 Mich. 147; *Murphy v. Martin*, 58 Wis. 276, 16 N. W. 603, 604.

Probable cause "is where the information possessed by the prosecutor is believed by him, and is such, and from such sources, that the generality of business men of ordinary care, prudence, and discretion would prosecute upon it. If the circumstances are such as would have justified a man of rectitude in moving in obedience of his duty as a citizen, the law will not inquire whether he who did move was governed by base motives or not. The act in itself being proper, the bad purpose in the mind is left to the penalties of the moral law; but a man has no right to set the criminal law in motion against another upon the mere conjecture that he committed a crime. And when neither the conduct of the accused apparent to the accuser nor the information of the latter are sufficient to warrant the just suspicion before pointed out, there can be no justification, and a person cannot shield himself from liability by claiming that the appear-

ances afforded probable cause if the fact be that the circumstances and information were false, and unreasonably construed and applied. Much less can he do so if he was aware that the accused was in fact guiltless, or was aware of matters which would have explained the unfavorable appearances and exculpated the accused, and did not divulge them, or was privy to the fact that, in order to give a colorable basis for prosecution, trickery and fabrications were resorted to, and appearances of suspicion raised by conspiracy or other corrupt means." *Hamilton v. Smith*, 39 Mich. 222, 226.

#### **Honest belief.**

Probable cause does not depend upon the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting. *Sandoz v. Veazle*, 30 South. 767, 772, 106 La. 202; *Gann v. Varnado*, 25 South. 79, 84, 51 La. Ann. 370; *Cullen v. Hanisch*, 89 N. W. 900, 904, 114 Wis. 24; *Messman v. Ihlenfeldt*, 62 N. W. 522, 523, 89 Wis. 585; *Cook v. Walker*, 30 Ga. 519, 522; *Harpham v. Whitney*, 77 Ill. 32, 42; *Mowry v. Whipple*, 8 R. I. 360; *Goldstein v. Foulkes*, 36 Atl. 9, 19 R. I. 291; *Humphries v. Parker*, 52 Me. 502, 505.

As applied to an action of malicious prosecution the legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action, and such as would warrant a man of ordinary caution, prudence, and judgment, under the circumstances, in entertaining it. *Wall v. Toomey*, 52 Conn. 35, 36.

If there be an honest belief in guilt, and if there exist reasonable grounds for such belief, the party will be justified. But however the appearances may be from existing circumstances, if the prosecutor has knowledge of facts which will explain the suspicious appearances, and exonerate the accused from a criminal charge, he cannot justify a prosecution by putting forth the prima facie circumstances, and excluding those within his knowledge which tend to prove innocence. *Gonzales v. Cobliner*, 8 Pac. 697, 701, 68 Cal. 151.

Probable cause is that apparent state of facts found to exist upon reasonable inquiry; that is, such inquiry as a given case renders convenient and proper, which would induce a reasonably intelligent and prudent man to believe that the accused person had committed the crime charged. There must be real, honest belief and reasonable grounds upon all of the appearances after such investigation as a prudent person would make under the circumstances of the case, to afford a justification. *Hutchinson v. Wenzel*, 155 Ind. 48, 54, 56 N. E. 845, 846 (citing *Lacy v. Mitchell*, 23 Ind. 67).

If the prosecutor has an honest, though mistaken, belief in the charge laid in a criminal complaint, it is evidence of a probable cause. *Goldstein v. Foulkes*, 36 Atl. 9, 19 R. I. 291.

But it must be a belief honestly entertained and derived from facts and evidence which in themselves are sufficient to justify a man who was calm, and not governed by passion, prejudice, or want of ordinary caution and care, in believing the party guilty. There is no doubt that actual belief and reasonable grounds for that belief are essential to constitute probable cause. *Humphries v. Parker*, 52 Me. 502, 505; *Willard v. Holmes*, 21 N. Y. Supp. 998, 999, 2 Misc. Rep. 303.

"Probable cause," as used in an action for malicious prosecution, means honest belief in the guilt of the person charged. *Turner v. O'Brien*, 5 Neb. 542, 544.

"The question of what constitutes probable cause does not depend upon whether the offense has in fact been committed, nor whether the accused is guilty or innocent, but upon the prosecutor's belief, based upon reasonable grounds." *Fagnan v. Knox*, 66 N. Y. 525.

"Probable cause, unlike malice, is not determined by standard of the particular defendant, but of the ordinarily prudent and cautious man exercising conscience, impartiality, and reason without prejudice upon the facts." Thus the fact that a person procuring an arrest has an honest belief in defendant's guilt is not sufficient to prevent the prosecution from being malicious, but such prosecution must be based on reasonable grounds. The test, then, is not exclusively limited to the actual knowledge in fact of the defendant, but may be put to any knowledge which he could or ought to have gained in the exercise of ordinary prudence and caution; and if, by such exercise, a proper investigation might have cleared away suspicious circumstances, and yet was omitted, there may be evidence of no probable cause. *Scott v. Dennett Surpassing Coffee Co.*, 64 N. Y. Supp. 1016, 1017, 51 App. Div. 321.

The essential elements which constitute probable cause and are the ground of defense in an action for malicious prosecution are absence of malice, and an honest belief in the guilt of the person charged, and a reasonable amount of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person is guilty of the offense of which he is charged; and these last two elements must unite; for good faith may be based upon mere conjecture. It may be founded on mere suspicion, unsupported by any act or circumstances tending to show that the accused is guilty; hence belief itself will not protect the

prosecutor from liability. There must be circumstances which would authorize a reasonable man to entertain a belief. If, however, it can fairly be gathered from the circumstances of the case that the prosecutor was actuated by an honest and fair intent to bring the suspected culprit to justice on grounds sufficient to authorize the belief of a cautious man, it will remove all ground for a just inference of malice, and thus protect the defendant; but mere professed belief will not. *Turner v. O'Brien*, 5 Neb. 542, 544.

A belief of the guilt of the accused, founded on circumstances tending to show that he has committed a criminal offense, is sufficient to show probable cause. *Harpham v. Whitney*, 77 Ill. 32, 42.

#### Just cause.

In an action against a railroad company for damages for having been arrested by the conductor of the train while plaintiff was a passenger thereon, an instruction which in defining the right of a conductor as a conservator of the peace to arrest, uses the words "just cause" for "probable cause" is erroneous, for, while probable cause is just cause, just cause may be and is something else, and hence the charge is misleading so far as the jury is concerned, for it may be taken to mean full or complete cause, such as would secure the criminal conviction of the defendant. *Claiborne v. Chesapeake & O. R. Co.*, 33 S. E. 262, 265, 46 W. Va. 363.

#### Knowledge.

It must appear that the defendant knew of the existence of those facts which tended to show reasonable and probable cause, because without knowing them he could not act upon them. *Gann v. Varnado*, 25 South. 79, 84, 51 La. Ann. 370.

Probable cause which constitutes a defense to an action for malicious prosecution depends upon what the prosecuting party knew or ought to have known at the time of instituting the criminal prosecution. *Cullen v. Hanisch*, 89 N. W. 900, 904, 114 Wis. 24.

#### Misinformation as to law.

Probable cause may be founded on misinformation as to the facts, but not as to the law; and one is liable for malicious prosecution where he knew the facts, and they afforded no probable cause, though he believed otherwise, through misinformation as to the law. *Whitney v. New York Casualty Ins. Ass'n*, 50 N. Y. Supp. 227, 230, 27 App. Div. 320.

#### Prosecution to enforce civil liability.

Evidence that the prosecution was commenced to enforce a civil liability is proof of the want of a probable cause. *Clark v. Thompson*, 61 S. W. 194, 195, 160 Mo. 461.

**Reliance on information of others.**

In determining whether there is a probable cause or not the inquiry is not limited to the facts within the prosecutor's knowledge, but the information given to the prosecutor by others may be shown. *Owens v. New Rochelle Coal & Lumber Co.*, 55 N. Y. Supp. 913, 914, 38 App. Div. 53; *Harpham v. Whitney*, 77 Ill. 32, 40.

Probable cause sufficient to authorize an arrest "is such reasonable representations consistent with the guilt of the party accused, made to him by credible persons claiming to know the facts they represent respecting the committing of such supposed offense, and honestly believed by him to be true, as lead him to believe that the person accused is guilty of the offense charged." *Atchison, T. & S. F. R. Co. v. Watson*, 15 Pac. 877, 880, 37 Kan. 773.

Probable cause is the existence of such facts and circumstances as would excite the belief in the mind of a reasonable man that the plaintiff was guilty of the offense. Rumors are not, but the representation of others is, foundation for such a belief. The law presumes that probable cause existed until the party aggrieved can show the contrary. *Mosley v. Yearwood*, 19 South. 274, 275, 48 La. Ann. 334.

**PROBABLE CONSEQUENCE.**

The "probable consequence" of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. *Western Commercial Travelers' Ass'n v. Smith* (U. S.) 85 Fed. 401, 405, 29 C. C. A. 223, 40 L. R. A. 653.

**PROBABLE EVIDENCE.**

"'Probable' evidence," says Bishop Butler in the opening sentence of his analogy, "is essentially distinguished from 'demonstrative' by this: that it admits of degrees and of all varieties of them from the highest moral certainty to the very lowest presumption." *Commonwealth v. Costley*, 118 Mass. 1, 23.

**PROBABLE VALUE.**

Rev. St. div. 5, §§ 821, 822, providing that special contractors shall give notice to the owner at the time of furnishing any material or performing any labor of a "probable value" thereof, means that the employer should be notified of the particular sum approximating the value. *Whiteside v. Lebacher*, 17 Pac. 548, 550, 7 Mont. 473.

"Probable value" and "net profits" are convertible terms, as applied to a business. *Poposkey v. Munkwitz*, 32 N. W. 35, 41, 68 Wis. 322, 60 Am. Rep. 858.

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**PROBATE.**

See "Matters of Probate."

All probate matters, see "All."

The probate of a will is a civil proceeding as contradistinguished from criminal proceedings. In contemplation of law it is solely an inquiry as to the validity of a certain paper writing whether it is or is not the last will and testament of the decedent, and the judgment or decree in such case is either that it is or is not such a will. In *re Spiegelhalter's Will* (Del.) 39 Atl. 465, 466, 1 Pennewill, 5.

The probate of a will is a proceeding to establish its validity. *McCay v. Clayton*, 12 Atl. 860, 119 Pa. 133.

The probate of a will is defined to be "the proof before an officer authorized by law that the instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be." 2 Bouv. Law Dict. 378. In other words, probate is proving the instrument purporting to be a will to have been signed by the testator in the presence of at least two witnesses, who, at his request, signed the same as witnesses, and that the testator at the time of the execution thereof was of sound mind. *Pettit v. Black*, 12 N. W. 841, 844, 18 Neb. 142.

To "probate" a will involves only a determination that the will was duly signed and published, and that the testator was competent to make it. It simply establishes the validity of the will. *Lamb's Estate v. Hall*, 80 N. W. 1081, 1082, 122 Mich. 239.

In England the probate of will of personal property was exclusively vested in the ecclesiastical courts. There were two modes of probate—one, *ex parte*; the other, *inter partes*. One was proof of the will "in common form"; the other was proof thereof "in solemn form," or "per testes." When a will was proven "in common form," it was taken before the judge of the proper court of probate, and the executor produced witnesses to prove it to be the will of the deceased, without citing or giving notice to the parties interested. It was admitted to probate in the absence of such parties. When, however, a will was proven "in solemn form," it was done upon petition of the proponent for a hearing, and all such persons as had an interest, such as the widow, heirs, next of kin, etc., were notified and cited to be present at the probating of the testament. Interrogatories were propounded to the witnesses by those producing the will and by the adverse party. The executor of the will proved "in common form" might, at any time within thirty years, be compelled, by a person having an interest, to prove it per testes—"in solemn form." *Luther v. Luther*, 13 N. E. 166, 168.



122 Ill. 558. See, also, *Richardson v. Green*, 61 Fed. 423, 426, 9 C. C. A. 565.

A probate is a judicial act of a court having competent jurisdiction, and while it remains unappealed completely authenticates the rights of executors. And under the federal Constitution, requiring each state to give full faith and credit to the records, public acts, and judicial proceedings of other states, an executor may sue in North Carolina upon letters testamentary issued upon a probate in another state. *Steven's Ex'rs v. Smart's Ex'rs*, 4 N. C. 83.

The probate of a will in solemn form is the probate by the oath of other persons than the executor. The probate of a will in common form is done by the sole oath of the executor. The probate of a will per testes is a probate by the oath of other witnesses besides the executor. In *re Hodnett's Will* (N. J.) 55 Atl. 75, 78.

#### Administration and guardianship.

Probate originally meant merely relating to proof, and afterward relating to the proof of wills. Yet in the American law it is now a general name or term used to include all matters of which probate courts have jurisdiction, which are usually the estates of deceased persons and all persons under guardianship. *Johnson v. Harrison*, 50 N. W. 923, 924, 47 Minn. 575, 28 Am. St. Rep. 382.

The term "probate," when strictly used, relates to the proof of a will before an officer or tribunal having jurisdiction to determine the question of its validity. In common usage, however, it is often used with reference to the proceedings incident to the administration and settlement of the estates of decedents, and it is sometimes used in this sense in the statutes. *Reno v. McCully*, 22 N. W. 902, 904, 65 Iowa, 629.

Pub. St. c. 199, § 13, provides that no heir or devisee shall have power to alien or encumber the real estate of any decedent so as to affect the executor's sale thereof within three years and six months after the "probate of the will," but that after that period he may do so, and the realty not be liable for decedent's debts in the hands of the purchaser. Held, that the phrase "probate of the will" means not only the admission of the will to probate, and its establishment as a testamentary instrument, but also the acceptance or qualification of the executor. *Appeal of Dawley*, 19 Atl. 248, 249, 16 R. I. 694.

Code, § 2321, in providing that all "bonds relating to probate matters" shall be filed in the office of the clerk of the circuit court, etc., meant bonds given by executors and administrators, and would not include a guardian's bond, it being in no sense a bond relating to probate matters. *Reno v. McCully*, 22 N. W. 902, 904, 65 Iowa, 629.

Jurisdiction of all "probate and testamentary matters," given by Constitution of Ohio to the court of common pleas, may be completely exercised without the possession of the power to order the sale of the lands of the intestate. Such jurisdiction is not identical with that power, nor does it comprehend it. *Bank of Hamilton v. Dudley*, 27 U. S. (2 Pet.) 492, 524, 7 L. Ed. 496.

#### PROBATE APPEAL.

The statutory action given by Rev. St. c. 66, § 11, to one who claims to be a creditor of an insolvent estate, where the commissioners of the insolvent decide against him, or where the administrator, an heir at law, or another creditor gives notice at the probate office of an appeal from the decision of such commissioners in his favor, is not a probate appeal. *Merrill v. Crossman*, 68 Me. 412, 414.

#### PROBATE BOND.

A "probate bond" within the meaning of the statute is a bond which must by law be given to the judge of probate; such as bonds given by executors or administrators, and some others which are provided for by statute. *Thomas v. White*, 12 Mass. 367, 369.

#### PROBATE CODE.

The body or system of law relating to all matters of which probate courts have jurisdiction. *Johnson v. Harrison*, 50 N. W. 923, 924, 47 Minn. 575, 28 Am. St. Rep. 382.

#### PROBATE COURT.

See "Prefect's Court."

Distinct tribunals for the establishment of wills and administration of the assets of men dying either with or without wills are variously called "prerogative courts," "probate courts," "surrogate courts," or "orphans' courts." *Robinson v. Fair*, 9 Sup. Ct. 30, 35, 128 U. S. 53, 32 L. Ed. 415.

Under the constitutional system the probate court is, for most purposes at least, a prerogative, and not a judicial court, and has no jurisdiction over persons or property except in such proceedings as relate to the assets of a deceased person or those under disability and liable to wardship. *Grand Rapids, L. & D. R. Co. v. Chesebro*, 42 N. W. 66, 68, 74 Mich. 466.

The origin of our probate courts is traced back to the ecclesiastical courts of England, the jurisdiction of which was practically limited to the probate of wills, the granting of administrations, and the suing for legacies. 3 Bl. Comm. pp. 95-98. In every other respect the control of estates, executors, and administrators was exclusively in the com-

mon-law and chancery courts. As Judge Woerner puts it in his invaluable treatise *The American Law of Administration*: "It should therefore be remembered that there is a very great difference between the totality of the powers exercised by the English courts in connection with the administration of estates of deceased persons, sometimes called testamentary or probate jurisdiction, and the testamentary or probate jurisdiction of ecclesiastical courts,—a distinction which is of the utmost importance in ascertaining the conclusiveness of the judgments and decrees of the several classes of courts in collateral proceedings. Now, in this country, probate courts, since their first establishment in Massachusetts in 1784 (Rev. St. 1784, c. 46; *Wales v. Willard*, 2 Mass. 120, 124), were patterned after the English models. But in the great majority of instances they have outgrown their limited and inferior jurisdiction as mere statutory courts deriving their sole authority from legislative enactment, and have developed into courts of record, with increased powers (proceeding according to the course of common law), and within the field of their jurisdiction they are as much a branch of the judiciary of the state as any court of general or plenary powers. \* \* \* Their orders, judgments, and decrees are therefore as conclusive upon the parties to the record, until reversed or annulled on appeal, writ of error, or direct proceeding in chancery for fraud, as decrees in chancery or judgments at law." Woerner, *Adm'n* (2d Ed.) § 145. Connecticut, however, has remained a signal exception, and in that state they are still committed to a restrictive view of probate jurisdiction. The court is described as of "limited jurisdiction" (*Griffin v. Pratt*, 3 Conn. 513); as "inferior courts of limited jurisdiction" (*Wattles v. Hyde*, 9 Conn. 10, 13); as "limited and inferior" (*Appeal of Culver*, 48 Conn. 165); as of "special and limited jurisdiction" (*Appeal of Potwine*, 31 Conn. 381); as "limited and special and purely statutory" (*Fayerweather v. Monson*, 61 Conn. 431, 23 Atl. 878); as not proceeding according to the course of the common law (*Sears v. Terry*, 26 Conn. 273). *Plant v. Harrison*, 74 N. Y. Supp. 411, 441, 36 Misc. Rep. 649.

In discussing the character of probate courts under the provisions of the Constitution and laws of Minnesota, it is said that they are, in fact, courts of superior jurisdiction. Though limited to certain specified subjects, their jurisdiction in respect to the same is general, and not inferior. To be sure, they are to some extent under the control of the district and superior courts, but only in the exercise of an appellate and remedial jurisdiction. *Davis v. Hudson*, 11 N. W. 136, 139, 29 Minn. 27.

**As county court.**

See "County Court."

**As court of record.**

See "Court of Record."

**Probate judge synonymous.**

The words "probate court," as used in a motion, affidavit, and order for the examination of a judgment debtor, in place of the words "probate judge," as employed in the statute giving jurisdiction to issue such orders, were nearly synonymous with the words "probate judge," so that the variance was immaterial. *White Sewing Mach. Co. v. Wait*, 24 Kan. 136, 139.

**PROBATE COURT HAVING JURISDICTION.**

Gen. St. 1866, c. 57, § 47, subd. 1, declares that the executor, administrator, or guardian should be licensed to make a sale of real estate by the "probate court having jurisdiction." Held, that the "probate court having jurisdiction," as there used, should be construed to mean the probate court whose jurisdiction it is proper to invoke in the case in hand—in other words the probate court in whose jurisdiction the administration of the estate is pending; and that it did not mean the probate court granting the license to sell. Although it be the proper and only court which could grant it, it must also, before granting it, have acquired authority to do so through the petition and notices prescribed by the statute. *Rumrill v. First Nat. Bank*, 9 N. W. 731, 732, 28 Minn. 208.

**PROBATE COURT OF COMPETENT JURISDICTION.**

See "Competent Jurisdiction."

**PROBATE FEE.**

A reward or compensation to a county judge or judge or register of probate for services rendered or to be rendered. *State v. Mann*, 45 N. W. 526, 527, 76 Wis. 469.

**PROBATE HOMESTEAD.**

A "probate homestead" is a homestead set apart by the court for the use of a surviving husband or wife and the minor children out of the common property, or, if there be no common property, then out of the real estate belonging to the deceased. In *re Noah's Estate*, 15 Pac. 290, 291, 73 Cal. 590, 2 Am. St. Rep. 834.

**PROBATE JUDGE.**

As county officer, see "County Officer."

As judge, see "Judge."

Prefect as, see "Prefect."

Probate court synonymous, see "Probate Court."

## PROBATE JURISDICTION.

There is no definition which describes generally the jurisdiction pertaining to probate courts. They are courts created as a rule by statutes, and their jurisdiction defined by statutes. In each state where such courts exist their powers are defined by its laws. *Richardson v. Green* (U. S.) 61 Fed. 423, 425, 9 C. C. A. 565.

The words "probate jurisdiction" in Rev. St. § 1932, providing that the probate courts of the territory of Montana, in their respective counties, in addition to their "probate jurisdiction," are authorized to hear and determine civil causes, etc., mean the exercise of the ordinary power of what *ex vi termini* is generally understood to be the authority of courts of that name. They derive their origin from the ecclesiastical courts of England, and this fact suggests the character of their powers. Unless otherwise regulated by statute, they have a special mode of procedure, and are subject to rules that had their origin in the ecclesiastical courts, and issues of fact are not tried by jury. Their powers are limited unless extended by statute, and are confined to the establishment of wills, the settlement and management—or, in other words, the administration—of decedents' estates, the supervising of the guardianship of infants, the control of their property, the allotment of dower, and other powers pertaining to the same general subject. *Chadwick v. Chadwick*, 13 Pac. 385, 388, 6 Mont. 566.

Const. art. 7, § 12, providing that the county court shall have the "jurisdiction pertaining to probate courts," will be construed to include the jurisdiction to appoint guardians for minors and insane persons. "The phrase has no legal definition. Courts of probate had no existence at common law. These courts have been created and their duties and jurisdiction defined by law in most, if not all, of the states of the Union. In the majority of the states at the time of the adoption of the Constitution the authority to appoint guardians of the persons and estates of insane persons was vested in the probate courts." *Monastes v. Catlin*, 6 Or. 119, 122.

While the "probate forum" is often unadvisedly spoken of as of limited jurisdiction, the powers of this court are not only general, but plenary, in cases where it is authorized to act; and its judgment is final and conclusive on all parties. *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 90 N. W. 378, 380, 86 Minn. 140.

## PROBATE OFFICE.

Under Act July 3, 1861, c. 2483, § 1, requiring the debtor to file a schedule of property embraced in the assignment and a list of the names and residences of the creditors

in the office of the register of probate, a plea stating that the filing was in the "probate office" was substantially equivalent to one alleging a filing in the "register of probate's office," both terms meaning the same thing. *Chamberlain v. Perkins*, 51 N. H. 336, 339.

## PROBATE PROCEEDING.

As an action, see "Action."

As case, see "Case."

As civil action or suit, see "Civil Action—Case—Suit—Etc."

As judicial proceedings, see "Judicial Proceeding."

As proceeding, see "Proceedings."

As special proceeding, see "Special Proceeding."

As suit, see "Suit (Noun)."

A "probate proceeding" is one to contest the validity, as a will, of a paper which had been admitted to probate as such, as much as a proceeding instituted to have a paper probated as a will. *Franks v. Chapman*, 61 Tex. 576, 579.

## PROBATION.

See "Period of Probation."

## PROBATIONARY TERM.

The expression "probationary term," as used in Laws 1899, c. 370, § 8, requiring all appointments in the classified service of a city to be for a "probationary term," implies definite or stated length of duration, especially so when such term is to be provided in advance. It is not any time within a fixed length of duration, unmeasured by the rules, and measurable by the pleasure or will of the appointing power. Probationary implies the purpose of the term or period, but not its length. *People v. Kearny*, 58 N. E. 14, 15, 164 N. Y. 64.

## PROBATIVE FORCE.

"Probative force means a force serving for proof." *Appeal of Sturdevant*, 42 Atl. 70, 73, 71 Conn. 392.

## PROBATOR.

Where a culprit indicted for treason or felony confessed the truth of the charge, and upon being sworn revealed all the treasons and felonies within his knowledge, and entered before a coroner his appeal against all his partners in crime who were within the realm, the criminal thus confessing was called the "approver," or in Latin "probator," and the person implicated was styled the "appellee"; and where he made a full and true disclosure and convicted the appellee the

King pardoned him as to his life. *State v. Graham*, 41 N. J. Law (12 Vroom) 15, 16, 32 Am. Rep. 174.

## PROCEDENDO.

The function of a "procedendo" is to remit a cause to an inferior from a superior court to which it has been removed, by writ either granted on a suggestion or of course. It directs the inferior court to proceed, either because the suggestion has not been sustained or because the party who procured the removal has not conformed to the rules prescribed by the superior court in such cases. It is intended to restore the statu quo. *Yates v. People* (N. Y.) 6 Johns. 337, 446.

## PROCEDURE.

"The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms 'pleading,' 'evidence,' and 'practice.' The word means those legal rules which direct the course of proceedings to bring parties into court, and the course of the court after they are brought in." *Kring v. Missouri*, 2 Sup. Ct. R. 443, 452, 107 U. S. 221, 27 L. Ed. 506 (quoting Bish. Cr. Proc. § 2); *Angevine v. Fleischmann*, 67 N. Y. Supp. 182, 183, 55 App. Div. 106; *Kansas City v. O'Connor*, 36 Mo. App. 594, 598.

The word "procedure," as used in the general rule that in matters of procedure the lex fori controls, applies to the nature of the action—as, whether it shall be covenant, assumpsit, debt, etc.; to the rules of pleading and evidence; the order and manner of trial; and the nature and effect of process; and perhaps to all other matters of remedy only, which are not incorporated into the contract as affecting its nature and obligatory character. *Cochran v. Ward*, 29 N. E. 795, 797, 5 Ind. App. 89, 51 Am. St. Rep. 229.

The term "procedure" is broad enough to cover an order to stay execution of a judgment, and it is so used in Act March 22, 1892, § 74, providing that the procedure prescribed by the Code of Civil Procedure for actions, proceedings, and remedies in courts of record shall be used in Mt. Vernon city court. It is the generic term adopted for the formal title of the codified law of this state. *Angevine v. Fleischmann*, 67 N. Y. Supp. 182, 183, 55 App. Div. 106.

## PROCEED.

"Proceed," as used in a notice by a surety on a note after it became due, directing that the payee should at once proceed and collect the note, means to commence and

carry on a legal process. *Iliff v. Weymouth*, 40 Ohio St. 101, 103.

A stipulation not to proceed against a party is an agreement not to sue him. *Planter's Bank v. Houser*, 57 Ga. 140, 141.

The words "to proceed," as used in New York City Charter, § 1406, provides that the Courts of Special Sessions of New York should have in the first instance exclusive jurisdiction to hear and determine all charges of misdemeanors committed within the city of New York except charges of libel, but such courts should be divested of jurisdiction "to proceed" with the hearing and determination of any charge of misdemeanor in either of certain cases, are not to be construed in the narrow sense of continuing a proceeding already begun. The words are used in their broader sense. Lexicographers give as the usual definition of "to proceed": "to conduct, to begin and carry on an action or proceeding." *People v. McCarthy*, 61 N. E. 899, 900, 168 N. Y. 549 (citing Webst. Dict.; Cent. Dict.).

## PROCEED TO SEA.

"Proceed to sea," as used in a bond providing for a forfeiture if a seaman should desert and escape so that the vessel should "proceed to sea" without him, etc., should not be construed to mean as soon as the ship begins to proceed towards the sea, or, in other words, as soon as she commences the voyage, but means until the ship got to sea; and hence where a seaman shipped at Philadelphia, and deserted at a point on the voyage down the Delaware river, the forfeiture was not incurred. *Behncke v. King* (Pa.) 9 Serg. & R. 151, 154.

A vessel which had left her docks and anchored in the river two days before her date of sailing, the master not being on board, and the riggers being engaged in completing her rigging, will not be deemed to be "proceeding to sea," within 5 Geo. IV, c. 73, § 35, providing that, in case the master of an outward bound ship shall "proceed to sea" without employing a licensed pilot he shall be liable to pay the pilot who first offers his services in like manner as if the pilot had been employed, and hence the owners of the boat were liable for damages caused while the ship lay at anchor. *Rodriguez v. Melhuish*, 10 Exch. 110, 113.

## PROCEEDING.

See "Admiralty Proceeding"; "Bankruptcy Proceeding"; "Bastardy Proceeding"; "Civil Action—Case—Suit—Etc."; "Collateral Proceeding"; "Common Proceeding"; "Composition Proceeding"; "Criminal Proceeding"; "Disbarment Proceeding"; "Divorce Case";

"Future Action or Proceeding"; "Irregular Proceedings"; "Judicial Proceeding"; "Legal Proceedings"; "Matter of Procedure"; "Ordinary Proceeding"; "Probate Proceeding"; "Special Proceeding"; "Stay of Proceedings"; "Summary Proceeding"; "Supplementary Proceeding"; "Unfair Proceedings."

All proceedings, see "All."

Like proceedings, see "Like."

Other proceedings, see "Other."

"In its general acceptance, 'proceeding' means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and of executing. Ordinary proceedings intend the regular and usual mode of carrying on a suit by due course of common law." *Erwin v. United States* (U. S.) 37 Fed. 470, 488, 2 L. R. A. 229 (citing *Bouv. Law Dict.*).

The word "proceeding" ordinarily relates to forms of law, to the modes in which judicial transactions are conducted. *People v. White* (N. Y.) 14 How. Prac. 498, 501.

A "proceeding" is defined as the instrument whereby the party injured obtains redress for wrongs committed against him, either in respect to his personal contracts, his person, or his property. *Sanford v. Sanford*, 28 Conn. 6, 20.

The term "proceedings" in Code, § 3518, providing that all proceedings prescribed for the circuit court shall be pursued in justices' courts, does not relate to matters pertaining to the powers of the court, but to the form and manner of the exercise of power. The Code does not confer power, it relates to the manner of the exercise of power. *St. Joseph Mfg. Co. v. Harrington*, 5 N. W. 568, 569, 53 Iowa, 380.

The phrase "proceedings and practice," as used in Const. 1870, art. 6, § 29, providing that all laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, shall be uniform, must be construed to mean the form in which actions are brought, and the manner of conducting and carrying on suits to be repugnant to the provisions of the Constitution must give special judicial powers to certain judges which are not given by express terms or by implication to judges of other courts of the same class or grade in the state. *People v. Raymond*, 57 N. E. 1066, 1069, 186 Ill. 407.

A city charter provided that all "proceedings" before the municipal court, including proceedings for the violation of any city ordinance, should be governed and regulated by the general laws of the state applicable to

the justice of the peace or justice's court is like or similar cases. Held, that the word "proceedings" was evidently used in its very broadest signification. Proceeding is defined by Black as follows: "In a general sense, the form and manner of conducting judicial business before a court or judicial office. In a more particular sense, any application to a court of justice." *Ex parte McGee*, 54 Pac. 1091, 1092, 33 Or. 165.

A motion for new trial is not a mere "matter of proceeding" within Act June 1, 1872, relating to conformity with state practice in federal courts in mere matters of proceeding. *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

#### As act to be performed.

The word "proceeding," both in its popular use and in its technical application, has a definite meaning. It means in all cases the performance of an act, and is wholly distinct from any consideration of an abstract right. A proceeding in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode of action for carrying into effect a legal right. *Rich v. Husson*, 11 N. Y. Leg. Obs. 119, 121; *Fielden v. Lahens*, 22 N. Y. Super. Ct. (9 Bosw.) 436, 444. And, so far from involving any consideration or determination of the right, presupposes its existence. The proceeding follows the right. *Rich v. Husson*, 8 N. Y. Super. Ct. (1 Duer) 617, 620; *Id.*, 11 N. Y. Leg. Obs. 119, 121; *Hopewell v. State*, 54 N. E. 127, 129, 22 Ind. App. 489; *In re Mace* (N. Y.) 4 Redf. Sur. 325, 327. The rules by which proceedings are governed are rules of procedure; those by which rights are established and defined, rules of law. It is the law which gives a right to costs and fixes their amount. It is procedure which declares when and by whom the costs to which a party has a previous title shall be adjusted or taxed, and when and by whose direction a judgment in his favor shall be entered. *Fargo v. Helmer* (N. Y.) 43 Hun, 17, 19.

Proceeding means the performance of an act. *Ex parte McGee*, 54 Pac. 1091, 1092, 33 Or. 165.

A proceeding in court is an act done by the authority or direction of the court, expressed or implied, as the issuing of an execution, or the delivery by the clerk of a transcript of the judgment to the plaintiff. *Bulkeley v. Keteltas*, 5 N. Y. Super. Ct. (3 Sandf.) 740, 741.

#### All matters and steps.

In *Morewood v. Hollister*, 6 N. Y. (2 Seld.) 309, it is said: "The term 'proceedings,' in its more general sense in law, means all steps or measures adopted in the prosecution or defense of an action." *Gordon v. State*, 4 Kan. 489, 501; *Atchison, T. & S. F. Ry. Co. v.*

Brassfield, 32 Pac. 814, 815, 51 Kan. 167; In the above cases it will be seen that the term "proceedings" is used with reference to something done or to be done in a court of justice. *Hopewell v. State*, 54 N. E. 127, 129, 22 Ind. App. 489.

The word "proceedings" has acquired a technical and appropriate meaning in law. It may mean more than the record history of a case. It is undoubtedly sometimes used in the restrictive sense. In its ordinary acceptance the word, when unqualified except by the subject to which it applies, includes the whole of the subject. Thus, the proceedings of a suit embrace all matters that occur in its progress judicially; proceedings upon a trial, all that occur in that part of the litigation. We are of the opinion, when a court orders the stay of all proceedings in an action, it arrests and suspends anything which pertains to its progress as such action, except such steps which operate incidentally to the purpose for which the stay of proceedings was obtained, or which are not dependent upon or connected with the order. A judgment entered after an order staying proceedings is obtained, and within the time in which it was operative, is a violation of the order. *Uhe v. Chicago, M. & St. P. Ry. Co.*, 54 N. W. 601, 602, 3 S. D. 563.

The word "proceeding" is applicable to every step taken by a suitor to obtain the interposition or action of a court. *Johnson v. Jones*, 2 Neb. 126, 127; *O'Dea v. Washington County*, 3 Neb. 118, 121.

In its most comprehensive sense, the term "proceeding" includes every step taken in a civil action, except the pleadings. *Strom v. Montana Cent. Ry. Co.*, 84 N. W. 46, 47, 81 Minn. 346. See, also, *O'Dea v. Washington County*, 3 Neb. 118, 121; *Wilson v. Macklin*, 7 Neb. 50, 52.

Under Code 1846, § 149, which authorizes the court at any time in furtherance of justice to amend any pleading or proceeding by correcting a mistake in any respect, it was held that the term "proceeding" is generally applicable to any step taken by a party in the progress of an action, and that anything done from the commencement to its termination is a proceeding. *Wilson v. Allen* (N. Y.) 3 How. Prac. 369, 371; *Hopewell v. State*, 54 N. E. 127, 129, 22 Ind. App. 489.

The word "proceeding," as used in Comp. Laws, § 382, providing that the court may dismiss an action for disobedience by the plaintiff of an order concerning the proceedings in the action, means any proceedings in the case. *Jackson County Com'rs v. Hoaglin*, 5 Kan. 558.

How. Ann. St. § 6496, authorizing the transfer of civil suits or proceedings from one circuit court to another where certain special causes exist, includes all matters con-

nected with or attending the exercise of the power conferred upon the circuit courts in chancery which are necessary to enable the court to exercise the superintending control and authority conferred upon it by the statute. *Kittridge v. Washtenaw Circuit Judge*, 44 N. W. 1051, 1052, 80 Mich. 200.

"Proceedings upon executions and other final processes," as used in Act 1828, c. 68, which provides that the process and modes of proceedings of the highest state court of original jurisdiction are applicable to courts of the United States in the states respectively, "includes all the regulations and steps incident to that process, from its commencement to its termination, as prescribed by the state laws, so far as they can be made to apply to the federal courts." *Duncan v. Darst*, 42 U. S. (1 How.) 301, 306.

In *Beers v. Houghton*, 34 U. S. (9 Pet.) 362, 9 L. Ed. 145, the court, in construing the act of May 19, 1828, say: "The words 'the proceedings on writs of execution and other final process' must, from their very import, be construed to include all the laws which regulate the rights, duties, and conduct of officers in the service of such process, according to the exigency, upon the person or property of the execution debtor; and also all exemptions from arrest or imprisonment under such process created by those laws." This quotation covers the whole ground of controversy on the effect of the words "proceedings thereupon." *United States v. Knight*, 39 U. S. (14 Pet.) 301, 314, 316, 317, 10 L. Ed. 465.

The phrase "proceedings thereupon" in Act Cong. May 19, 1828, means the exercise of all the duties of the ministerial officers of the states prescribed by the laws of the state for the purpose of obtaining the fruits of judgment. *Amis v. Smith*, 41 U. S. (16 Pet.) 313, 10 L. Ed. 973.

#### As entire proceeding.

Under Code 1873, c. 118, § 34, providing that "after sentence or order . . . a person not a party to the proceeding may, within five years, proceed by bill in equity to impeach or establish the will," etc., the term "proceeding" refers to the entire proceeding, including the order admitting the will to probate or rejecting it. *Dillard v. Dillard's Ex'r*, 78 Va. 208, 210.

The word "proceeding," as used in an indictment which charged defendant with perjury committed in a criminal proceeding entitled "*The State of Iowa v. Fred Perry*," wherein the said Perry was charged and accused on preliminary hearing of crime, was not intended to refer to the information filed, as that was mentioned as the basis of the proceedings, but the word has reference to the criminal action as a whole, and not of some particular process essential to its pros-

ecution, or some act or step taken therein. *State v. Perry*, 91 N. W. 765, 766, 117 Iowa, 463.

#### **Acknowledgment by notary.**

Within Code Civ. Proc. § 547, providing that a judge should not act in an action or proceeding to which he is a party or in which he is interested, etc., the terms "action" and "proceeding" refer to actions or proceedings in courts of justice, and cannot be held to apply to the taking of an acknowledgment by a notary public. *First Nat. Bank v. Roberts*, 23 Pac. 718, 722, 9 Mont. 323.

#### **Act of officer.**

The act, however tortious, of an executive officer of a court, done under color of its process, is a "proceeding" of that court within Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], inhibiting injunctions by federal courts to stay proceedings in state courts, except in certain cases. *American Ass'n v. Hurst* (U. S.) 59 Fed. 1, 5, 7 C. C. A. 598.

#### **Action and suit synonymous.**

The words "suit," "action," and "proceedings at law," in Gen. St. c. 36, § 24, providing that no person shall be disqualified as a witness in common civil suits or proceedings, at law or in equity, by reason of his interest in the event of the same as a party or otherwise, and providing that in all actions, except actions on book account, where one of the original parties to a contract or cause of action, at issue on trial, is dead or insane, the other party shall not be admitted to testify in his own favor, and in Acts 1864, No. 31, § 1, providing that the proviso in the former act shall not in any manner affect any suit brought or pending on the 1st day of August, 1863, were used in reference to the same subject-matter, and substantially as synonymous terms. *Calderwood v. Calderwood's Estate*, 38 Vt. 171-174.

While it is true that the term "proceeding" is a broader and more comprehensive term than "action," it is quite evident that the term "proceedings" in the United States law (Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430]) providing that, when an adverse claim to mining ground shown to be patented is filed, it shall be the duty of the adverse claimant, within 30 days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim, is used in the sense of "action," as there are no other proceedings by which the right to possession of real property can be determined by a court of competent jurisdiction and judgment ren-

dered therein. *Mars v. Oro Fino Min. Co.*, 65 N. W. 19, 23, 7 S. D. 605.

#### **Allowance of jail liberties.**

"Proceedings thereupon," as used in Act Cong. 1828, c. 68, § 3, providing that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, should be the same, except their style, in each state respectively as are now used in the courts of such state, should be construed to include the allowance of the jail liberties. Proceedings consequent upon and incident to such writs of execution and other final process, until the complete satisfaction and discharge thereof, are properly, in the sense of the act, proceedings on the execution or other final process; and therefore the proceedings to obtain the jail liberties by a debtor imprisoned on such execution or other final process are "proceedings thereupon" within the scope and purview of the act. This is the natural import of the words used, and a rational exposition of their intention and object. *United States v. Knight* (U. S.) 26 Fed. Cas. 793, 798; *United States v. Knight*, 39 U. S. (14 Pet.) 301, 314.

#### **Any proceeding other than criminal.**

An action under Hurd's Rev. St. 1897, p. 1614, providing for the trial of the right of property in personal property, is a "proceeding at law" within Act June 2, 1871, § 8, as amended by Act 1887, providing that the Appellate Court shall have jurisdiction of all matters of appeal from the final judgment of a county court in any proceeding at law other than criminal cases. *Sellers v. Thomas*, 57 N. E. 10, 185 Ill. 384.

#### **Appeal.**

Steps taken by which the judgment of the court is vacated, and the case taken to, and the appearance of the parties effected in, another tribunal, is a "proceeding," and a very important one, in the progress of a civil action. It is as clearly a proceeding by which a suitor takes steps to prosecute his action or defense in an appellate court, as is the suing out of process at the commencement of an action, or the filing of a petition in error with process served. Besides, the term "proceeding" is used in Code Civ. Proc. § 144 (providing that "the court may, before judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings, add or strike out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect. \* \* \* And whenever any proceeding taken by a party fails to conform in any respect to the provision of this Code, the court may permit the same to be made conformable thereto by amendment"), to distinguish all other steps

taken in an action from those embraced in the word "pleading." Steps taken by filing an appeal bond to obtain a review of a warranty made by appraisers of damages on account of the laying out of a public highway is a "proceeding" within the meaning of the term. *O'Dea v. Washington County*, 3 Neb. 118, 121.

#### **Application for costs.**

An application for costs is not a proceeding. *In re Mace* (N. Y.) 4 Redf. Sur. 325, 327.

#### **Assessment proceeding.**

Rev. Mun. Code, passed in 1878 (75 Ohio Laws, pp. 161-419; Rev. St. §§ 1536-2729), by which the general laws then in force granting power to assess and reassess for street improvement were repealed, contained the following saving clause: "No suit, prosecution or proceeding shall be in any manner affected by such change, but the same shall stand or proceed as if no change had been made." 75 Ohio Laws, p. 165, § 4; Rev. St. § 1539. At the time of the passage of the act an assessment had been made under the acts in force in 1873, which were among those repealed, but subsequent to such repeal the assessment was enjoined, not on ground giving it power to assess, or the justice of the assessment, but for the reason that the particular assessment was illegally made. Held, that the various steps in the council and before the board with respect to such street improvement constituted a "proceeding" within the meaning of the above provision, and hence the council was empowered to reassess pursuant to the Municipal Code of 1896, §§ 551, 552. *Raymond v. Cleveland*, 42 Ohio St. 522, 529.

#### **Assignment for benefit of creditors.**

In Bankr. Act July 1, 1898, c. 541, § 70, subds. "a," "b," 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3452], providing that proceedings commenced under such insolvency laws before the passage of the bankruptcy act shall not be affected by it, the word "proceedings" was not employed with reference to specific litigation or actions in some particular matter pending the insolvency administration, but it refers to the commencement of proceedings to establish the fact of insolvency in the state courts. The making of an assignment for the benefit of creditors is such a proceeding. This is the view various federal courts have taken. *In re Bates* (U. S.) 100 Fed. 263; *In re Mussey* (U. S.) 99 Fed. 71.

#### **Drawing of grand jury.**

The ordering, drawing, and summoning of the grand jury is a "judicial proceeding" within the meaning of Comp. Laws 1885, p. 19, § 1, providing that in the construction of statutes of this state the following rules

shall be observed: "First, the repeal of a statute does not revive a statute previously repealed thereby, nor does such repeal affect any right which accrued \* \* \* nor any proceeding commenced under or by virtue of the statute repealed." *In re Tillery*, 23 Pac. 162, 163, 43 Kan. 188.

#### **Election for location of county seat.**

The holding of an election for permanently locating a county seat is not a "proceeding" within Comp. Laws 1862, c. 188, § 1, providing that the repeal of a statute does not affect any proceeding, it not relating to judicial matters. *Gordon v. State*, 4 Kan. 489, 501.

#### **Equitable action.**

St. 1801, c. 189, provides that "the people will not sue or implead any person for or in respect to any lands" by reason of any right acquired "forty years before any suit or proceeding for the same be commenced." Held, that the word "proceeding," being a more general and comprehensive term than "suit" and "implead," includes an equitable action to vacate letters patent. *People v. Clarke*, 9 N. Y. (5 Seld.) 349, 368.

#### **Execution.**

A "proceeding by execution" is a proceeding by a suit at law, within the meaning of the statute authorizing assignments of property for the benefit of creditors. *Vanderveer v. Conover*, 16 N. J. Law (1 Har.) 487, 492.

#### **Extension of time to answer.**

An order enlarging the time to answer does not stay a proceeding, nor does it in any sense stay or prevent any provisional remedy plaintiff may apply for; hence such order, though granted on an ex parte motion and affidavit, is not in conflict with the provisions of section 402, Code Civ. Proc., providing that no order to stay proceedings for a longer time than 20 days shall be granted by a judge out of court, except on notice to the adverse party. *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.* (U. S.) 60 Fed. 929, 933.

#### **Filing of affidavit.**

The term "proceeding" is used in the Code of Civil Procedure to distinguish all other steps taken in an action from those embraced in the word "pleading," and includes the filing of an affidavit in an action of replevin. *Wilson v. Macklin*, 7 Neb. 50, 52.

#### **Filing transcript.**

A "proceeding in court" is an act done by the authority or direction of the court, expressed or implied, as the issuing of an execution, or the delivery by the clerk of a transcript of the judgment to the plaintiff. But when a transcript is once given to



the plaintiff, the right to file it results from the law, and the filing of it cannot be considered as a proceeding in court, or as a thing done by authority of the court, within the meaning of the provision of the Code on the subject of appeals. *Bulkeley v. Keteltas*, 5 N. Y. Super. Ct. (3 Sandf.) 740, 741.

Generally, a "proceeding," in contemplation of law, means any application, however made, to a court of justice for the purpose of having a matter in dispute judicially determined. The mere doing of a ministerial act by a nonjudicial officer is not such a proceeding as is provided for in Act March 15, 1893, § 2, providing that a person instituting any action or proceeding shall pay, when the cause is entered in the court, or when the first paper on his part is filed, \$4. The filing of a transcript of a judgment of a justice by the county clerk is not a "proceeding" within the act. *State v. Gordon*, 36 Pac. 498, 499, 8 Wash. 488.

#### **Finding of facts.**

The word "proceeding," as used in Rev. St. 1894, § 401, providing that the court must in every stage of the action disregard any error or defect in the proceeding or pleading which does not affect the substantial rights of the adverse party, includes the finding of the facts of the case. *Thompson v. Connecticut Mut. Life Ins. Co.*, 38 N. E. 796, 805, 139 Ind. 325.

#### **Foreclosure of mortgage.**

The statutory proceedings to foreclose a mortgage are not "proceedings in court," so as to authorize the courts to remedy defects in them. *Dwight v. Phillips* (N. Y.) 48 Barb. 116.

#### **Hearing before county board.**

A hearing before a county board is a "proceeding," within the meaning of a statute giving the attorney a lien on the amount recovered in an action or proceeding. *Maloney v. Douglas County*, 89 N. W. 248, 249, 2 Neb. (Unof.) 396.

#### **Hearing by mayor.**

Prac. Act, c. 8, § 442, provided that every court, judge, or clerk of any court, justice, notary public, and every officer authorized to take testimony or to decide upon evidence in any proceeding, shall have power to administer oaths or affirmations. Held, that the word "proceeding" did not embrace the action of the mayor of the city, as head of the police force, in receiving and examining into complaints against policemen for neglect or violation of duty. *Payne v. City of San Francisco*, 3 Cal. 122, 127.

#### **Instructions.**

In a judicial sense, the term "proceedings" fairly includes the instructions given

to the jury. The charge of a court is a "proceeding" in a case, and where there is a statement in a case that it contains all the "proceedings in the case," it will be held that all instructions are embraced therein. *Atchison, T. & S. F. R. Co. v. Brassfield*, 32 Pac. 814, 815, 51 Kan. 167.

#### **Levy and sale under execution.**

Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], provides that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. Held, that a levy and sale under an execution is a "proceeding" within the statute. *Mills v. Provident Life & Trust Co.* (U. S.) 100 Fed. 344, 346, 40 C. C. A. 394.

#### **Mandamus.**

The term "proceedings," as used in Rev. St. §§ 3717, 3718, providing for a stay of proceedings on filing of a recognizance on appeal, includes a peremptory writ of mandamus. *State ex rel. Laclede Bank v. Lewis*, 76 Mo. 370, 377.

#### **Minutes or record of case.**

"Proceedings," as used in Code 1880, § 2193, providing that every justice shall keep a docket in which he shall enter proceedings before him in each case, means his minutes; the record of a case required to be made by a justice. *Hughston v. Cornish*, 69 Miss. 372, 374.

The term "proceedings," in its more general sense in law, means all the steps or measures adopted in the prosecution or defense of an action. It may mean more than the record history of the case, but is undoubtedly sometimes used in this restrictive sense. In its ordinary acceptation, the word, when unqualified except by the subject to which it is applied, includes the whole of the subject. Thus, the "proceedings of a suit" embrace all actions that occur in its progress judicially; and "proceedings on a trial," all that occur in that part of the litigation. Under 2 Rev. St. p. 49, § 47, providing that, when any authority shall be exercised by any officer pursuant to any of the provisions of the title, the proceedings may be removed into the Supreme Court by certiorari and there examined and corrected, the word "proceedings" embraces all matters connected with or attending the exercise of the powers which are necessary to enable the court of review to determine its validity and correctness. *Morewood v. Hollister*, 6 N. Y. (2 Seld.) 809, 819.

#### **Notice of motion.**

Under Laws 1864, c. 185, providing that where the Supreme Court orders a new trial

or further proceedings, the record shall be transmitted to the court below, and proceedings shall be had thereon within one year from the time of entering in the Supreme Court such an order for a new trial or further proceedings, a notice served by plaintiff's attorney on defendant's attorney, within the year, that the cause had been entered, and that on a day named after the expiration of the year he would move the court to vacate its judgment, was such a "proceeding," within the meaning of the statute, as would prevent a dismissal of the action. *Bonesteel v. Orvis*, 31 Wis. 117, 119.

#### **Petition to enforce mechanic's lien.**

A petition for a mechanic's lien is a proceeding to continue and enforce a lien, and therefore comes within the Wisconsin statute of amendment, and the amendment of a petition as to the name of the petitioner is allowable, and filing of the petition is a proceeding to continue the lien. *Sherry v. Schraage*, 4 N. W. 117, 119, 48 Wis. 93 (citing *Witte v. Meyer*, 11 Wis. 295, 296).

#### **Pleadings.**

Under Code Civ. Proc. § 586, providing that plaintiff in error shall file with his petition a transcript of the proceedings, containing the final order or judgment sought to be reversed, vacated, or modified, the word "proceedings" includes duly certified copies of the pleadings on which the action was tried. *School Dist. No. 49 of Adams County v. Cooper*, 62 N. W. 1084, 44 Neb. 714.

A pleading is a "proceeding of the court" within the meaning of Code Civ. Proc. § 14, providing that a court of record has power to punish any abuse of a proceeding of the court. Therefore the interposition of a false answer may be punished as a contempt. *Martin Cantine Co. v. Warshauer*, 28 N. Y. Supp. 139, 7 Misc. Rep. 412.

#### **Preliminary examination.**

The examination of one charged with a crime is a "proceeding" within Gen. St. c. 65, § 20, providing for the transfer of a proceeding by the justice before whom the same is pending to another justice. *State v. Bergman*, 34 N. W. 737, 738, 37 Minn. 407.

#### **Preparation for trial.**

As used in Rev. St. 1898, § 4713, providing that whenever, in a criminal action or proceeding, any attorney shall defend the accused by order of the court on the ground that the accused is destitute, the county in which such criminal action or proceeding may arise shall only be liable to pay such attorney such sum as the court may certify to be reasonable, and which shall in no case exceed \$15 per day for each day actually

occupied in such trial or proceeding, the word "proceeding" refers to something in the nature of a criminal action, but distinguished therefrom, and days spent out of court in preparing for trial are not days spent in the proceeding. *Green Lake County v. Waupaca County*, 89 N. W. 549, 552, 113 Wis. 425.

#### **Probate proceeding.**

The term "proceeding" is used in the Probate Code as a general designation of the actions and proceedings whereby the law is administered upon the various subjects within probate jurisdiction. Thus 1 Prob. Pr. Act, § 1, provides that proceedings in the probate court shall be construed in the same manner, etc., as proceedings in courts of general jurisdiction; section 5, Id., provides that the seal of the court need not be affixed to any proceeding therein, except, etc.; and other provisions of the Code use the term in the same sense; and throughout the Code of Civil Procedure the term "proceeding" is used in the more practical and less technical sense than the term "action"; so that, under the definition of a "judgment" as the final determination of the rights of the parties in an action or proceeding, a final determination of a probate matter is a judgment. In re *McFarland's Estate*, 26 Pac. 185, 189, 10 Mont. 445.

#### **Restoration of property on forthcoming bond.**

Under Act Cong. May 19, 1828, providing that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereon, shall be the same, except their style, in each state respectively, as are now used in the courts of such state, the phrase "proceedings thereon" means the exercise of all the duties of the ministerial officers of the states prescribed by the laws of the state for the purpose of obtaining the fruits of judgment. Among these proceedings is included the duty of the sheriff to restore personal property levied on by him to the defendant upon his executing a forthcoming bond according to the law of the state, and the further duty to return it in accordance with the state law to the court forfeited if the defendant fail to deliver the property on the day of the sale according to the condition of the bond. These are proceedings upon an execution, and therefore the forthcoming bond is to be regarded as a part of the final process. *Amis v. Smith*, 41 U. S. (16 Pet.) 313, 10 L. Ed. 973.

#### **Settlement of statement.**

The settlement of a statement is a "proceeding," within Code Civ. Proc. § 473, authorizing a court to relieve a party from a judgment, order, or other proceeding taken

against him through mistake, inadvertence, etc. *Banta v. Siller*, 53 Pac. 935, 121 Cal. 414.

#### **Stay bond.**

The word "proceeding," as used in Civ. Code, § 144, authorizing the court, either before or after judgment, in furtherance of justice, to permit amendments to any pleading, process, or proceeding, includes a stay bond, and therefore such bond may be amended. *State v. Russell*, 22 N. W. 455, 456, 17 Neb. 201.

#### **Taking deposition.**

A "proceeding" is an act done by the authority or direction of the court, express or implied. Code Civ. Proc. § 2021, authorizes the taking of the testimony of a witness by deposition in an action or special proceeding when the witness is a party, etc., or in any other case where the oral examination of the witness is not required, and where he is the only one who can establish facts or a fact material to the issue, provided that the deposition shall not be used where the witness' presence can be procured; and section 1209 authorizes the court to punish as for a contempt any unlawful interference with the "process or proceedings of the court." Held, that the taking of a witness' deposition before a notary public, to be used in a pending action, was "a proceeding of the court" within section 1209, and hence the court had power to punish such witness for his refusal to attend and be examined in pursuance of the notary's subpoena. *Burns v. Superior Court of San Francisco*, 73 Pac. 597, 599, 140 Cal. 1.

#### **Trial.**

The word "proceeding," as used in Gen. St. 1894, § 5659, providing for the examination of an adverse party to the record of any civil action or proceeding, is not synonymous with "action," but applies to the trial of any civil action involving an issue of fact, as well as to the trial of any proceeding involving such an issue, which the parties are entitled as a matter of right to have heard upon the oral testimony of witnesses and other evidence, as in ordinary trials. *Strom v. Montana Cent. Ry. Co.*, 84 N. W. 46, 47, 81 Minn. 346.

#### **Verification of pleading.**

The swearing to the petition is a proceeding, and so is attaching the jurat to the affidavit. It is clearly a proceeding by which the suitor takes steps to prosecute his action. The term "proceeding" is used in the section of the Code providing for the amendment of any pleading, process, or proceeding, to distinguish all other steps taken in an action from those embraced in the term "pleading." *Johnson v. Jones*, 2 Neb. 126, 127.

#### **Writ of assistance.**

The granting of a writ of assistance was a "proceeding had," within the meaning of Rev. St. § 1448, providing that no process shall be issued or other proceeding had on any final decree until the same shall have been signed and recorded. *Wilmott v. Equitable Bldg. & Loan Ass'n (Fla.)* 33 South. 447, 448.

#### **PROCEEDING IN AID OF EXECUTION.**

A "proceeding in aid of execution," though created by statute, is a proceeding in the action in which the judgment was recovered after the judgment debtor has had a hearing and trial, and is a substitute for the creditors' bill formerly used in chancery. The proceeding is a simple regulation of well-established and well-defined jurisdiction which courts of equity were accustomed to employ. After the decree in a court of equity for the delivery of the property or effects, the debtor, on disobeying the decree, was adjudged guilty of contempt of the authority of the court, and he could therefore be imprisoned so long as he remained in contempt. Obedience to the decree—that is, the delivery of the property—would terminate the imprisonment at any time. The purpose of the Code provisions in aid of execution conferring upon the district judge the power to require a judgment debtor to appear before him to answer concerning his property which he unjustly refuses to apply to the satisfaction of a judgment rendered against him, and to order any property in his actual possession and under his control, not exempt by law, to be delivered up and applied towards the satisfaction of the judgment under which the proceedings are had, and to enforce said orders by proceedings for contempt in case of disobedience, is to require the delivery of the property of the judgment debtor for the payment of his debts, and if it is made the debtor cannot be imprisoned. It is only when the debtor has property which he unjustly refuses to apply towards the satisfaction of a judgment after being afforded the opportunity so to do that he can be imprisoned. The imprisonment is not for the debt, but for the neglect and refusal to perform a legal duty. The provisions of the Code, therefore, are not in conflict with the fifth amendment of the federal Constitution, nor with the provisions of the Bill of Rights of the state Constitution, guarantying the right of trial by jury, and providing that no person shall be a witness against himself, and declaring that no person shall be imprisoned for debt except in case of fraud. In *re Burrows*, 7 Pac. 148, 150, 33 Kan. 675.

Proceedings auxiliary to execution as provided for in Code, tit. 18, c. 3, were unknown to the common law; and the object to be accomplished thereby and the manner of do-

ing it was quite similar to a creditors' bill, and may be well regarded as affording an additional remedy for the accomplishment of the same object. The statute authorizing the judge to commit to jail a party refusing to obey an order in proceedings auxiliary to execution, directing him to turn over property in his possession to the court, is not unconstitutional. *Elkenberry v. Edwards*, 25 N. W. 832, 833, 67 Iowa, 619, 56 Am. Rep. 360.

### PROCEEDING IN ERROR.

"Proceedings in error are in the nature of a new action, and are brought by the person against whom final judgment has been rendered in the court below, whether plaintiff or defendant. It is brought on some alleged error in such judgment and proceedings, and the person by whom it is brought is called the 'plaintiff in error,' and the opposite party the 'defendant in error.' *Pow. App. Proc.* p. 105, etc. \* \* \* A writ of error without supersedeas does not remove the record from the court below, in the sense that the lower court loses any control of it. \* \* \* A second appeal on a writ of error is allowed, when sued out within the statutory limitations, where the first has been dismissed for irregularity or want of jurisdiction." *Glasser v. Hackett*, 20 South. 532, 533, 37 Fla. 358.

### PROCEEDING IN PERSONAM.

See "In Personam."

### PROCEEDING IN REM.

See "In Rem."

## PROCEEDS.

See "Clear Proceeds"; "Gross Proceeds"; "Net Proceeds"; "Surplus Proceeds." All proceeds of estate, see "All."

The word "proceeds" is one of equivocal import, and of great generality. It does not necessarily mean money, its meaning in each case depending very much upon the connection in which it is employed and the subject-matter to which it is applied. *Phelps v. Harris*, 101 U. S. 370, 25 L. Ed. 855; *Appeal of Thompson*, 89 Pa. 36; *Dow v. Whetten* (N. Y.) 8 Wend. 160; *Haven v. Gray*, 12 Mass. 71, 76; *Wheeler & Wilson Mfg. Co. v. Winnett* (Neb.) 91 N. W. 514, 515. Strictly speaking, it implies something that arises or leads out of or from another thing, and in its ordinary acceptance, when applied to the income to be derived from real estate, it embraces the idea of issues, rents, profits, or produce. In a commercial sense it means the sum, amount, or value of goods or things sold and converted into money. *Hunt v. Williams*, 126 Ind. 493, 494, 26 N. E. 177.

"Proceeds of fines," as used in Const. art. 6, § 6, which provides that the proceeds of fines for any breach of the penal laws shall be exclusively applied, etc., to the support of the common schools, means the moneys collected from the fines, the amounts realized from fines, the whole amount, and not merely a portion thereof. *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1, 15.

"Proceeds," as used in a lease providing that the lessee should pay his lessor out of the "proceeds" a certain sum as rent, and also one-third of the "net proceeds," is equivalent to "receipts" or "gross proceeds." *Smith v. Hubert*, 81 N. Y. Supp. 1076, 1080, 83 Hun, 503.

Under the constitutional requirement that the "proceeds of mines" be taxed, the entire proceeds of the mines must be taxed, not the mere proceeds which happen to be on hand at the particular time the assessor may happen to visit the mine. *State v. Kruttschnitt*, 4 Nev. 178, 200.

### As gross proceeds.

Where, in the sale of wood and timber upon a certain tract of land, it was provided that the vendees might dispose of it, provided they pay over the proceeds thereof to the vendor as fast as sold and paid for, the term "proceeds of the wood and timber" was broad enough to include the gross amount of sales, and it was held that such was the intent of the parties. *McMurphy v. Garland*, 47 N. H. 316, 319, 321.

### As income.

"Proceeds," as used in a will bequeathing certain property to trustees, the income to be devoted to certain purposes, with power to sell any of the property and reinvest the proceeds, and also directing that so much of the proceeds of the property should be paid to a certain person as she may deem necessary for the maintenance of herself and another, should be construed to mean the income which had been devoted to the purposes of the will. *Appeal of Thomson*, 89 Pa. 36, 46; *In re Thomson's Estate* (Pa.) 12 Phila. 313, 315.

"Proceeds," as used in a will devising property to trustees, and directing the trustees to distribute the proceeds thereof in a certain designated manner, is to be construed to mean "income." *Appeal of Robert*, 92 Pa. 407, 419.

The word "proceeds," as used in a will that certain sums shall be paid to parties out of the proceeds of the estate, does not mean the income. *Allen v. Barnes*, 12 Pac. 912, 915, 5 Utah, 100.

As used in a will by which testator devised to his wife for life a certain farm, which at her death, if any remained, should

go to another person, provided such person maintained and provided for the testator's wife from the proceeds of the farm or otherwise, "proceeds" means money or other things of value obtained from the sale of property, though it also means produce or income. *Birmingham v. Lesan*, 1 Atl. 151, 152, 77 Me. 494.

The term "interest," and not "income and proceeds," would express the idea of the product of capital; and hence the direction to pay over to a grandson, at his arrival at the age of 22 years, the annual income and proceeds of any accumulations thereof, does not limit the gift to the interest upon the interest. What is meant is the income and proceeds of the residuary estate and of the accumulations, if any, which are authorized to be made during his minority. *In re Drake's Estate* (Pa.) 3 Kulp, 51, 52.

#### **As conveying interest in land.**

In a devise of one-half of the proceeds of a farm the word "proceeds" carries an interest in the land itself. *Hunt v. Williams*, 26 N. E. 177, 126 Ind. 494.

#### **As invoice.**

"Proceeds," as used in a trust receipt stating, in effect, that the person took a bill of lading in trust for the purpose of receiving and making a sale of flour as agent of the other party and turning over all the proceeds within a given period, cannot be construed to mean "invoice." The regular definition of "proceeds" is money or other articles of value obtained from the sale of property, while an "invoice" is a written account of particular merchandise shipped or consigned to a purchaser, consignee, or factor, with the value, price, or charges annexed. *Tradesmen's Nat. Bank v. National Surety Co.*, 62 N. E. 670, 672, 169 N. Y. 563.

#### **As money or other thing realized from sale.**

The term "proceeds," when used in connection with sale, means a sum of money derived from the sale of property. *Andrews v. Johns*, 51 N. E. 880, 882, 59 Ohio St. 65; *Hunt v. Williams*, 26 N. E. 177, 126 Ind. 493; *Appeal of Finney*, 4 Atl. 60, 63, 113 Pa. 11; *Wheeler & Wilson Mfg. Co. v. Winnett* (Neb.) 91 N. W. 514, 515.

The word "proceeds," as used in an agreement with a judgment creditor that certain acts of forbearance on his part should not prejudice the lien of his judgment for his right to payment out of the future proceeds of the property, means the amount of money that in the future will be obtained for the property upon a disposition of it by sale. *Belmont v. Ponvert*, 35 N. Y. Super. Ct. (3 Jones & S.) 208, 212.

"Proceeds," as used in an assignment wherein the assignee accepts the trust and

agrees to execute the same by disposing of the property and applying the proceeds to the payment of the debts, may be construed to mean money or other property; but in an assignment to sell property and apply the proceeds to debts, it will be held to imply a sale for cash. *Sprecht v. Parsons*, 25 Pac. 730, 7 Utah, 107.

"Proceeds," as used in a bond to pay the amount of a certain mortgage after the application of the proceeds on the sale of mortgaged premises, will be held to have been used in its ordinary signification of the sum. amount, money arising from the sale or the purchase price, and hence the sureties on the bond will not be liable for any deficiency created by other liens held to be prior to the mortgage, and to which such proceeds are applied. *Merrimack River Sav. Bank v. Curry*, 46 Pac. 204, 205, 4 Kan. App. 125.

In construing a will by which testator named a trustee for his children, and gave him full power to dispose of all or any portion of the property devised in the will that might fall to them, and invest the "proceeds" in such manner as he might think proper for their benefit, the court said: "The expression 'to dispose of' is very broad, and signifies more than 'to sell.' Selling is but one mode of disposing of property. It is argued, however, that the subsequent direction to invest the proceeds indicates that a sale was meant. But this does not necessarily follow. Proceeds are not necessarily money. This is also a word of great generality. Taking the words in their ordinary sense, a general power to dispose of land or real estate, and to take in return therefor such proceeds as one thinks best, will include the power of disposing of them in exchange for other lands. It would be a disposal of the lands parted with, and the lands received would be the proceeds." *Phelps v. Harris*, 101 U. S. 370-380, 25 L. Ed. 855.

The word "proceeds" is equipollent with "harvest" or "product." It is generally defined and understood as "the amount proceeding from some possession or transaction derived from the sale of goods." *Cent. Dict.* It is "the useful or material results of the action or course." *Stand. Dict.* Under Code Civ. Proc. § 666, giving an attorney a lien on his client's cause of action, which attaches to the proceeds of a judgment or order in whosoever hands they may come, the sums realized from the sale of judgments procured by him for a client constituted proceeds of the judgments, on which he was entitled to a lien. *In re Gates*, 64 N. Y. Supp. 1050, 1051, 51 N. Y. App. Div. 351, 352.

"Proceeds" may mean "product" or "income." It also signifies "money," or other things of value obtained from the sale of property. *Webst. Dict.* The word "proceeds," in a will authorizing provision for the life tenant to be made from the "pro-

ceeds" of the farm, held to have been used in the latter sense of the definition. *Birmingham v. Lesan*, 77 Me. 494, 497, 1 Atl. 151.

When a sale proper is effected, any money or thing received in exchange for the specific article sold constitutes the "proceeds of the sale." Such a use of the term "proceeds" is appropriate and familiar, but where a trust deed directed the trustees, on the death of the grantor, to convey or to transfer a certain certificate of stock to A., and to convey, for the best prices they could obtain, the other property, real and personal, described in the deed, retaining as compensation for their trouble five per cent. "on the proceeds of all such sales," they were not entitled to commissions on the transfer of the certificate of stock. It was a mere donation, a gratuity, from which no proceeds were received by the trustees. *College of Charleston v. Willingham* (S. C.) 13 Rich. Eq. 195, 207.

#### As net proceeds.

"Proceeds," as used in an agreement between judgment creditors and an assignee that the proceeds of a stock of goods were to be paid to the sheriff in satisfaction of his execution, means the amount of money produced, less the costs of sale. In *re Dickson*, 80 Atl. 1032, 1035, 166 Pa. 134.

When we speak of the "proceeds" of a note, we ordinarily mean the amount due or collected upon it. When we send a note to an attorney for collection, with instructions to collect it and remit the proceeds, it is usually inferred that he will retain his collection fees, and the "proceeds" in such a case may be held to be the amount remitted after deducting such fees. *Wheeler & Wilson Mfg. Co. v. Winnett* (Neb.) 91 N. W. 514, 515.

"Proceeds," as used by a testatrix in bequeathing, by the fourth item of her will, all the rest "of my personal property owned by me absolutely, amounting now to about \$26,000, and except the proceeds of" certain realty, and in the fifth item in devising such realty, or "the proceeds thereof" if sold before her death, refers to the net proceeds of the realty therein directed to be sold, and not to the personalty. In *re Curtis' Will*, 16 N. Y. Supp. 180, 188, 61 Hun. 372.

#### As notes taken in payment.

"Proceeds," as contained in a contract for the sale of merchandise, providing that the goods and "all proceeds" thereof should be held in trust for payment of the price, and requiring such application of the proceeds, includes notes taken in payment of said goods, and did not refer only to money arising from cash sales thereof. *Mordcaul v. Seignious*, 30 S. E. 717, 721, 53 S. C. 95.

#### As power to sell.

The use of the word "proceeds" in a will, in a gift over to testator's brothers and sister in case of the death of both his children, held to be, perhaps, some evidence of an intention to confer a power of sale upon executors. *Hollman v. Tigges*, 7 Atl. 347, 348, 42 N. J. Eq. (15 Stew.) 130.

#### As price agreed to be paid.

The word "proceeds" is of such general signification that resort must usually be had to the context, and to the subject-matter to which it relates, in order to ascertain its meaning; and where a stock of goods was transferred to mortgagees at an inventory price which was credited on the mortgage, and the mortgagees, on the transfer being set aside, were ordered to account "for the proceeds of the property transferred to them," the word "proceeds" included the price agreed to be paid for the goods, and did not refer only to the amounts realized from sales of the property. *Armour Packing Co. v. London*, 31 S. E. 500, 502, 53 S. C. 539.

#### As both real and personal estate.

"Proceeds," as used in a will by which testator, after directing his property and effects to be transferred to the children on their attaining 21, required that the interest, dividends, and "proceeds" of such estate and effects as shall be necessary for the purpose be applied toward the maintenance of J., the word "proceeds" would clearly include both real and personal estate. *Stokes v. Salomons*, 4 Eng. Law & Eq. 133, 137.

#### As same or substituted cargo.

Where goods shipped to a foreign port were there found to be unsalable, and returned in the same vessel to the port from which they were taken, such goods on the return voyage were not proceeds of the goods taken on the outward voyage, within the meaning of a policy of insurance "upon goods as per margin out and upon the proceeds thereof home." The grammatical sense of the term "proceeds" is the substituted cargo or property, whatever it may be, which results from or is acquired by means of the specified goods. It imports a sale, barter, or other disposition of the outward cargo, or some operation therewith by which, or by the future investment of the moneys or funds derived therefrom, other goods or insurable property are obtained on which the policy is to attach for the return voyage. *Dow v. Hope Ins. Co.*, 1 N. Y. Super. Ct. (1 Hall) 166, 172.

A policy of marine insurance on merchandise shipped at New York upon the goods out, and upon the proceeds thereof arising, cannot be construed to include the same goods upon the return voyage. The

term "proceeds," in its natural and ordinary sense, would not include the outward cargo sent back in the same state upon the return voyage. The definition of the word "proceeds," as rendered by Webster, is issue, rent, product, as the proceeds of an estate; in commerce, the sum, amount, or value of goods sold and converted into money; by Rees, "proceeds" among merchants is that which arises from a thing; by Crabb, that which arises from anything, as the "net proceeds" from a sale, etc. The word "proceeds," therefore, has been considered by these lexicographers as a mercantile term, and they accordingly distinguish it from the same word when used in another sense, as to "proceed" on a journey or on any other undertaking. The word "proceeds" means that which arises from anything sold, bartered, or exchanged, or anything proceeding from or produced by another thing. *Dow v. Whetten* (N. Y.) 8 Wend. 160, 167.

Where a policy of marine insurance provided that the risk should attach to the "proceeds" of the articles mentioned in the policy in the return cargo, and on the vessel reaching its destination a return cargo was taken as a substitute for the outward cargo, such return cargo should be considered as the proceeds of the outward cargo. *Haven v. Gray*, 12 Mass. 71.

## PROCESS.

See "Mechanical Process"; "Patentable Process."

Other process, see "Other."

In the case of *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 514, it is said that a "process is a mode of treatment of certain materials to produce a given result; it is an act or a species of acts performed upon the subject-matter to be transformed and reduced to a definite state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art." *American Fibre-Chamois Co. v. Buckskin Fibre Co.* (U. S.) 72 Fed. 508, 515, 18 C. C. A. 662; *Risdon Iron & Locomotive Works v. Medart*, 15 Sup. Ct. 745, 748, 158 U. S. 68, 39 L. Ed. 899; *Carnegie Steel Co. v. Cambria Iron Co.* (U. S.) 89 Fed. 721, 754; *Tannage Patent Co. v. Zahn* (U. S.) 66 Fed. 986, 989.

It is when the term "process" is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations. *Corning v. Burden*, 56 U. S. (15 How.) 252, 268, 14 L. Ed. 683.

"Process" is often used in a passive sense, in which a process cannot be the subject of a patent. Thus, we say a board is undergoing the "process" of being planed,

grain of being ground, iron of being hammered or rolled. Here the term is used subjectively as applied to the material operated on, and not to the method or mode of producing that operation, which is by a mechanical means, or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine which produces it. *Boyden Power-Brake Co. v. Westinghouse*, 18 Sup. Ct. 707, 716, 170 U. S. 537, 42 L. Ed. 1136; *Corning v. Burden*, 56 U. S. (15 How.) 252, 268, 14 L. Ed. 683.

The term "process," in the patent laws, is an act or a mode of acting. The mixing of certain substances together, or the heating of a substance to a certain temperature, is a process. When the term "process" is used to represent the means of producing a result, it is patentable, and includes all methods or means not effected by mechanism. If a process consists of a chemical combination by which the particular result is produced, its existence does not prevent another inventor from making a mechanical combination which produces the same result. *New Process Fermentation Co. v. Maus* (U. S.) 20 Fed. 725, 728.

### Art synonymous.

The term "art" is synonymous with the term "process." *Carnegie Steel Co. v. Cambria Iron Co.* (U. S.) 89 Fed. 721, 754.

A process by which a thing is manufactured is a useful art, and not subject to patent under the act of Congress. *Corning v. Burden*, 56 U. S. (15 How.) 252, 14 L. Ed. 683 (cited in *McKay v. Jackman* [U. S.] 12 Fed. 615).

"Process," *eo nomine*, is not made the subject of a patent in the act of Congress. An art may require one or more processes to produce a certain result. It is for the discovery or invention of some practical method or means of producing a beneficial result or effect that a patent is granted, not for the result or the effect itself. "Process," when used to represent the means of producing a beneficial result, is in law synonymous with "art," provided the means are not effected by mechanism or mechanical combinations. *Piper v. Brown* (U. S.) 19 Fed. Cas. 718, 719.

A "process," *eo nomine*, is not the subject of a patent, but is a useful art, and includes an application of some element or power of nature, or of one substance, to another, in which the result or effect is produced by chemical action. *Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co.* (U. S.) 55 Fed. 301, 316.

A new process is usually the result of discovery, a machine of invention. In *re Weston*, 17 App. D. C. 436; *Appleton Mfg. Co. v. Star Mfg. Co.* (U. S.) 60 Fed. 411, 413, 414, 9 C. C. A. 42.

#### **Machine or machinery distinguished.**

"A machine is a thing, a process is an act or a mode of acting. The one is visible to the eye, an object of perpetual observation; the other is a conception of the mind, seen only by its effects when being executed or performed. Either may be the means of producing useful results, and are both subject to patent." *Tilghman v. Proctor*, 102 U. S. 707-728, 26 L. Ed. 279; *O'Reilly v. Morse*, 56 U. S. (15 How.) 62, 14 L. Ed. 601; *Boyden Power-Brake Co. v. Westinghouse*, 18 Sup. Ct. 707, 728, 170 U. S. 537, 42 L. Ed. 1136; *Tannage Patent Co. v. Zahn* (U. S.) 66 Fed. 986, 989.

The term "machine" includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. But where the effect or result is produced by a chemical action, by the operation or application of some element or power of nature, or of one substance to another, such modes, methods, or operations are called "processes." In *re Weston*, 17 App. D. C. 436; *Piper v. Brown* (U. S.) 19 Fed. Cas. 718, 719, *Appleton Mfg. Co. v. Star Mfg. Co.* (U. S.) 60 Fed. 411, 413, 414, 9 C. C. A. 42.

A "process," *eo nomine*, is not made the subject of a patent in our act of Congress. It is included under the general term "useful act." An art may require one or more processes in order to produce a certain result or manufacture. It is when the term "process" is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not effected by mechanism or mechanical combinations. But the term "process" is often used in a more vague sense, in which it cannot be the subject of a patent. Thus we say that a board is undergoing the "process" of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively, as applied to the material operated upon, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process. In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it. *Appleton Mfg. Co. v. Star Mfg. Co.* (U. S.) 60 Fed. 411, 413, 414, 9 C. C. A. 42.

"A process," it was said in *Cochrane v. Deener*, 94 U. S. 788, "is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an 'art.' The machinery pointed out as suitable to perform the process may or may not be new or patentable, whilst the process itself may be altogether new and produce an entirely new result. The process requires that certain things be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence." *Appleton Mfg. Co. v. Star Mfg. Co.* (U. S.) 60 Fed. 411, 413, 414, 9 C. C. A. 42.

ment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an 'art.' The machinery pointed out as suitable to perform the process may or may not be new or patentable, whilst the process itself may be altogether new and produce an entirely new result. The process requires that certain things be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence." *Appleton Mfg. Co. v. Star Mfg. Co.* (U. S.) 60 Fed. 411, 413, 414, 9 C. C. A. 42.

#### **Product distinguished.**

Process and product are quite distinct matters, even where both are created by the same inventive act. *Durand v. Green* (U. S.) 60 Fed. 392, 396.

#### **PROCESS (In Practice).**

See "Abuse of Process"; "Civil Process"; "Compulsory Process"; "Executory Process"; "Final Process"; "Irregular Process"; "Judicial Process"; "Legal Process"; "Mesne Process"; "Original Process"; "Returnable Process"; "Summary Process"; "Trustee Process"; "Verbal Process"; "Void Process."

Any process, see "Any."

"Process" is synonymous with writ, all writs being called process. *Carey v. German American Ins. Co.*, 54 N. W. 18, 20, 84 Wis. 80, 20 L. R. A. 267, 36 Am. St. Rep. 907.

The common-law definition of "process" is a writ issued by some court or officer exercising judicial powers. *Tweed v. Metcalf*, 4 Mich. 578, 579, 588.

The term "process," as a legal term, has a very comprehensive signification. One of its definitions is that it is a writ, warrant, subpoena, or other formal writing issued by authority of law. *Savage v. Oliver*, 36 S. E. 54, 56, 100 Ga. 636.

The definition of "process" given by Lord Coke comprehends any lawful warrant, authority, or proceeding by which a man may be arrested. He says: "Process of law is twofold, namely, by the King's writ, or by due proceeding and warrant, either in deed or in law, without writ." *People v. Nevins* (N. Y.) 1 Hill, 154, 169, 170; *State v. Shaw*, 50 Atl. 863, 869, 73 Vt. 149.

Jacobs in his *Law Dictionary* says: "Process" has two qualifications: First, it is largely taken for all the proceedings in any



action or prosecution, real or personal, civil or criminal, from the beginning to the end; secondly, that is termed the "process" by which a man is called into any temporal court, because the beginning or principal part thereof, by which the rest is directed or taken. Strictly, it is the proceeding after the original, before judgment. A policy of fire insurance contained the condition that if the property shall be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree or voluntary transfer or convenience, then and in every such case the policy shall be void. The term "legal process," as used in the policy, means what is known as a writ; and, as attachment or execution on the writs are usually employed to effect a change of title to property, they are or are amongst the processes contemplated by the policy. The words "legal process" mean all the proceedings in an action or proceeding. They would necessarily embrace the decree, which ordinarily includes the proceedings. *Perry v. Lorillard Fire Ins. Co.* (N. Y.) 6 Lans. 201, 204. See, also, *Tipton v. Cordova*, 1 N. M. 383, 385.

"Process" is so-called because it proceeds or goes out upon former matter, either original or judicial. Citing *Jac. Law Dict.* It assumes former matter. The process may be criminal, where the former matter whence it proceeds or goes out is criminal. *State v. McCann*, 67 Me. 872, 874.

Baron Comyn says that process, in a large acceptance, comprehends the whole proceedings after the original and before judgment; but generally it imports the writs which issue out of any court to bring the party to answer, or for doing execution, and all process out of the King's courts ought to be in the name of the King. It is called "process" because it proceeds or goes out upon former matter, either original or judicial. *Gilmer v. Bird*, 15 Fla. 410, 421.

"Process" is so denominated because it proceeds or issues forth in order to bring the defendant into court to answer the charge preferred, and signifies the writ or judicial means by which he is brought to answer. *City of Davenport v. Bird*, 34 Iowa, 524, 527; *Fitzpatrick v. City of New Orleans*, 27 La. Ann. 457.

"The word 'process' has in law a well-established legal meaning in its application to the commencement of the proceedings. It is used to designate the writ or other judicial means by which a defendant is brought into court to answer a charge, though there may afterward be issued, in the progress of the case, interlocutory and final processes." *City of Philadelphia v. Campbell* (Pa.) 11 Phila. 163, 164.

"'Process' is defined by Blackstone to be the means of compelling a defendant to

appear in court, and although literally, perhaps, it can only be strictly characterized as the initial step in a case, it has come to be indicated by the two terms, 'mesne' and 'final,' which are used to designate the two stages in the progress of a cause in which it is employed. Process is always directed to some officer to be executed, and is strictly the mandate of the court to the officer, commanding him to do certain things or perform certain services within his official cognizance, and it is this character of it and the injunctions it contains that makes his return evidence." *Utica City Bank v. Buell* (N. Y.) 9 Abb. Prac. 335, 390, 17 How. Prac. 498, 501.

Process is the means whereby a court compels the appearance of a defendant before it or a compliance with its demands. *Neal-Millard Co. v. Owens*, 42 S. E. 266, 267, 115 Ga. 959.

The means used to acquire jurisdiction of defendants in an action, whether by writ or notice, may properly be denominated a "process." *Wilson v. St. Louis & S. F. Ry. Co.*, 18 S. W. 286, 293, 108 Mo. 588, 32 Am. St. Rep. 624.

Const. art. 6, § 4, provides that the style of all process shall be "The State of Minnesota." The word "process," as used here, means all such writs, whether original, mesne, or final, by which the authority of the state is exerted in obtaining jurisdiction over the person or property of the citizen, and which requires the exercise of a sovereign power for their enforcement. *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55, 60 (Gil. 44, 49).

The legal meaning of the word "process" varies according to the different context, subject-matter, and spirit of the statute in which it occurs. The process of the court, in its narrowest sense, means the writs and mandates of the court, under the seal thereof. In its largest sense, process is equivalent to procedure, including all the steps and proceedings in a cause from its commencement to its conclusion. The word "process," as used in Rev. St. § 911 [U. S. Comp. St. 1901, p. 683], providing that all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof, is used in the narrow sense, to mean the writs and mandates of the court, under the seal thereof. *United States v. Murphy* (U. S.) 82 Fed. 893, 899.

The process that shall protect an officer must, to use the customary legal expression, be fair on its face. The word "process" is made use of in this rule in a very comprehensive sense, and will include any writ, warrant, order, or other authority which purports to empower a ministerial officer to ar-

rest a person, or to seize or enter upon the property of an individual, or to do any act in respect to such person or property which, if not justified, would constitute a trespass. *Witherspoon v. State* (Tex.) 61 S. W. 396, 398 (quoting *Cooley, Torts* [2d Ed.] pp. 538, 539, 560).

Acts 1878, c. 106, § 30, providing for the appointment by every foreign insurance company doing business in the state of an agent on whom process of law can be served, provides further that the word "process," as there used, shall be held to include any writ, summons, or order whereby any action, suit, or proceeding shall be commenced, or which shall be issued in or upon any action, suit, or proceeding by any court, officer, or magistrate. *Oland v. Agricultural Ins. Co. of Watertown*, 14 Atl. 669, 670, 69 Md. 248. See, also, *Laws Pa.* 1873, p. 27, § 13; *Ex parte Schollenberger*, 96 U. S. 369, 374, 24 L. Ed. 853; *How. Ann. St. Mich.* § 4368; *German-American Ins. Co. v. Chippewa Circuit Judge*, 63 N. W. 531, 532, 105 Mich. 566.

"Writs" and "processes" of the courts may be divided into two classes: (1) Those which point out specifically the property or thing to be seized; (2) those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken. *Phillips v. Spotts*, 15 N. W. 332, 334, 14 Neb. 139.

#### As all proceedings.

The term "process," as commonly applied, indicates that proceeding by which a party is called into court. But it has a more enlarged signification, and includes all proceedings of the court, from the beginning to the end of a suit, and is defined in the books as "processus; a procedendo ab initio usque ad finem"; and, in this view, all proceedings which may be had to bring testimony into court, whether *viva voce* or in writing, may be considered to be within the process of the court. *Rich v. Trimble* (Vt.) 2 Tyler, 349, 350.

"Process," in one sense, is the method to be pursued by law to compel a compliance with the original writ, by giving the party notice to obey it; a warning to appear in court at the return of the original writ. Under the act entitled "An act to regulate processes in the courts of the United States," providing that "the forms of writs and modes of process in the circuit and district courts in suits at common law shall be the same in each state, respectively, as are now used or allowed in the Supreme Courts of the same," the word "process" is to be received in its broadest and most extensive sense. It is to be taken for all proceedings in any action, from the beginning

to the end. Mode of process includes modes of service, and whatever is necessary to complete the service of a writ returnable to a state court is by that statute made necessary to complete the service of a writ returnable to a District or Circuit Court of the United States. A mittimus is as necessary in one case as the other. *Palmer v. Allen* (Conn.) 5 Day, 193, 199.

"Process," in a large acceptation, is nearly synonymous with "proceedings," and means the entire proceedings in an action, from the beginning to the end. In a stricter sense, it is applied to the several judicial writs issued in an action. *Hanna v. Russell*, 12 Minn. 80, 86 (Gil. 43, 45).

The word "process," as generally used, is understood to mean a writ, warrant, subpoena, or other formal writing issued by authority of law; but it also refers to the means of accomplishing an end, including judicial proceedings. *Gollobitsch v. Rainbow*, 51 N. W. 48, 49, 84 Iowa, 567.

Under a statute providing that copies of a process shall be returned to the clerk's office, the word "process" does not mean simply the warrant, but is used in the larger sense of "proceedings." *Marvin v. United States* (U. S.) 44 Fed. 405, 411.

1 Stat. 79, relative to removal of causes, provides that the defendant must not only file a petition for removal, but offer good surety for his entering in the court copies of the process against him. Held, that the word "process" is equivalent in meaning to the word "proceedings," and does not include merely the summons or original writ. *McBratney v. Usher* (U. S.) 15 Fed. Cas. 1215, 1216.

The word "process" does not necessarily mean "writ" or "summons," but is often used in the sense of "proceedings." *Gen. St.* 1894, § 4240, provided that whenever any debtor should have become insolvent, or his property should have been levied on by virtue of any attachment, execution, or legal process, he might make an assignment of all his unexempt property, which, if made within 10 days after the levy, should operate to vacate every garnishment and levy then pending. Held, that the word "process" did not necessarily mean a writ or summons, but included supplemental proceedings. *Wolf v. McKinley*, 68 N. W. 2, 3, 65 Minn. 156.

The word "process," in *Rev. St.* § 1014 [U. S. Comp. St. 1901, p. 716], providing that, for any crime or offense against the United States, the offender may, by any commissioner of the Circuit Court to take bail, or other magistrate of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case

may be, for trial before such court of the United States, etc., and that copies of the process shall be returned as speedily as may be into the clerk's office of such court, etc., must, *ex necessitate*, mean any writ issued by the commissioner for service, and includes the warrant, the subpoena, and the mittimus writs, temporary and final, and the recognizance or bonds of the defendant and witnesses in the case are equally within the very terms of this statute. *Taylor v. United States* (U. S.) 45 Fed. 531, 537.

The term "process," as commonly applied, intends that proceeding by which a party is called into court, but it has a more enlarged signification, and covers all the proceedings in a court, from the beginning to the end of the suit; and, in this view, all proceedings which may be had to bring testimony into court, whether *viva voce* or in writing, may be considered the process of the court. *Rich v. Trimble* (Vt.) 2 Tyler, 349, 350.

The word "process" signifies a writ or summons issued in the course of judicial proceedings. Pen. Code Ariz. 1901, par. 7, subd. 15; Sand. & H. Dig. Ark. 1893, § 7220; Code Civ. Proc. Cal. 1903, § 17, subd. 6; Pen. Code Cal. 1903, § 7, subd. 15; Pol. Code Cal. 1903, § 17, subd. 6; Pol. Code Mont. 1895, § 16, subd. 6; Code Civ. Proc. Mont. 1895, § 3463, subd. 5; Pen. Code Mont. 1895, § 7, subd. 15; Rev. St. Utah 1898, § 2498; Rev. Codes N. D. 1890, § 5152; Code Civ. Proc. S. D. 1903, § 8; Civ. Code Ky. § 732, subsec. 26; *Epperson v. Graves*, 3 Ky. Law Rep. 527, 528.

"Process," as used in the article relating to the sheriff, includes all writs, warrants, summons, and orders of courts of justices or judicial officers. Pol. Code Cal. 1903, § 4175; Rev. St. Utah 1898, § 574; Pol. Code Mont. 1895, § 4380; Pol. Code Idaho 1901, § 1644.

The word "process" shall include any writ, declaration, summons or order whereby any action, writ, or proceeding shall be commenced, or which shall be issued in or upon any action, suit, or proceeding authorized by law in this state. Gen. St. Minn. 1894, §§ 2865, 3190; Ann. Codes & St. Or. 1901, § 5169; Ballinger's Ann. Codes & St. Wash. 1897, § 4405.

The word "process," as used in the act relative to the service of process upon insurance companies, shall include any writ, declaration, summons, order, or subpoena whereby any action, suit, or proceeding at law or in chancery shall be commenced against any such insurance company, whether such suit or proceeding is connected with the insurance business of such company in the state or not, and whether such suit or proceeding is founded on any credit or demand connected with such business of insurance, or upon matters

growing out of such business, or whether it is founded or based on any other claim or demand, whatever may be the nature of such claim or demand. *Comp. Laws Mich.* 1897, § 10,021.

#### **Proceeding synonymous.**

The word "process," as used in section 12 of the judiciary act, which provides that if a suit be commenced in any state court, and the nonresident defendant petitions for a removal, and offers surety for entering in the federal court copies of said process against him, the state court shall proceed no further with the cause, etc., is equivalent in meaning to the word "proceeding." *McBratney v. Usher* (U. S.) 15 Fed. Cas. 1215, 1216.

#### **Attachment.**

A writ of attachment has all the requisites of any writ or process named in the statute, in which all writs are called "processes." A writ is a process, and a process is a writ, interchangeably. So a writ of attachment is a process, within the meaning of the condition of a fire insurance policy providing that, if any change takes place in the title or possession of the property by legal process, then the policy shall be void. *Carey v. German-American Ins. Co.*, 54 N. W. 18, 19, 84 Wis. 80, 20 L. R. A. 267, 36 Am. St. Rep. 907.

"Process," within the meaning of Act April 4, 1873, as amended by Act June 20, 1883, providing that no foreign insurance company shall do business in the state without filing a stipulation that any legal process on the company may be served on its agent, and providing that the term "process" shall include any and every writ, includes an attachment execution. *Kennedy v. Agricultural Ins. Co.*, 30 Atl. 724, 725, 165 Pa. 179.

#### **Bond or recognizance.**

The bond in a replevin suit is not a part of the process in the suit, but is collateral thereto, and hence a defective bond cannot be amended under a statute permitting amendments of process. *Simpson v. Wilcox*, 25 Atl. 391, 18 R. I. 40.

The word "process," as used in Rev. St. § 602 [U. S. Comp. St. 1901, p. 484], providing that, when the office of judge of any district court is vacant, all processes, pleadings, and proceedings pending shall be continued of course until the next stated term after the appointment and qualification of his successor, is used neither in its narrowest nor its broadest sense, but includes, among other things, the means provided by law for compelling one arrested and held on a criminal charge to appear in court, there to be judicially dealt with. Therefore a recognizance taken by a United States commissioner for appearance and answer in a crim-

final case is process, within the meaning of the section. *United States v. Murphy* (U. S.) 82 Fed. 893, 899.

"Process," as used in Revenue Act Cong. June 30, 1864, Schedule B (13 Stat. 301), requiring a stamp duty on process on appeal from justices' courts, does not include affidavits, recognizances, or justices' returns. *Dorman v. Bayley*, 10 Minn. 383, 384 (Gil. 306).

Under Revenue Act Cong. June 30, 1864, Schedule B (13 Stat. 301), providing that a 50-cent revenue stamp shall be placed upon writs or other process on appeal from justices' courts, the bond required by statute on appeal from the judgment of a justice is neither a writ nor a process. *Smith v. Waters*, 25 Ind. 397, 398.

#### Citation.

See "Citation."

#### Commission to examine witnesses.

The term "process" does not include a commission to examine witnesses. *Duncan v. Hill*, 19 N. C. 291, 292.

#### Declaration in ejectment.

A declaration in ejectment is not a process, within the meaning of that phrase as implied in Judiciary Act 1847, § 57, declaring that every court of record shall always be open for the issuance and return of process. *Knapp v. Pult* (N. Y.) 3 How. Prac. 53, 55.

#### Decree of sale.

An order of court directing a sale of the property of the judgment debtor is legal process, within the meaning of a statute by which the jurisdiction of the state over a certain piece of land therein described was ceded to the United States, with a proviso that such action should not interfere with the service or execution of any legal process, although such order is not a "writ" or "process" within the limited signification of these words as used in the Constitution, prescribing the style of writs and processes, and requiring that they shall run in the name of the state. *Sauer v. Steinbauer*, 14 Wis. 70, 76, 79.

The word "process," as used in Comp. St. art. 1, c. 18, § 123, which provides that sheriffs and their deputies may execute any process which may be in their hands at the expiration of their office, includes an order of sale in a foreclosure proceeding, which has been regularly issued and placed in the hands of the sheriff of the county in which it was issued during his term of office; and therefore he may complete the execution of such order after the expiration of his term. *National Black River Bank v. Wall* (Neb.) 91 N. W. 525.

The term "process," as found in Code, c. 106, § 3767, declaring that a summary mo-

tion against any officer of court must be made in the circuit court of the county in which he was acting at the time of his default, or in the court to which the process was returnable, was used in its ordinary legal sense, which renders it synonymous with "writs." Decrees of sale are not process, and moneys received by the register merely as the custodian of sale proceeds belonging in court are not moneys collected under process. *Parks v. Bryant*, 31 South. 593, 132 Ala. 224.

#### Execution.

The term "process" includes any and every writ, rule, order, notice, or decree, including any process of execution, that may issue in or upon any action, suit, or legal proceedings. *National Fire Ins. Co. v. Chambers*, 32 Atl. 663, 666, 53 N. J. Eq. (8 Dick.) 468.

It cannot be questioned but that an execution issued on the foreclosure of a land lord's lien is embraced in the general definition of process. *Savage v. Oliver*, 36 S. E. 54, 56, 110 Ga. 636.

The term "process," in Act Cong. Jan. 6, 1800, extends to executions, and is not restricted to mesne process. The term is broad enough to embrace all process upon which a party is imprisoned, and there is no reason why it should not be taken in this general sense. *United States v. Noah* (U. S.) 27 Fed. Cas. 176, 177.

The word "process," as used in Pub. St. c. 27, § 14, providing that a constable may, within his town, serve any written or other process in a personal action, includes an execution. *Lewis v. Morton*, 34 N. E. 544, 159 Mass. 432.

Under Code Prac. § 667, providing that every process in an action shall be directed to the sheriff of the county, etc., it is held that an execution is "process," within the meaning of the statute. *Gowdy v. Sanders*, 11 S. W. 82, 88 Ky. 346; *Johnson v. Elkins*, 13 S. W. 448, 449, 90 Ky. 163, 8 L. R. A. 552.

Acts 1777, c. 8, § 5, providing a penalty against a sheriff if he fails to execute all writs and other process, should be construed to include executions as well as original writs, for the language includes every description of process which by law could come into the hands of the sheriff to be executed. *Harman v. Childress*, 11 Tenn. (3 Yerg.) 327, 329.

#### Fee bill.

The term "process," in Const. art. 4, § 7, providing that all process, writs, and other proceedings shall run in the name of the people of the state of Illinois, includes a fee bill. *Reddick v. Cloud's Adm'rs*, 7 Ill. (2 Gilman) 670, 678.

**Fieri facias.**

A *fi. fa.* is included in the generic word "process," as used in Civ. Code, § 687, subsec. 1, reading, "Every process in an action or proceeding shall be directed to the sheriff of the county," etc. *Epperson v. Graves*, 3 Ky. Law Rep. 527, 528.

**Garnishment summons.**

The word "process" is very broad, and, as used in an act authorizing the service of process in attachment, on an agent of a foreign corporation in the state of New Jersey, it cannot be considered as synonymous only with the word "summons." A summons is, of course, a process, but many kinds of process are not summonses, and the word, in the attachment act, means any kind of a legal writ to which a corporation, under our laws, may at any time and in any way be subject; and among these is the liability to become a garnishee by the proper service of a process of attachment in a suit between other parties, though it is neither the plaintiff nor the defendant in the original suit. *Franklyn v. Taylor Hydraulic Air Compressing Co.*, 52 Atl. 714, 716, 68 N. J. Law, 113.

The word "process," as used in the practice act, means all process. A garnishee summons is a process, within the terms of the act. *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 256, 40 Am. Rep. 581.

The word "process," in Acts 1832, c. 306, § 5, is sufficiently comprehensive to apply to the service of writs of attachment on a corporation as garnishee, and any corporation chartered by the laws of Maryland may be brought into the court of defendant in the mode pointed out by that section. *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 210, 79 Am. Dec. 646.

How. Ann. St. § 4368, provides that the word "process," as used in the act regulating service thereof on foreign insurance companies, shall include any writ, declaration, summons, order, or subpoena in an action, suit, or proceeding at law or in chancery. Held, that a summons in garnishment is process, within the statute. *German-American Ins. Co. v. Chippewa Circuit Judge*, 63 N. W. 531, 532, 105 Mich. 566.

A garnishee summons is a process, within Const. art. 6, § 4, providing that the style of all process shall be, "The State of Minnesota." *Hinkly v. St. Anthony Falls Water Power Co.*, 9 Minn. 55, 60 (Gil. 44, 49).

The term "process," within the meaning of the statute prescribing the manner in which process shall issue from the federal courts, includes the summons in garnishment proceedings. *Middleton Paper Co. v. Rock River Paper Co.* (U. S.) 19 Fed. 252, 253.

Rev. St. § 915 [U. S. Comp. St. 1901, p. 684], gives plaintiff, in common-law causes in the United States Circuit Court, remedies by attachment or other process against defendant's property, similar to those provided by the state statutes. Code Iowa, § 2962, provides that the clerk shall issue the writ of attachment. Section 2967 provides that property of defendant held by a third person may be attached by giving the latter notice of attachment. Section 2975, as amended by Laws 18th Gen. Assem. c. 58, provides that garnishment is effected by informing the supposed debtor that he is attached as garnishee, and leaving written notice not to pay any sum due or deliver the property to defendant, etc. There is no provision in the Revised Statutes or the Iowa Code requiring either of such notices to proceed from the clerk. Held, that a notice to the garnishee is not a process, within Rev. St. § 911 [U. S. Comp. St. 1901, p. 683], relating to process, and that such notice in actions in the United States Circuit Court in Iowa is properly signed by the marshal, and need not bear the seal of such court, or the teste of the Chief Justice of the United States. *Wile v. Cohn* (U. S.) 63 Fed. 759, 764.

**Information, indictment, or motion.**

An information filed before a police magistrate accusing an individual of violation of a city ordinance is not a process, and hence need not be in the name of the state of Iowa, as process is required to be by Const. art. 5, § 8. *City of Davenport v. Bird*, 34 Iowa, 524, 527.

Motions made by the Attorney General, copies of indictments, etc., are not process, within the meaning of a statute providing additional fees to a clerk of court for issuing any process. *Fitzpatrick v. City of New Orleans*, 27 La. Ann. 457.

**Lists of jurors.**

A list of grand jurors and alternates, petit jurors and alternates, selected by the county commissioners and furnished the sheriff as provided by Gantt's Dig. § 3677 et seq., would be a process, and properly—to use a familiar legal designation—a writ of *venire facias*, entitling the sheriff to the fees provided in service of process. *Williams v. Hempstead County*, 39 Ark. 176, 179.

**Notice.**

See, also, "Notice."

The word "process," as used in the act changing the time of holding a term of court, and providing that all process returnable to the former term shall be deemed returnable at the time newly designated, includes a guardian's notice of application to sell his ward's land. *Nichols v. Mitchell*, 70 Ill. 258, 260.

It is entirely immaterial what is the means or method pointed out by statute or used to acquire jurisdiction of defendants—whether by writ or notice; it is properly denominated “process.” *Wilson v. St. Louis & S. F. Ry. Co.*, 18 S. W. 286, 293, 108 Mo. 588, 32 Am. St. Rep. 624.

A subpoena or notice issued on the filing of a bill in equity to enjoin an action at law is not regarded as an original process or proceeding, within the meaning of Act March 3, 1875, § 1, providing that no civil suit shall be brought by any original process or proceeding in any other district than that wherein defendant is an inhabitant, etc.; nor is it within Sup. Ct. Rule 13 in Equity, providing that service of all subpoenas shall be by delivery to defendant personally, or leaving a copy at his usual place of abode with some adult; the practical construction of the rule having always been not to extend it to subpoenas on bills for injunctions. *Cortes Co. v. Thannhauser* (U. S.) 9 Fed. 226, 228.

The notice provided by the Code is not a “process,” as contemplated by the Constitution, and it need not be in the style of the state of Iowa. *Nichols v. Burlington & Louisa County Plank Road Co.* (Iowa) 4 G. Greene, 42, 43.

#### Notice of injury.

“Process,” as used in St. 1884, c. 830, providing for the service of lawful process in any action or proceeding against a foreign corporation, means process emanating from a court, or by the authority of a court, and cannot be understood to refer to such acts or notices in pais between private parties as derive no authority from a court, but simply serve to create a right of action. Hence the notice of the time, place, and cause of injury to an employé required to be given to the employer as a condition precedent to the right of action is not within the meaning of the term “process.” *Healey v. Geo. F. Blake Mfg. Co.*, 62 N. E. 270, 271, 180 Mass. 270.

#### Order for appearance of absent defendant.

The word “subpoena” or “process,” in a rule that the service of all process, mesne and final, shall be made by the marshal of the district, or by his deputy, or by some other person especially appointed by the court for that purpose, does not include an order for the appearance of an absent defendant. *Forsyth v. Pierson* (U. S.) 9 Fed. 801-803.

#### Papers on appeal.

Where, on an appeal from justice court, no papers are required except the affidavit and recognizance given by appellant as a condition precedent to an allowance of the ap-

peal, and the return of the appeal papers by the justice, there is no process, within the meaning of the internal revenue law of 1864, requiring a stamp duty of 50 cents on “writs or other process on appeal from justice court or other courts of inferior jurisdiction to a court of record.” *Dorman v. Bayley*, 10 Minn. 383, 384 (Gil. 306).

#### Petition.

Process is the means whereby a court compels the appearance of a defendant before it, or a compliance with its demands. Where no process is attached to a petition, and the process is not waived by the defendant, service of the petition upon him does not give the court jurisdiction to render judgment against him; and, where a defendant in a pending suit is served with a process in which an entirely different person is named as defendant, such process is, as to the person served therewith, no process at all. *Neal-Millard Co. v. Owens*, 42 S. E. 266, 267, 115 Ga. 959.

A petition in probate asking that the probate of a will be set aside did not come within the meaning of the word “process” as used in the act of Congress (13 Stat. 110) which required a stamp on writs or other original process by which a suit was commenced. *Sowell v. Sowell's Adm'r*, 40 Ala. 243, 246.

#### Proceeding to set off judgments.

Under section 5173, Mansf. Dig., providing that judgments for the recovery of money may be set off against each other by an order, upon motion, when both judgments are in the same court, or in an action by equitable proceedings in the court in which the judgment sought to be annulled by the set-off was rendered, a proceeding to set off one judgment against another is a “process of court,” within the meaning of those words as used in Const. art. 9, § 2; and, where it appears that the judgment sought to be annulled is a part of the exemption to which the owner is entitled under that section of the Constitution, the set-off will not be allowed. *Atkinson v. Pittman*, 2 S. W. 114, 115, 47 Ark. 404.

#### As process in ordinary actions.

The term “process,” as used in Comp. Laws, § 1903, requiring all original process in any suit to be returned on the first day after its issuance, applies only to ordinary actions commenced by petition, and not to the extraordinary remedies of habeas corpus, quo warranto, mandamus, etc. *Territory v. Ashenfelter*, 12 Pac. 879, 885, 4 N. M. (Johns.) 85.

#### Precept synonymous.

See “Precept.”

### Registry of judgment.

The term "process," as used in 12 & 13 Vict. c. 106, § 211, providing that any trader unable to meet his engagements with his creditors may present a petition setting forth the true cause of such inability, and praying that his person and property may be protected from all process until further order, cannot be construed to include the registry of a judgment. "Process" means a writ of execution. *Fluester v. McClelland*, 8 C. B. (N. S.) 357, 360.

### Rule to show cause.

A rule to show cause is not a process, within the meaning of St. 1782, c. 9, § 3, requiring all process to be under sale of the court. *Taylor v. Henry*, 19 Mass. (2 Pick.) 397, 398.

Within the meaning of Code, § 361, which requires the sheriff to execute and return the process and orders of any court of record in the state, a rule nisi issued in an action to foreclose a mortgage is judicial process. It commands the defendant to appear at the next term and show cause, etc., and can only be served by the sheriff, and service of such an order by a private citizen was held of no effect. *Falvey v. Jones*, 4 S. E. 264, 80 Ga. 130.

### Scire facias.

The term "process," in Act April 18, 1861, staying civil process against any person in the service of the state or of the United States for the term of such service and 30 days thereafter, includes a scire facias upon a mortgage. *Drexel v. Miller*, 49 Pa. (13 Wright) 246, 247.

"Process," within the meaning of Const. art. 6, § 2, providing that the style of all process shall be, "The state of Florida," includes a scire facias ad audiendum errores. *Weiskoph v. Dibble*, 18 Fla. 22, 23.

### Summons.

A summons issued and signed by plaintiff's attorney under a statute authorizing the commencement of an action in that manner is not process, within the meaning of the constitutional provision requiring all process to run in the name of the people. *Comet Consol. Min. Co. v. Frost*, 25 Pac. 506, 507, 15 Colo. 310. See, also, *Bailey v. Williams*, 6 Or. 71, 73; *Hanna v. Russell*, 12 Minn. 80 (Gil. 43, 45); *Brooks v. Nevada Nickel Syndicate*, 53 Pac. 597, 599, 24 Nev. 311; *Porter v. Vandercook*, 11 Wis. 70, 71; *Gilmer v. Bird*, 15 Fla. 410, 421; *Sherman v. Gundlach*, 33 N. W. 549, 550, 37 Minn. 118.

Process, within the meaning of the statute authorizing the amendment of process, does not include a summons. *Dwight v. Merritt* (U. S.) 4 Fed. 614-616.

A summons in a civil action is process, within the meaning of the rule that a resident of another state or county, who has in good faith gone into this state as a witness to give evidence in a cause here, is exempt from service of process for the commencement of a civil action against him. *Sherman v. Gundlach*, 33 N. W. 549, 550, 37 Minn. 118.

A summons is a process issued in the course of judicial proceedings, within the Code of Civil Procedure, defining a process as a writ or summons issued in the course of judicial proceedings, and therefore a summons cannot be served on a Sunday; Comp. Laws, § 6246, prohibiting the service "of legal process of any description whatever" on Sunday. *McLaughlin v. Wheeler*, 50 N. W. 834, 835, 2 S. D. 379.

The word "process" means any writ issued by the court against the defendant, commanding him to appear, etc. It includes a summons from a justice court, as well as the process attached to the declaration by the clerk in a case brought in a superior court. *Hyfield v. Sims*, 16 S. E. 990, 90 Ga. 808.

The term "process," within the meaning of Laws 1857, c. 210, § 31, providing that the process of the city court of Dubuque may be served by the marshal of said city or any sheriff, includes original notices in actions commenced in the Dubuque city court. *Tully v. Beaubien*, 10 Iowa, 187.

A summons issued in compliance with Rev. St. c. 124, which does not require that it shall be tested in the name of the chief justice or presiding judge of the court, nor that it shall be subscribed by the clerk, and which expressly dispenses with all affixing of a seal, cannot be regarded as a process issuing out of the courts of record, within the meaning of chapter 136, requiring such process to be tested in the name of the judge and subscribed by the clerk. *Johnston v. Hamburger*, 13 Wis. 175, 177.

### Warrant for arrest.

In criminal cases, where a person is brought into court for trial, the term "process" is used to designate the warrant which is issued for his arrest, whether before or after indictment found. It is properly called, in this and all like instances, "process," because it is the means or proceeding which in practice issues to secure the appearance and the control of the defendant in court. *City of Philadelphia v. Campbell* (Pa.) 11 Phila. 163, 164.

The term "process" is generic, and is used in such sense in Port Jervis Charter, § 86, providing that police constables shall execute all process issued by the police justice, and therefore a warrant of such justice

should be served by such police constables. *Gorr v. Village of Port Jervis*, 68 N. Y. Supp. 15, 16, 57 App. Div. 122.

In criminal cases, that which is called a "warrant" before the filing of the bill is termed "process" when issued after the indictment has been found by the grand jury. The office of process is to bring the defendant into court to answer the charge or information. *City of Davenport v. Bird*, 34 Iowa, 524, 527.

#### **Warrant of commitment.**

The word "process" usually signifies a writ or warrant, but it also means a good deal more. It means all the proceedings in the cause after the first step. In that sense, it would comprehend a rule or order. But taken more strictly, there is no doubt that a rule or an order to commit, made in proceedings to punish for contempt, as plainly comes within the meaning of the word "process" as a precept or a *capias* ad respondendum. *People v. Nevins* (N. Y.) 1 Hill, 154, 169.

The word "process," as used in Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], allowing for travel in going only to serve any process, warrant, attachment, or other writ, including writs of *subpoena* in civil or criminal cases, six cents a mile, to be computed from the place where the process was returned to the place of service, refers to process for bringing persons or property within the jurisdiction of the court, and not to warrants of commitment, by virtue of which criminals are transported from the court to the place of commitment. *United States v. Tanner*, 13 Sup. Ct. 436, 437, 147 U. S. 661, 37 L. Ed. 321.

#### **Warrant to collect taxes.**

The term "process" as used in the Constitution, relative to judicial proceedings, does not include a warrant to collect taxes, and therefore it is not essential to the validity of such a warrant that it shall run in the name of the people. *Haley v. Elliott*, 26 Pac. 559, 560, 16 Colo. 159; *Sprague v. Birchard*, 1 Wis. 457, 469, 60 Am. Dec. 393.

The common-law definition of "process" is a writ issued by some court or officer exercising judicial powers, and, a supervisor having no judicial powers, his warrant to the township treasurer, authorizing him to collect taxes, is not process, and need not run in the name of the people or the state. *Tweed v. Metcalf*, 4 Mich. 578, 579, 588.

The term "process," as used in Rev. St. Mo. 1889, § 7479, limiting the right to bring an action of replevin to cases where property has not been seized under any process, execution, or attachment against the prop-

erty of plaintiff, includes a taxbook authenticated by the seal of the court, under which a tax collector is authorized by statute to seize and sell property to enforce a collection of taxes. *Missouri v. Spiva* (U. S.) 42 Fed. 435, 437.

The precept under which the sheriff makes sale of lands for nonpayment of taxes is not process, and hence need not run in the name of the people, as process must, under the Constitution. *Scarritt v. Chapman*, 11 Ill. (1 Peck) 443, 444; *Curry v. Hinman*, 11 Ill. (1 Peck) 420, 423.

#### **Writ of assistance.**

A writ of assistance on a *fi. fa.* for costs is civil process within the meaning of the stay law. *Clark v. Martin* (Pa.) 3 Grant, Cas. 393, 394.

#### **Writ of inquiry.**

A writ of inquiry, which is but a warrant to the sheriff to assess the damage, is no more process than a rule for assessment of damages by the clerk. *Cook v. Tuttle* (N. Y.) 2 Wend. 289, 290.

#### **Written process.**

The word "process," as used in a statute punishing the offense of resisting the sheriff while attempting to serve process, is used in its extended or unlimited sense, and is equivalent to the sheriff's official authority, and does not mean that the sheriff shall be protected only while he is serving written process alone. It would be a strange law that would require an officer, under sanction of an oath and the obligations of an official bond, to perform certain duties without any written process, and yet leave him with no protection other than that which is common to every citizen. *People v. Nash*, 1 Idaho, 206, 209.

The officer who obeys the mandate of the court to call into the box persons to act as jurors is enforcing process of the court, within the meaning of Code, § 350, providing that service of process in actions where the sheriff is disqualified to act officially shall be by the coroner, "whether he summons members of the regular panel by means of a venire, or presents talesmen from the body of the county." *Gollobitsch v. Ranibow*, 51 N. W. 48, 49, 84 Iowa, 567.

#### **PROCESS BUTTER.**

The term "process butter," as used in an act relating to oleomargarine, is defined to mean butter which has been subjected to any process by which it is melted, clarified, or refined, and made to resemble genuine butter, always excepting adulterated butter. U. S. Comp. St. Supp. 1903, p. 267.



**PROCESS OF LAW.**

See "Due Process of Law"; "Ordinary Process of Law"; "Under Process of Law."

**PROCHEIN AMI.**

See "Next Friend."

**PROCLAMATION.**

"The act of proclaiming; a declaration or notice by public outcry, such as is given by criers at the opening or adjourning of courts," or "a public notice in writing given by a state or city official of some act done by the government, or to be done by the people." *Mackin v. State*, 62 Md. 244, 247 (quoting *Webst. Dict.*).

"In English law the instrument is thus defined: 'Proclamation (proclamatio) is a notice publicly given of anything whereof the King thinks fit to advise his subjects.'" *Lapeyre v. United States*, 84 U. S. (17 Wall.) 191, 195, 21 L. Ed. 606.

To give it a definition corresponding to our political system, it is a notice publicly given of anything whereof the executive thinks fit to inform and notify the public. It is a publication by authority—an official notice given to the public. *Carter v. Territory*, 1 N. M. 317, 336.

The proclamation by the president is his official, public announcement of an order. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained. *Wood v. Beach*, 15 Sup. Ct. 410, 411, 156 U. S. 548, 39 L. Ed. 528.

**PROCURADOR DEL COMUN.**

The "procurador del comun" was the officer appointed to make inquiry, put a petitioner in possession of land prayed for, and execute the Lieutenant Governor's orders. *Le Compte v. United States*, 52 U. S. (11 How.) 115, 126, 13 L. Ed. 627.

**PROCURATION.**

Mandate is a consensual contract by which one of the parties confides the carrying on or execution of one or more matters of business to the other, who takes them in his charge. Mandate has also the name of procuration; but the word "mandate" is more general, and comprehends every power given to another, in whatsoever mode it be, whilst procuration supposes a power given by writing. *Williams v. Conger*, 8 Sup. Ct. 933, 946, 125 U. S. 397, 31 L. Ed. 778.

A mandate, procuration, or letter of attorney is an act by which one person gives power to another to transact for him, and in his name, one or several affairs. *Civ. Code La.* 1900, art. 2985.

**PROCURE.**

The word "procure" means to acquire for one's self; to cause; and, as used in an allegation in an answer that plaintiff procured to be issued to her a policy of insurance, will be construed as equivalent to an allegation to deliver to, and acceptance of such policy by, plaintiff. *Sisk v. Citizens' Ins. Co.*, 45 N. E. 804, 805, 16 Ind. App. 565.

The word "procure," as used in the statutes making it an offense to procure a female to have illicit connection with any man, does not cover the offense of seduction. The natural meaning of the word "procure" is that the illicit intercourse is with a person other than the one who commits the offense of procuring, etc. *People v. Roderigas*, 49 Cal. 9, 11.

"Procure," as used in an act punishing the procuring of a bribe, means obtaining it from others. *State v. Harker (Del.)* 4 Har. 559-561.

Code, § 3665, excepts the application of the provisions of the statute of frauds when the article of personal property sold is not, at the time of the contract, owned by the vendor and ready for delivery, but labor, skill, or money is necessary to be expended in procuring the same. Held, that the word "procuring" means obtaining; bringing into possession. *Mighell v. Dougherty*, 53 N. W. 402, 403, 86 Iowa, 480, 17 L. R. A. 755, 41 Am. St. Rep. 511.

The word "procure," as used in Code, § 1594, making it an offense to procure liquor for a minor, unless it be procured by one the guardian, etc., of the minor, is defined by Webster as to acquire or provide for one's self or for another. *Jenkins v. State*, 34 South. 217, 218, 82 Miss. 500.

**Accessory denoted.**

"There are no words in the law that have acquired a more definite and specific meaning than "procure, advise, and assist," as contradistinguished from the actual commission of the crime. The latter is the principal offense, but the former only accessory. If a person does no more than procure, advise, or assist, he is only an accessory; but if he is present, consenting, aiding, procuring, advising, and assisting, he is a principal, and must be indicted as such. *United States v. Wilson* (U. S.) 28 Fed. Cas. 699, 710.

**Action implied.**

"Procure" means to initiate a proceeding to cause the thing to be done, and does not

mean the passive permitting of an act. *Gore v. Lloyd*, 12 Mees. & W. 463, 480.

The word "procure," as used in the pleadings in an action, and acted on by the courts, imports an initial, active, and wrongful effort. *Nash v. Douglass* (N. Y.) 12 Abb. Prac. (N. S.) 187, 190.

"Procure," as defined by Webster, means to contrive; to bring about; to effect; to cause. It means action, and, where a nol. pros. is entered at the instance or request of a party, it will be deemed to have been procured by him, and an action for malicious prosecution cannot be maintained by such party. *Marcus v. Bernstein*, 23 S. E. 38, 39, 117 N. C. 31.

The words "has procured or suffered a judgment," as used in section 60 of the bankruptcy act, relating to preferences, indicates some act on the part of the insolvent in or by which the preference is created, and which necessarily implies an intent on his part. *Benedict v. Deshel*, 79 N. Y. Supp. 205, 207, 77 App. Div. 276.

The bankruptcy act, avoiding a judgment procured or suffered by the insolvent as a preference, cannot be construed to apply to a judgment obtained in proceedings by the cestui que trust to procure the removal of the insolvent, who was the trustee; the judgment being for the payment of the trust fund. *Fry v. Pennsylvania Trust Co.*, 46 Atl. 10, 12, 195 Pa. 343.

#### As cause.

"Procure," as used in *Burns' Rev. St.* 1894, § 1992 (Rev. St. 1881, § 1919; *Horner's Rev. St.* § 1919), making it a crime to procure an abortion, etc., is used in the sense of "cause"; and it is not impossible for a person in the same transaction to both administer a poison, and to procure it to be done. *Rosenbarger v. State*, 56 N. E. 914, 915, 154 Ind. 425.

"Procure," as used in a statute making it criminal to aid, abet, or procure the commission of a crime, is defined as meaning to contrive, effect, or bring about; to effect; to cause. *Long v. State*, 36 N. W. 310, 315, 23 Neb. 33.

In a declaration charging that defendant maliciously "caused and procured" plaintiff to be declared a bankrupt, the words "caused and procured" are to be interpreted in their ordinary sense; and the words are satisfied if a false statement by the defendant in fact occasioned such result, though the statement was, as a matter of law, insufficient to cause the adjudication which the court erroneously made. An interpretation of the words that nothing was a consequence of the defendant's untrue statement which would not be a necessary and legal result of the truth was

incorrect. *Farley v. Danks*, 4 El. & Bl. 493, 499.

#### Completion imported.

An indictment charging that defendant "did procure, advise, and assist a mail carrier to secure, embezzle, and destroy a letter with which he, the said mail carrier, was intrusted," sufficiently shows that the letter was embezzled and destroyed. The charge of procuring and assisting the mail carrier to embezzle and destroy the letter necessarily implies that the act was done, and is such an averment or allegation as made it necessary on the part of the prosecution to prove that it had been done; hence it was not necessary to allege, as an affirmative, abstract proposition, that the carrier did embezzle and destroy the letter. *United States v. Mills*, 32 U. S. (7 Pet.) 138, 142, 8 L. Ed. 636.

"Procure," as used in *St. 2 Geo. II, c. 24, § 7*, punishing a person who shall "corrupt or procure any person or persons to give his or their vote or votes," is to get the thing done; and it is essential that the vote should be given, whereas the corruption is complete by effecting an agreement amounting to corruption. *Henslow v. Fawcett*, 3 Adol. & El. 51, 55.

#### As instigate or persuade.

"Procured," as used in a petition alleging that defendant requested, instigated, and procured mortgagors to sell and dispose of the mortgaged property, is used for the purpose of expressing the idea that through the instigation of the defendant the sale had been accomplished, since "procured" is synonymous with "persuaded" or "instigated," and hence is a proper allegation, though the defendant merely suggested such action, and did not do it himself. *Cone v. Ivinston*, 35 Pac. 933, 940, 4 Wyo. 203.

#### Suffer distinguished.

Under a provision of a bankruptcy act to the effect that if one, being insolvent or in contemplation of insolvency, shall procure or suffer his property to be taken on legal process, he commits an act of bankruptcy, etc., it is said that the word "procure" and the word "suffer" have different meanings. "Procure" is active, while "suffer" is passive. A man may suffer a thing to be done when he has the means of doing something other than suffering it to be done. So it is held that if the person omits to go into bankruptcy under a state of facts such that he knew that his property might be taken on legal process, though against his will, he must be regarded as having suffered his property to be taken on legal process, within the meaning of the act. In *re Dibble* (U. S.) 7 Fed. Cas. 651, 654. See, also, *Campbell v. Traders' Nat. Bank* (U. S.) 4 Fed. Cas. 1192, 1195.

## PROCURING CAUSE.

A procuring cause, as used in the sense of a real estate broker procuring for a client a purchaser, means the original discovery of the purchaser by the broker, and the starting of the negotiations by him, together with the final closing by or on behalf of his client with the purchaser through the efforts of the broker. *Ware v. Dos Passos*, 38 N. Y. Supp. 673, 675, 4 App. Div. 32.

## PRODUCE.

Code, § 3665, exempts from the operation of the statute of frauds cases where the article of personal property sold is not, at the time of the contract, owned by the vendor, and ready for delivery, but labor, skill, or money is necessary to be employed in producing the same. Held, that the word "producing" means "giving being or form to, manufacturing, making." *Mighell v. Dougherty*, 53 N. W. 402, 403, 86 Iowa, 480, 17 L. R. A. 755, 41 Am. St. Rep. 511.

The word "produced," as used in Rev. St. § 4776, providing that, upon complaint made to a magistrate that a criminal offense has been committed, he shall examine on oath any witnesses produced by the complainant, means suggestion of the witnesses' names to the magistrate. *State v. Keyes*, 44 N. W. 13, 15, 75 Wis. 288.

## PRODUCE (Noun).

See "Yearly Produce."  
Otherwise produced, see "Otherwise."

"Produce," as used by a testator in bequeathing to his wife the dividends of bank stock, and on her decease to be transferred, and the "produce thereof" to the plaintiff, means that the stock is to be changed into money, and the latter paid to the beneficiary. *Longdale v. Bovey*, 2 Anst. 570, 571.

When the produce of a fund is bequeathed to a legatee, or in trust for him, without any limitation as to continuance, it amounts to a bequest of the principal also. *Craft v. Snook's Ex'rs*, 13 N. J. Eq. (2 Beasl.) 121, 122, 78 Am. Dec. 94.

Laws 1887, c. 377, § 1, provides that any person engaged in the manufacture or bottling of beer, etc., having his name or any device engraved or otherwise produced on the bottles, may file a description of the device, etc.; and the statute renders it unlawful for any person to fill such bottles without the consent of the person filing the statement. Held, that the word "produced" relates to the same means of engraving on the bottles, etc., as the other preceding words indicate, such as etching or blowing, and do not cover a case of printed or lithographed labels. *Peo-*

*ple v. Elfenbein*, 20 N. Y. Supp. 364, 365, 65 Hun, 434.

## As any article of commerce.

An agreement by a freighter to furnish "a full and complete cargo of produce" would be satisfied by a shipment of any article of commerce which was usually shipped from the loading port. *Warren v. Peabody*, 8 C. B. 800, 808.

"Produce," as used in Act April 19, 1862, creating the New York Produce Exchange, and giving such exchange jurisdiction to regulate and enforce just and equitable rules of trade, cannot be construed so as to limit such jurisdiction to contracts relating to agricultural products, but should also apply to cement, as an article of produce. *Haebler v. New York Produce Exchange*, 44 N. E. 87, 90, 149 N. Y. 414.

## Butter and eggs.

The words "produce dealer," as used in the license law of the District of Columbia, which says that every person whose business it is to buy and sell produce shall be regarded as a produce dealer, apply to one who brings eggs and butter to vend in the market, as much as to one who brings only cereals or fruits, or what is ordinarily called "garden stuff." *District of Columbia v. Oyster (D. C.)* 4 Mackey, 285, 286, 54 Am. Rep. 275.

## Coal, iron, lumber, etc.

Coke aa, see "Coke."

The term "produce of the state," in Const. art. 2, § 30, exempting from taxation all articles manufactured of the produce of the state, imports whatever is produced or grown in, or is the yield of, the state, including crops, timber, coal, and iron, and everything produced from or found in the soil of the state. Logs grown on the soil of the state, when in the hands of mill operating manufacturers, intended for manufacture, and also the lumber cut from them, are articles manufactured from the produce of the state, within the meaning of the section. *Benedict v. Davidson County*, 67 S. W. 806, 807, 110 Tenn. 183.

## Cotton.

"Produce," as used in Act March 6, 1850, § 1, for the suppression of trade and barter with slaves, providing that any person buying, selling, or receiving of any slave any corn, fodder, or other produce whatsoever, should be punished, should be construed to include cotton, and an indictment charging the selling of cotton charges a sale of produce. *State v. Borroun*, 23 Miss. (1 Cushman) 477, 481.

## Crops and increase of personalty.

Code, § 2026, providing that all produce, rents, or profits arising from homesteads

should be exempt from levy and sale, means produce, rents, or profits arising directly from the use of the homestead or exempted property, such as crops and rent from the realty, and the profits or increase from the personalty. They do not include the earnings of a physician, though arising from services in rendering which he used a house, horse, and professional books. *Staples v. Keister*, 8 S. E. 421, 422, 81 Ga. 772.

#### **Pork.**

"Produce for export," within the meaning of a municipal charter exempting produce for export from taxation, includes pork held for export. *Fitch v. City of Madison*, 24 Ind. 425, 427.

#### **Rents.**

The term "income and produce," as used in a will devising land to trustees to receive and collect the income and produce thereof, includes rents that became due from tenants soon after the testator's decease. *Sohler v. Eldredge*, 103 Mass. 345, 350.

#### **PRODUCE BROKER.**

A produce, merchandise, or grain broker is defined in an ordinance of the city of Chicago requiring such brokers to be licensed as one who, for commission or other compensation, is engaged in selling or negotiating the sale of goods, wares, merchandise, produce, or grain belonging to others. *O'Neill v. Sinclair*, 39 N. E. 124, 125, 153 Ill. 525.

"Produce broker," as used in the internal revenue law of 1886 (14 Stat. 98) levying a tax on produce brokers, means any person whose occupation it is to buy or sell agricultural products, without regard to whether such person buys or sells for himself or for another. A farmer or gardener who brings his own articles to market is not a produce broker, but, if a person acts in the capacity of a merchant or dealer, though buying exclusively for himself, he is a broker, within the meaning of the act. *United States v. Simons* (U. S.) 27 Fed. Cas. 1080, 1081.

#### **PRODUCE DEALER.**

The term "produce dealer" applies to a person engaged in the business of buying and selling fruit, butter, eggs, poultry, and produce. Such a dealer is a merchant, within the meaning of the Kansas City Charter, authorizing the common council to license merchants, etc. *Kansas City v. Lorber*, 64 Mo. App. 604, 608.

#### **PRODUCE FOR EXPORT.**

Under a provision of the city charter exempting from municipal taxation goods and produce for export, it is held that the provi-

sion is to be construed strictly, and to exempt only property in possession of any consignee on storage or to be forwarded. *City of Madison v. Fitch*, 18 Ind. 33, 34.

#### **PRODUCER.**

"Producer," as used in a local option act—that "it shall not be construed to apply to domestic wines or cider sold or offered for sale by the producer"—is identical in meaning with "manufacturer"; and the latter term, of course, applies both to him who actually makes the wine, and to him who causes it to be made. *Hancock v. State*, 40 S. E. 317, 318, 114 Ga. 439.

"Producer," as used in 26 Stat. 567, giving a bounty to producers of sugar, refers to the manufacturer of the sugar, and not the producer of the cane, when these are different persons. *Allen v. Smith*, 19 Sup. Ct. 446, 449, 173 U. S. 389, 43 L. Ed. 741.

#### **PRODUCT.**

See "Agricultural Product"; "Farm Product"; "Forest Products."

The word "product" imports an article which is made of something, and which, when made, has characteristics which are apparent to the senses. In judging as to the similarity of products, the material of which a product is made, and its appearance when made, may be taken into consideration. *White v. Barney* (U. S.) 43 Fed. 474, 475.

The term "products," as used in assessment Laws 1871, c. 176, providing that the products of any state of the United States consigned to any town or ward in this state for sale on commission for the benefit of the owner thereof shall not be assessed for taxation to such agents, means the natural products of the country. It includes nails. *People v. Commissioners of Taxes*, 23 N. Y. 242, 246.

Tolls earned by a gristmill situated on a farm are not products of a farm, in the sense of Acts 1887, c. 135, § 31, which imposes a license on the sale of liquors, except when sold by a person at the place of manufacture, and manufactured from the products of his own farm. The products of a farm are such things as are produced by labor, or otherwise of spontaneous growth, and the products of his own farm are such as are so produced by him who owns and cultivates the farm. A mill situated on a farm is not a product of it. It is not the result of the cultivation of the soil. The purpose of the statutory provision is not to encourage millers, but to afford every farmer the larger opportunity to sell the corn, wheat, rye, and the like products of his own farm by turning it into an article of ready sale at a better price. *State v. Kennerly*, 4 S. E. 47, 48, 98 N. C. 657.

**As output.**

"Product," as used in a contract for the sale of the product of certain mines of a mining company for a given period at a named price, imports the entire product; the output; all the ore mined and marketable. *Robert E. Lee Silver Min. Co. v. Omaha & G. Smelting & Refining Co.*, 28 Pac. 326, 330, 16 Colo. 118.

**Process distinguished.**

"Product" and "process" are quite distinct matters, even where both are created by the same inventive act. *Durand v. Green* (U. S.) 60 Fed. 392, 396.

**As value of labor.**

As used in a statute forbidding the employment of the inmates of penal institutions at any trade or industry whereby his work, or the product and profits of his work, shall be farmed out, contracted, given, or sold to any person, "product" does not refer to articles of property, but to the net value of labor. The act does not forbid the dealing in tangible things or articles of property whenever made, but the farming out, contracting, giving away, or selling of convict labor. *People v. Hawkins*, 51 N. E. 257, 260, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736.

**PRODUCT OF DISTILLATION.**

"Product of distillation," as used in 14 Stat. 566, relating to federal revenues on products of distillation, does not include a mash fermented in the same way as for the production of whisky, which was condensed, etc., by cold water and vinegar, and thence manufactured into vinegar; the words "product of distillation" meaning such products as contain alcohol. *One Vaporizer* (U. S.) 18 Fed. Cas. 726, 727, 2 Bin. 438.

**PRODUCTION.****See "Professional Production."**

The term "production" has been used to describe the legal source of the proprietary rights of authorship. It is a species of occupancy, and is called "production" as distinguished from "invention." *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 185.

The word "production" may designate as well a thing produced as the operation of producing. A claim for a patent, describing it as "the improvement in the manufacture of coloring matters, consisting in the production of violet coloring matters by the action of nitroso derivatives of the tertiary amines on tannin, or equivalent reaction," is for a process, and not for the resulting product, and it cannot be maintained to cover the latter on the ground that the product inheres in the process. *Durand v. Green* (U. S.) 60 Fed. 392, 395.

**Of labor.**

"Production," as used in Gantt's Dig. § 4079, which provides that laborers who perform work and labor for any person under a written or verbal contract, if unpaid for the same, shall have an absolute lien on the production of their labor for such work and labor, would include hay, as that may be said to be a production of the laborer who cuts and rakes it. *Emerson v. Hedrick*, 42 Ark. 263, 265.

The term "production of his labor," as used in the laborer's lien act of July 23, 1868, giving a laborer a lien on the production of his labor, does not entitle a laborer to a lien upon land for work done upon it, for the land, however much improved by his toil, can in no proper sense of the word be considered the production of his work or labor. *Taylor v. Hathaway*, 29 Ark. 597, 601.

**PRODUCTIVE REAL ESTATE.**

Vacant lots, which are good for nothing but for the use of the soil in making bricks, are not productive real estate, within the meaning of a will directing the executors to invest the proceeds of the personal property in productive real estate. *Holcomb v. Holcomb's Ex'rs*, 11 N. J. Eq. (3 Stockt.) 281, 290.

**PROFANE—PROFANITY.**

Any words importing an imprecation of divine vengeance, or implying divine condemnation, so used as to become a public nuisance, suffice to make out the offense of profanity, although the name of the Deity is not used. *Gaines v. State*, 75 Tenn. (7 Lea) 410, 411, 40 Am. Rep. 64.

Imprecations of future divine vengeance constitute profane cursing. *Holcomb v. Cornish*, 8 Conn. 375, 380.

The word "profanely" must be used in an indictment for a violation of the statute making it criminal for any one to willfully, premeditatively, and despitefully blaspheme and speak loosely and profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth, as it is descriptive of the offense. Though the words "blasphemously and despitefully" may be synonymous with "profanely," and tantamount in common understanding, yet, as the Legislature has adopted this word as a description or definition of the crime, the omission is fatal. *Updegraph v. Commonwealth* (Pa.) 11 Serg. & R. 394, 409.

**PROFECTITUM PECULIUM.**

"Profectitum peculium" is the Latin name applied to the acquisition of property by children by making it out of the property

of their father. *Sparks v. Spence*, 40 Tex. 693, 699.

## PROFERT.

**Profert** is an allegation formally made in a pleading where a party alleges a deed that he shows in court, it being in fact retained in his own custody. As originally understood, perhaps the term implied that as a fact the written instrument pleaded was produced in court and read, or a copy thereof annexed to the pleading. As now used, however, the term does not imply that the recorded instrument pleaded is annexed to the bill, or actually produced to the court. *Germain v. Willgus* (U. S.) 67 Fed. 597, 599, 14 C. C. A. 561.

## PROFESSION.

All other professions, see "All Other."  
As property, see "Property."

One definition of a profession is an employment, especially an employment requiring a learned education, as those of law and physic. *Worcester Dict. tit. "Profession."* In the *Century Dictionary* the definition of profession is given, among others, as a vocation in which a professional knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interest or welfare in the practice of an art founded on it. Formerly theology, law, and medicine were specifically known as the professions, but, as the application of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professional attainment in special knowledge as distinguished from mere skill; a practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation as distinguished from its pursuits for its own purposes. *United States v. Laws*, 16 Sup. Ct. 998, 1001, 163 U. S. 258, 41 L. Ed. 151.

The term is applied to an occupation or calling which requires learned and special preparation in the acquirement of scientific knowledge and skill. *Commonwealth v. Fittler*, 10 Pa. Co. Ct. R. 144, 147.

The word "profession," in its larger and broader meaning, is defined by Webster to be the "occupation, if not mechanical or agricultural or the like, to whatever one devotes one's self; the business which one professes to understand and to follow for subsistence; calling; vocation; employment." In a restricted sense it only applies to the learned professions. *Betz v. Maler*, 33 S. W. 710, 12 Tex. Civ. App. 219; *State v. Hunt*, 40 S. E. 216, 217, 129 N. C. 686, 85 Am. St. Rep. 758.

The word "profession" means a calling—an employment, so that saying that one is a physician by profession is equivalent to saying that he is a physician by practice. *Thompson v. Bertrand*, 23 Ark. 730, 733.

"Profession," as contained in an instruction in an action against a physician for malpractice, charging that the "defendant, by accepting the employment, bound himself to use the reasonable ordinary degree of care and skill of the profession in his community," was used as equivalent to "physicians and surgeons." *Lawson v. Conway*, 16 S. E. 564, 565, 37 W. Va. 159, 18 L. R. A. 627, 38 Am. St. Rep. 17.

**Carpenter, farmer, or building contractor.**

"A profession is said to be that of which one professes knowledge; the occupation, if not mechanical, agricultural, or the like, to which one devotes one's self; the business which one professes to understand and to follow for subsistence. It is not equivalent to 'occupation' in its general sense. Therefore I do not think that a farmer or carpenter could be taxed as such, although one dealing in the products of either might be liable as a dealer." *State v. Hunt*, 40 S. E. 216, 217, 129 N. C. 686, 85 Am. St. Rep. 758.

Code Or. § 211, exempting from execution tools and implements used by a person engaged in any "trade, occupation, or profession," does not include the business of a building contractor. *In re Whetmore* (U. S.) 29 Fed. Cas. 921.

**Chemist.**

A chemist coming to the United States to work in that capacity on a sugar plantation is a person belonging to a recognized profession within Act March 3, 1891, c. 551, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1294], excepting such persons from the operation of Act Feb. 26, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], prohibiting the importation of aliens under contract to perform labor. *United States v. Laws*, 16 Sup. Ct. 998, 1001, 163 U. S. 258, 41 L. Ed. 151.

**Insurance agent.**

The word "profession," as used in *Sayles' Civ. St. art. 2337*, means occupation, calling, employment, and includes the business of an insurance agent, so as to entitle him to the exemption therein provided for. *Betz v. Maler*, 33 S. W. 710, 12 Tex. Civ. App. 219.

**Manufacturer of iron.**

"Profession," as used in Act April 15, 1834, § 4 (P. L. 512), making all offices and posts of profit, professions, trades and occupations, taxable, may be construed to include the business of conducting ironworks in the manufacture of iron so as to render the same profitable for the owners, for it requires a

very considerable degree of skill, derived from experience in the business, as well as unremitted attention, which but few are capable of exerting. The term "profession" may possibly be thought by some to be a more dignified term than "occupation." *Lebanon County Com'rs v. Reynolds (Pa.)* 7 Watts & S. 329, 330.

#### **Ministers of the Gospel.**

The term "profession" in Act April 29, 1844, § 32, declaring that all offices, posts of profit, professions, trades and occupations, except the occupation of farmers, shall be valued, assessed, and subject to taxation, includes the calling of a minister of the gospel. That term is especially applicable to persons who teach or practice in law, physic, or divinity. It is universally understood that ministers of the gospel are members of a learned profession. *Miller v. Kirkpatrick*, 29 Pa. (5 Casey) 226, 229.

#### **Renting of tolls.**

The renting of tolls is not a profession or trade. *Bellamy v. Burch*, 16 Mees. & W. 590.

#### **PROFESSIONAL.**

The term "professional" has been construed, in a case involving a construction of a statute incorporating a steamship line and providing that the stockholders should be individually liable for debts due and owing to their laborers and operatives, to correctly describe the services of a consulting engineer. The engineer is not correctly described by the term "laborer" or "operative." *Ericsson v. Brown (N. Y.)* 38 Barb. 890, 892.

#### **PROFESSIONAL ARTIST.**

A woman who is engaged as a milliner is not a "professional artist" within the exception of such persons from the operation of the act of Congress prohibiting the immigration of aliens under contract to perform labor. *United States v. Thompson (U. S.)* 41 Fed. 28, 29.

#### **PROFESSIONAL CAPACITY.**

An application to an attorney to draw a deed is an application in a "professional capacity," making the same a privileged communication, which the attorney cannot divulge. *Shellard v. Harris*, 5 Car. & P. 592.

"Professional capacity," as used in a statute authorizing disbarment of any attorney for misdemeanor in his professional capacity, is used as the equivalent of "professional misbehavior," and not in the technical sense of offenses punishable by fine and imprisonment. *In re Bowman*, 7 Mo. App. 569.

#### **PROFESSIONAL EARNINGS.**

The term "professional or personal earnings" in the statute exempting from execution personal or professional earnings, does not include debts due the proprietor and keeper of a public hotel for the boarding and accommodation of guests. *Youst v. Willis*, 49 Pac. 56, 57, 5 Okl. 170.

#### **PROFESSIONAL EMPLOYMENT.**

"Professional employment," as used in Comp. Laws, § 5734, authorizing the issue of a capias against one charged with some misconduct or neglect in office or in some "professional employment," means some of those occupations usually classed as professions, the general duties and character of which courts must be expected to understand judicially, and hence does not include a real estate agency. *Pennock v. Fuller*, 2 N. W. 176, 177, 41 Mich. 153, 32 Am. Rep. 148.

"Professional employment," as used in Comp. Laws, § 4119, authorizing actions for misconduct for neglect in any professional employment, does not include employment of an agent for the purpose of making sales of sewing machines for a manufacturing company. *People v. McAllister*, 19 Mich. 215, 217.

Under Sess. Laws 1839, p. 76, exempting from the operation of the act abolishing imprisonment for debt actions for fines and penalties, or for money collected by any public officer, or for any misconduct or neglect in office or in any professional employment, where it did not appear that the party bailed held himself out to plaintiff as an attorney by profession, or that he in fact was such, or that the business about which he was employed was of such a character that it could be performed only by an attorney at law, and plaintiff did not aver that he reposed confidence in such party by reason of his supposed or assumed professional character, it was held that the action was not for misconduct or neglect in a professional employment, within the meaning of the act. *Bronson v. Newberry (Mich.)* 2 Doug. 88, 52.

#### **PROFESSIONAL EXPERTS.**

"Professional experts," within the meaning of Act June 1, 1885, relating to cities of the first class, and providing that all officers, servants, and employes shall be appointed only after competitive examinations, but excepting professional experts from the requirement, includes the medical staff or board of the Philadelphia Hospital, consisting of specialists or experts of the various departments of medical science, and who perform gratuitous services. *Commonwealth v. Fitler*, 23 Atl. 568, 569, 147 Pa. 288, 15 L. R. A. 205.

**PROFESSIONAL PRODUCTIONS.**

"Professional productions" of a statuary or sculptor include all the artistic work of such persons produced in the exercise of his profession, whether the creation of the artist or copies of the creation of others. *Viti v. Tutton* (U. S.) 14 Fed. 241, 246.

Marble statues executed by professional sculptors in the studio and under the direction of another professional sculptor, whether from models just made by a professional sculptor or from antique models whose author is unknown, are "professional productions of a statuary or of a sculptor" within the meaning of Rev. St. § 2504, Schedule M, imposing duties on statuary imported, which shall be understood to include "professional productions of a statuary or of a sculptor only." *Tutton v. Viti*, 2 Sup. Ct. 687, 688, 108 U. S. 312, 27 L. Ed. 737.

The phrase "the professional production of a sculptor" in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194 [U. S. Comp. St. 1901, p. 1678], providing that the term "statuary" shall be understood to include only such statuary as is the "professional production of a statuary or sculptor," must be considered as synonymous with the "production of a professional sculptor." *United States v. Townsend* (U. S.) 113 Fed. 442, 443, 51 C. O. A. 276.

**PROFESSIONAL SERVICES.**

An instruction, in an action for injuries, to assess sums expended for "professional services, physicians, and nurses," means professional services of physicians and nurses. The words "physicians and nurses" are in opposition with the words "professional services" in the sentence, and the instruction is not erroneous as authorizing the jury to allow for professional services other than those of physicians and nurses. *Duke v. Missouri Pac. Ry. Co.*, 12 S. W. 636, 637, 99 Mo. 347.

**PROFIT.**

See "Annual Profits"; "Clear Profits"; "Community of Profits"; "Mesne Profits" (Action for); "Neat Profits"; "Net Profits"; "Office of Profit"; "Pecuniary Profit"; "Rents, Issues, and Profits"; "Rents and Profits"; "Surplus Profits."

Any profits, see "Any."

Profit is the gain made on any business or investment when both the receipts and payments are taken into consideration. *Providence Rubber Co. v. Goodyear*, 76 U. S. (9 Wall.) 788, 804, 19 L. Ed. 566; *Hazeltine v. Belfast & M. L. R. Co.*, 10 Atl. 328, 330, 79 N. E. 411, 1 Am. St. Rep. 330; *Bates v. Porter*, 6 Wds. & P.—50

15 Pac. 732, 739, 74 Cal. 224; *People v. Niagara County Sup'rs* (N. Y.) 4 Hill, 20, 23; *Dean v. Dean*, 11 N. W. 239, 241, 54 Wis. 23.

Profit is the acquisition beyond expenditure; excess of value received for producing, keeping, or selling over cost; hence pecuniary gain in any transaction or occupation; emolument. *Mundy v. Van Hoose*, 30 S. E. 783, 786, 104 Ga. 292.

The word "profits" is one in common use, unambiguous, and primarily means acquisition beyond expenditure, or the excess of sale or value received over cost; and in determining the profits of a business one cannot take such parts as show a gain and reject such as show a loss. *Curry v. Charles Warner Co.* (Del.) 42 Atl. 425, 428, 2 Marv. 98.

"Profits," as contained in an instruction in an action for breach of contract, stating the measure of damages to be the loss of "profits" occasioned by such breach, means the gain which would have been made if the contract would have been completed. *Hinckley v. Pittsburgh Bessemer Steel Co.*, 7 Sup. Ct. 875, 879, 121 U. S. 264, 30 L. Ed. 967.

The word "profits," when applied to trade or business, means advance in price of goods sold beyond the cost of purchase. In *re Vedder's Will*, 2 Con. Sur. 548, 561, 15 N. Y. Supp. 798, 805 (citing *Burrill*, Law Dict. p. 344); *People v. San Francisco Sav. Union*, 13 Pac. 498, 499, 72 Cal. 199; *Prince v. Lamb*, 60 Pac. 689, 690, 128 Cal. 120; *Rogers-Ruger Co. v. McCord*, 91 N. W. 685, 686, 115 Wis. 261.

The term "profits," in reference to manufacturing certain goods, has been construed to be the proper term to designate the difference between what it cost the manufacturers to make and sell them and what it brought them. *Burdett v. Estey* (U. S.) 3 Fed. 566, 569.

"Profits" are contributed to by all, and not one only, of the various elements which combine to produce them. All the different kinds of work and labor which enter into the manufacture of an article form the source and basis of profits, and, moreover, the possible breakage, loss of time, expense of general supervision, natural wear and tear of capital, and other matters, all tend to show that the profits of an ice manufacturing business are too uncertain, speculative, and contingent to furnish the true rule of damages. *Maryland Ice Co. v. Arctic Ice Mach. Mfg. Co.*, 29 Atl. 69, 71, 79 Md. 103 (citing *Wood v. State*, 66 Md. 61, 5 Atl. 476).

"Profits," as contained in a note wherein the maker promises to pay the bearer forty dollars "profits," with interest, does not express or suggest a contingency or uncertain-



ty, but an absolute existing fund as the consideration of the promise, and on account of which the money was to be paid, and is not such an apparent defect or infirmity as to put a holder on inquiry. *Matthews v. Crosby*, 56 N. H. 21, 25.

Where, under an agreement, defendant was to give plaintiff for his services 50 per cent. of the profits of certain stock as may accrue, it is apparent that the language "profits as may accrue" did not mean profits in the sense of the ordinary dividends which are annually declared out of the yearly earnings of an ordinary trading corporation. The profits are those which will from time to time and finally be derived from the sales of the land of the corporation originally purchased by it for the purpose of which sale it was organized. *Morris v. Shepard* (N. J.) 53 Atl. 172, 174.

The "rents and profits" of an estate or "income," or the "net income" of it are all equivalent expressions. *Andrews v. Boyd*, 5 Me. (5 Greenl.) 199, 203.

In the chapter relating to insurance, "profits" of a mutual insurance company means that portion of its cash funds not required for payment of losses and expenses, nor set apart for any purpose allowed by law. *Rev. Laws Mass. 1902, p. 1120, c. 116, § 1; Rev. St. Tex. 1895, art. 3096a; Bates' Ann. St. Ohio 1904, § 3648.*

#### **Annuity distinguished.**

See "Annuity."

#### **Compensation distinguished.**

See "Compensation."

#### **As damage for infringement of patent.**

Profits are the gains or savings made by the wrongdoer by an invasion of another's property right in his patent. They are the direct pecuniary benefits received, and are capable of a definite measurement. Calling them the measure of damages in equity does not mean that they are the same as damages in an action at law. They are not the same. Profits in equity are the gain or saving, or both, which the wrongdoer has made by employing the infringing invention. This gain or saving is a fact. *Head v. Porter* (U. S.) 70 Fed. 498, 501.

As used in the patent act, making one infringing on a patent liable to the owner for profits and damages, the word "profits" is not convertible with the word "damages." Profits refer to what the wrongdoer has gained by the use of the patented invention, while "damages" refer to what the owner of the patent has lost. *Goodyear Dental Vulcanite Co. v. Van Antwerp* (U. S.) 10 Fed. Cas. 749, 750.

"Profits," within the meaning of patent laws, are the net gains of the infringer from

the use of the patented invention, while "damages" are the losses sustained by the owner in consequence of the infringement. *La Baw v. Hawkins* (U. S.) 14 Fed. Cas. 899, 900.

In determining the cost of a patented article for the purpose of ascertaining the "profits" as between the owners of the patent, all the elements that go to make up the expenditures in the manufacture and sale are to be taken into account. "Profits," says Mr. Justice Swain, "is the gain made upon a business or investment, when both the receipts and payments are taken into account." *Freeman v. Freeman*, 142 Mass. 98, 102, 7 N. E. 710 (citing *Providence Rubber Co. v. Goodyear*, 78 U. S. [9 Wall.] 788, 791, 19 L. Ed. 566).

In considering what profits the owner of a patent was entitled to recover from one who infringed the patent, the court said: "These profits arise because by using the patented loom the defendants have produced more yards of carpet than they could have produced by using such looms and appliances as it was open for them to use. Upon this theory it is to be ascertained to what extent defendants' production has been increased by the use of the patented loom, and then the average profit per yard, or the aggregate profit on the increased production, that actually accrued to the defendants. The complainant has the right to follow the profits through all the stages of production and all the departments of their business, because the ultimate profit made by the defendants is the measure of their accountability." *Webster Loom Co. v. Higgins* (U. S.) 39 Fed. 462, 465, 466.

The standard for estimating damages for the infringement of a patented machine is the actual profits from the making, using, or selling of the invention by defendant. The reasonable cost of the labor and materials must be deducted, as the plaintiff himself, if he had made the machines, would have had to pay such expenses. *Parker v. Perkins* (U. S.) 18 Fed. Cas. 1153.

On an accounting for the infringement of a patent there was testimony tending to show that the patented article could be made much cheaper than those in use before, but it was not shown that the infringing defendant was under any obligation to make the old articles if patented ones had not been made, or would have done so; nor was there anything else from which it was made to appear that the saving was a profit because it diminished a loss. Held, that the amount so saved was not profits for which the infringer was accountable to the patentee. *Bell v. United States Stamping Co.* (U. S.) 32 Fed. 549, 550.

Where the infringer of a patent has made a profit on one fraction of the mechan-

item made and sold, but has met with losses on a larger fraction, so that a correct account of the whole operation would show a loss on the total manufacture, he is liable to the patentee for the profits made on the part which has been manufactured at a profit, without any deduction for the losses sustained on the other part. *Graham v. Mason* (U. S.) 10 Fed. Cas. 930, 931.

Where a patentee executed a license to defendant to manufacture a patented article on payment of a certain royalty, and, after defendant began to manufacture thereon, canceled the license, but defendant continued to manufacture and sell the goods, the measure of damages is not to be determined by the royalty, but by the actual profits by defendant. *Wales v. Waterbury Mfg. Co.* (U. S.) 87 Fed. 920, 921.

In an action for infringement of a patent for the manufacture of glycerine the patentee is entitled to recover as profits on an accounting the saving made by the infringer of material previously used by him in the manufacture, as well as the increased profits on the sale of the glycerine manufactured, owing to its improved quality. *Tilghman v. Mitchell* (U. S.) 23 Fed. Cas. 1224, 1225.

The profits which the owner of a patented invention can recover from an infringer are limited to such profits only as result directly and immediately from the infringement, and do not include remote and contingent profits. *Piper v. Brown* (U. S.) 19 Fed. Cas. 722, 723.

#### **Dividend distinguished.**

Webster's Dictionary (1893) defines a "dividend" as "the share of a sum divided that falls to each individual; a distributive sum, share, or percentage applied to the profits as apportioned among stockholders." It differs from "profits" in not being taken out of the joint property of the partnership or company and transferred to the separate property of the individual partners or stockholders. No safely conducted business, corporate or other, distributes all its earned profits. *City of Allegheny v. Pittsburgh, A. & M. P. R. Co.*, 36 Atl. 161, 179 Pa. 414.

#### **As earnings or income.**

"Profits" is sometimes used as synonymous with "income." *Bates v. Porter*, 15 Pac. 732, 739, 74 Cal. 224.

"Profits" generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account, and is distinguished from "income," which is what comes in. *People v. Niagara County Sup'rs* (N. Y.) 4 Hill, 20, 23.

Profits derived from capital invested in business cannot be considered as earnings.

*Wallace v. Pennsylvania R. Co.*, 45 Am. 685, 195 Pa. 127, 52 L. R. A. 33.

"Profits," as used in Act March 26, 1870, authorizing manufacturing corporations to issue and dispose of preferred stock, and guaranty the holders of such stock semiannual dividends, and the common stock to be entitled to dividends only out of the surplus of the profits after setting apart a sum sufficient to pay current expenses and dividends on such preferred stock, should be construed as meaning "earnings" or "income." *Burt v. Rattle*, 31 Ohio St. 116, 128.

Within a will giving testator's wife the "income" of all his estate, both real and personal, and in the same item the "profits" of all his estate, both real and personal, and in another the "income and profits" of certain property, there is no difference in the meaning of the words, and the use is only due to a lawyer-like fondness of using several words where one is sufficient. *In re Clark*, 17 N. Y. Supp. 93, 96, 62 Hun, 275; *In re Vedder*, 15 N. Y. Supp. 798, 805, 2 Con. Sur. 548.

"Profits," as used in Internal Revenue Act (14 Stat. 138) § 122, as amended in 1866, imposing a 5 per cent. tax on all profits of any railroad or canal company, refers to the profits arising from the operation of the road or canal, without deduction of interest paid to its bondholders or dividends paid to its stockholders. *Sioux City & P. R. Co. v. United States*, 3 Sup. Ct. 565, 567, 110 U. S. 205, 28 L. Ed. 120.

#### **As excess of premium over charges.**

The amount of net premium of a life insurance policy is calculated upon the basis of certain tables of mortality and upon the assumption that the company will receive a certain rate of interest upon all its assets, and the amount of the loading is calculated upon a certain assumed rate of expense. It may happen that the rate of mortality experienced by the company is less, and the rate of interest actually received is greater, than that assumed, and that the ratio of actual expense is less. In such case the company has in reservation more than enough, with the anticipated annual premiums, to provide for future costs of insurance and management. It has a sum which is not needed for the purpose for which it was paid. This sum is called "profits." It is in fact a surplus resulting from overpayments by policy holders. This surplus is derived from money paid by the insured and received by the company for a particular purpose; i. e., providing for cost of insurance and expense of management. *Fuller v. Metropolitan Life Ins. Co.*, 41 Atl. 4, 11, 70 Conn. 647.

#### **As excess of property over liabilities.**

Profits of a corporation for the purpose of declaring a dividend consist in the excess

of its cash and other property on hand over its liabilities. *Hubbard v. Weare*, 44 N. W. 915, 79 Iowa, 678.

The profits of any business are only what remains after deducting the debts, expenses, and capital paid in. Where partners have advanced unequal capital, and have agreed to share the profits and losses equally, the rule, supported alike in reason and by authority, is that on a dissolution each partner is entitled to his advances before a division. *Hayes v. Hayes*, 19 Atl. 571, 572, 66 N. H. 134.

#### **Forfeiture under lease.**

Where one leases part of the realty set apart as a homestead for mining purposes, the lessee to pay a certain amount on the ore mine, or, in case the land is not worked, to pay a stipulated forfeiture, such forfeiture, if due, is profits arising from the homestead, within Code, § 2026, providing that "all produce, rents, or profits arising from homesteads in this state . . . shall be exempt from levy and sale." *Larey v. Baker*, 11 S. E. 800, 801, 85 Ga. 687.

#### **Good will distinguished.**

The distinction between "profits" and "good will" is obvious. Profits are the gains realized from trade; good will is that which brings trade. The favorable location of a mercantile establishment, or the habit of customers to resort to a particular locality, will bring trade. This advantage may be designated by the term "good will." What the trader gains on the trade so acquired are "profits." *Nelson v. Hiatt*, 38 Neb. 478, 485, 56 N. W. 1029, 1032.

#### **Income distinguished.**

See "Income."

#### **Increase in value.**

In ordinary parlance, "profit" is the pecuniary advantage resulting from dealing and trafficking in property, but as used in a will devising the income and profits of a certain sum which shall be invested in good, approved securities, will not be held to include the increased value of the securities. In *re Proctor*, 33 N. Y. Supp. 196, 197, 85 Hun, 572; In *re Biden's Estate*, 33 N. Y. Supp. 196, 197; *Linsly v. Bogert*, 33 N. Y. Supp. 975, 980, 87 Hun, 137.

Mere advance in value in no sense constitutes the "profits" specified in the revenue law as profits of the owner for the year in which the sale of the property was made. Such advance constitutes and can be treated merely as increase of capital. *Gray v. Darlington*, 82 U. S. (15 Wall.) 63, 65, 21 L. Ed. 45 (cited in *Re Graham's Estate*, 47 Atl. 1108, 1110, 198 Pa. 216).

"Profit," as used in a contract giving a president of a bank a certain compensation from the net "profits" of the institution, would not include a difference in value in United States bonds held by the bank during a certain year, represented by an invoice showing that their market price at the end of the year was greater than their cost price; for, as the bonds were not sold at the end of the year, nor their value determined by an agreement between the parties, the increase in their market value was not a "profit" within the meaning of that term as used in the contract. *Jennery v. Olmstead* (N. Y.) 36 Hun, 536, 538.

A testator devised the income and profits of an estate to his wife for life. After her death the property was sold pursuant to the will; and it was held that her personal representatives were not entitled to the excess of the price obtained at such sale over the inventory value of the estate at the time of the testator's death. The court said: "The claim of her personal representatives must be based upon the legal proposition that the advance or increase in the value of the estate belonged to her as life tenant without reference to any expressed intent on the part of the testator to give her the same. This proposition, we think, cannot be successfully maintained. This very question has been repeatedly before the courts, and it is now settled by numerous adjudications. The rule, as settled, may be stated to be that an increase from natural causes in the value of real and personal estate held as an investment does not constitute profits to go to a life tenant, but becomes principal, and goes to the remainderman." In *re Vedder*, 15 N. Y. Supp. 798, 805, 2 Con. Sur. 548.

Where by a will a fund was left to trustees to invest in stocks, bonds, and mortgages, and pay the annual interest, income, and dividends thereof to testator's daughter for life, and on her death leaving no issue to divide the principal or capital sum among his other children, and after the death of such daughter the trustee sold the stock for more than the amount of the original investment, such increase constituted in no sense a profit upon the investment, but was an accretion to the fund itself, arising from natural causes, and belonged to the remaindermen, and not to the representatives of the life tenant. In *re Gerry*, 103 N. Y. 445, 450, 9 N. E. 235, 236.

#### **As measure of earning power.**

Profits derived from capital invested in business cannot be considered as earnings, but in many cases profits derived from the management of a business may properly be considered as measuring the earning power. *Wallace v. Pennsylvania R. Co.*, 45 Atl. 685, 195 Pa. 127, 52 L. R. A. 33.

Profits represent the net gain made from an investment, or from the prosecution of some business after the payment of all expenses incurred. The net gain depends largely on other circumstances than the earning capacity of the persons managing the business. The size and location of the town selected, the character of the commodities dealt in, the degree of competition encountered, the measure of prosperity enjoyed by the community may make an enterprise a decided success, which, under less favorable circumstances, in the hands of the same persons might turn out a failure. The profits of a business with which one is connected cannot, therefore, be made use of as a measure of his earning power. *Goodhart v. Pennsylvania R. Co.*, 35 Atl. 191, 193, 177 Pa. 1, 65 Am. St. Rep. 705.

#### **As money or property.**

Profits do not necessarily imply money, but may consist of unsold portions of the property. *Jones v. Davis*, 21 Atl. 1035, 1038, 48 N. J. Eq. (3 Dick.) 493.

Profit is defined as acquisition beyond expenditure, or excess of value received over cost; and a contract for moiety of property to be acquired is not a contract for the division of profits. *Prince v. Lamb*, 60 Pac. 689, 691, 128 Cal. 120.

#### **As net earnings or income.**

The word "profits" signifies an excess of the value of returns over the value of advances; the excess of receipts over expenditures—that is, net earnings. *People v. San Francisco Sav. Union*, 13 Pac. 498, 499, 72 Cal. 199.

"Profits" generally means the gain which is made on any business or investment when both receipts and payments are taken into account. *Thorn v. De Breteuil* 83 N. Y. Supp. 849, 853, 86 App. Div. 405.

The word "profits" has a fixed and definite meaning, and imports the net amount made after deducting any expenses incident to a business. It is said that the correct meaning of the word "profits" is the excess of receipts over expenditures. *Lepore v. Twin Cities Nat. Building & Loan Ass'n*, 5 Pa. Super. Ct. 276, 280.

The word "profits," in an agreement between the owners of separate steamboats to operate their own boats and share the profits at the end of the season, means the excess of receipts over expenditures—that is, net earnings; such being its usual, ordinary, and correct meaning. *Connolly v. Davidson*, 15 Minn. 519, 530 (Gil. 428, 436), 2 Am. Rep. 154.

It is held that the term "profits" in a mortgage of the rents, issues, and profits of a railroad company indicates that only the

net income was intended. *Freights of The Kate* (U. S.) 63 Fed. 707, 716.

In construing a will by which a plantation was left to a trustee "to make all the contracts which may be necessary to the keeping up of such plantation, and to pay and discharge all the proper debts which may accrue against it, and to allow testator's children out of the profits of said plantation annually such sums of money as in his discretion may be right," the court said: "The term 'profits,' when applied to the cultivation of the plantation, had a general popular signification. It was never confounded with 'rent' or with 'proceeds.' It denoted the annual gain or income from the sale of products after a deduction of the expenses of cultivation." *Taylor v. Harwell*, 65 Ala. 1, 11.

In manufacture, agriculture, and ordinary business the word "profit" ordinarily means the excess of returns over expenditures, and may or may not, according to circumstances, include in the returns any increase in value of the capital, and in the expenditures any depreciation of capital. In a more scientific sense, it relates to that excess which remains after deducting from the returns not only the operating expenses and depreciation of capital, but also interest on the capital employed. The word "profits" in a contract whereby an actress was to have a certain weekly salary and also commission on the profits in excess of a certain sum, held to mean the difference between the receipts and running expenses. *Mayer v. Nethersole*, 71 App. Div. 383, 390, 75 N. Y. Supp. 987, 990.

#### **As net profits.**

In a statute providing for the taxation of the profits of the corporation, the term "profits" should be construed as meaning "net profits." *Hubbard v. Brainard*, 35 Conn. 563, 571.

"Profit," in the common acceptance of the term, is the benefit or advantage remaining after all costs, charges, and expenses have been deducted, because until then, and while anything remains uncertain, it is impossible to say whether or not there has been a profit. *Mackey v. Millar* (Pa.) 6 Phila. 527.

Profits had a fixed and definite meaning as used in an agreement by which the parties were to prosecute certain claims for pensions against the government by which the "profits" were to be equally divided. The word did not mean gross profits, but imported the net amount made after deducting any proper expense incident to the business. *Jones v. Davidson*, 34 Tenn. (2 Sneed) 447, 452.

"Profits," as used in Act Cong. June 30, 1864, § 121 (13 Stat. 284), requiring banks to

make returns of the "amount of profits which have accrued or been earned or received," means net profits after deducting expenses and losses, from whatever source, connected with the business, including loss by embezzlements. *United States v. Central Nat. Bank* (U. S.) 10 Fed. 612, 614.

"Profits," as used in a contract to pay a certain proportion of the profits realized by the sale of, or by the revenue arising from, certain land, means the sum remaining, or the price in excess of the purchase money, with interest upon it. There are no profits in a land speculation which does not return to the investor his purchase money with interest upon it. In estimating the cost of unproductive land to a purchaser who held it for 30 years, interest on the price paid for it must be included, and, if the sum for which it is sold does not exceed the purchase money and interest, there is no profit on the investment. "Profits," said Mr. Lindley in his work on Partnership, p. 8, "are the excess of returns over advances, the excess of what is obtained over the cost of obtaining it; and 'profits' and 'net profits' are, for all legal purposes, synonymous expressions." *Hentz v. Pennsylvania Co. for Insurance on Lives & Granting of Annuities*, 19 Atl. 685, 134 Pa. 343.

Where a statute declared that the trustees of savings banks declaring any interest or dividend in excess of the interest or profits earned should be personally liable to the corporation for the amount of the excess, the statute did not intend to limit the interest which might be lawfully voted for to net profits. *Van Dyck v. McQuade*, 86 N. Y. 38, 53.

#### **As net receipts.**

By Act Cong. Feb. 16, 1876, appropriating \$1,500,000 to the Centennial Board of Finance, it was provided that the United States should be repaid "out of the moneys that remained in the treasury of the company after the payment of the debts, before any dividend or percentage of profits shall be paid the holders of the stock." In considering the question whether the United States should be paid before the amount of stock held by the stockholders should be paid to them, the court said: "This will depend much upon the signification of the term 'profits' as here used. The capital stock of this corporation was not employed in, but to prepare for, the business of the contemplated exhibition; and the receipts of the exhibition 'over and above its current expenses' are the profits of the business. These were the only profits anticipated. They are in fact the net receipts, which, according to the common understanding, ordinarily represent the profits of the business. The public, when referring to the profits of the busi-

ness of a merchant, rarely ever take into account the depreciation of the buildings in which the business has been carried on, notwithstanding they have been erected out of the capital invested. Popularly speaking, the net receipts of a business are its profits. So here, as the business to be carried on was that of an exhibition, and its profits were to be derived only from its receipts, to the popular mind the net receipts would represent the net profits." "Profits" has substantially the same meaning as "remaining assets," as used in the act of 1872. *Eyster v. Centennial Board of Finance*, 94 U. S. 500, 503, 24 L. Ed. 188.

#### **As net value of labor.**

The statute forbidding the employment of the inmates of penal institutions at any trade or industry whereby their work or the "product and profits of their work" shall be farmed out, contracted, given, or sold to any person, do not refer to articles of property, but to the net value of labor. The act does not forbid the dealing in tangible things or articles of property whenever made, but the farming out, contracting, giving away, or selling of convict labor. *People v. Hawkins*, 51 N. E. 257, 260, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736.

#### **Premiums on sale of securities.**

Profit is the acquisition of gain above expenditures arising from some transaction or operation, and will not include premiums received on the sale of securities. *Cross v. Long Island Loan & Trust Co.*, 27 N. Y. Supp. 495, 496, 75 Hun, 533.

#### **As proceeds of estate.**

"Profits," as used in a will giving to a certain person an equal, undivided, one-fifth part of the profits obtained on the sale of testator's real estate, should be construed in the sense of "proceeds," or an equivalent term, it appearing that the testator meant to give her an equal share in the whole of the remainder of the proceeds of the sale of the real estate, after deducting a certain amount. *Stewart v. Stewart*, 31 N. J. Eq. (4 Stew.) 398, 400.

The word "profits," when applied to trade or business, means "the advance in price of goods sold beyond the cost of purchase." *Bouv. Law Dict.* When applied to real estate, it means "the produce of lands," and is, as used in the phrase "rents, issues, and profits," synonymous with "rents." *Burrill, Law Dict.* p. 344. "Rents and profits" of real estate means "the sum annually yielded by the same." *Delaney v. Van Aulen*, 84 N. Y. 16, 23. An increase from natural causes in the value of real or personal estate held as an investment does not constitute profits, and go to the life tenant, but becomes principal, and goes to the remain-

dermen. In re Vedder's Will, 15 N. Y. Supp. 798, 805, 2 Con. Sur. 548.

**As products of farm.**

"Rents and profits of real estate" mean the sum annually yielded by the same. In re Vedder, 15 N. Y. Supp. 798, 805, 2 Con. Sur. 548 (citing Delaney v. Van Aulen, 84 N. Y. 23).

A lease provided that the lessee should furnish the labor to cultivate the farm, and pay the lessor "half of all profits from the farm." Held, that the word "profits" was used in a sense of "products," binding the lessee to pay one-half the products of the farm, and was not intended to require only a surrender of one-half "the profits of the farm." Richmond v. Connell, 11 Atl. 853, 854, 55 Conn. 403.

Const. 1874, art. 9, § 6, declares that the widow of the owner of a homestead shall have the rents and profits thereof during her natural life. It was held that the term "profits" comprehends the produce of the soil, whether it arises above or below the surface, as herbage, wood, turf, coal, minerals, stones, and fish; so that under this statute a widow is entitled to a strata of coal underlying a homestead. Russell v. Berry, 67 S. W. 864, 70 Ark. 317.

**As profits on purchase on foreclosure.**

The term "profits and income" in a will by which testator leaves his estate to his executors in trust, to receive and collect the rents of the real estate and the income and profits of the personal estate, and to pay the income and profits to his daughter during her life, and directing the corpus of the estate to go to her children after her death, includes the profits made on land purchased by the executors at a foreclosure sale of a mortgage to secure a loan of estate funds. In re Park's Estate, 33 Atl. 884, 886, 173 Pa. 190.

**Receipts from sale.**

The rents and profits of a trust estate do not include the purchase money received by a trustee from a sale of land rescinded through the purchaser's abandonment of the contract. Mansfield v. Alwood, 84 Ill. 497, 499.

**As rents.**

The word "profits," when applied to real estate, means the produce of lands, and is, as used in the phrase "rents, issues, and profits," synonymous with "rents." In re Vedder's Will, 2 Con. Sur. 548, 561, 15 N. Y. Supp. 798, 805 (citing Burrill, Law Dict. p. 844).

"Profits," as distinguished from "rents," are the result of trade, which is fluctuating and uncertain, and dependent on skill, care,

and the nature of and amount of the business transacted. Bennett v. Austin, 81 N. Y. 308, 319.

"Profits," as used in the statute of April 8, 1801 (1 K. & R. 562), providing that the people will not sue for lands by reason of any right or title of the people to the same which shall not have accrued within the space of forty years, unless the people, or those under whom they claim, shall have received the rents and profits, is synonymous with "rent," though rent is a tribute which issues out of lands as a part of its actual or supposed profits, and the word "profits" means yearly profits. People v. Van Rensselaer (N. Y.) 8 Barb. 189, 199 (citing Ivy v. Gilbert, 2 P. Wms. 13; Earl of Albemarle v. Rogers, 2 Ves. Jr. 477, 480, and notes; Green v. Belchier, 1 Atk. 505, 506).

Ky. St. § 2128, provides that the wife shall be entitled to one-third of the rents and profits of her husband's dowable real estate from his death until dower is assigned. In considering the question as to whether under this statute the widow was entitled to gross rents, without any deduction for taxes, insurance, or repairs, the court said: "The use of the word 'profits' cannot be deemed to be a limitation upon or qualification of the preceding word 'rents,' so as to restrict that word in meaning to 'net rents.'" Morton's Ex'rs v. Morton's Ex'r, 66 S. W. 641, 643, 112 Ky. 706.

**Wages distinguished.**

The word "profits" signifies an excess of the value of returns over the value of advances; the excess of receipts over expenditures; that is, net earnings. In commerce it means the advance in the price of goods sold beyond the cost of purchase. In distinction from the wages of labor, it is well understood to imply the net return to the capital or stock employed after deducting all the expenses, including not only the wages of those employed by the capitalist, but the wages of the capitalist himself for superintending the employment of his capital stock. Profits are divided by writers on political economy into gross and net; the former being the entire difference between the value of advances and the value of returns, and the latter so much of this difference as arises exclusively from the capital employed. Profits cannot consist of earnings never yet received. People v. San Francisco Sav. Union, 13 Pac. 498, 499, 72 Cal. 199.

Within the meaning of Rev. St. 1874, p. 291, § 31, providing that "associations and societies which are intended to benefit the widows and orphans as agencies of deceased members thereof, and where no annual dues or premiums are required, and where the members shall receive no money as profits or otherwise, shall not be deemed insurance

companies," the payment to officers of compensation for their services would not be a receipt of money as profits or otherwise. The word "profits," as ordinarily used, means the gain made upon any business or investment; a different thing altogether from mere compensation or labor. *Commercial League Ass'n of America v. People*, 90 Ill. 166, 173.

#### **As conveying the whole estate.**

"It is well settled as a general rule of law that the devise of rents, issues, and profits of land is equivalent to a devise of the land itself." *In re France's Estate*, 75 Pa. (25 P. F. Smith) 220, 224.

A devise of the rents and profits of the profits and benefits of lands, without qualification or limitation, will impliedly carry the fee; but where testator directed that the rents and profits of his land be paid to his widow during her life, and then for the support of his son until he should reach the age of 21 years, but upon the death of his wife and his son arriving at the age of 21 years the land should be sold, and directed how the proceeds should be divided, such devise did not carry the fee. *Collier v. Grimesey*, 36 Ohio St. 17, 21, 22.

The words "rents and profits" in a devise may be so construed as to authorize a sale of land, when necessary to raise a sum so as to effect the object of testator—as where testator devised all of his estate to his wife for life, and after her death to his son, in fee, on condition that he shall comfortably maintain a daughter of testator during life; and if the son failed to maintain the daughter, then the executors were authorized to take possession of the land, and to lease, or by any other means out of the profits therefrom arising, to support and maintain the daughter. The word "profits," says Sir Thomas Plumer in *Allen v. Backhouse*, 2 Ves. & B. 65, does *ex vi termini* include the whole interest, as a devise of the profits would pass the land itself; and it was held in that case that the words "rents and profits" extended beyond their natural meaning by a technical, artificial, but liberal construction established by a long train of decisions, and were held to mean not merely annual rents and profits, but a mortgage and sale, when the same was necessary to raise a gross sum, and thereby effect the testator's object. This extension of the word "profits" is supported by a series of authorities from the case of *Backhouse v. Middleton*, as early as 22 Car. II, 1 Ch. Cas. 173, down to the present time. Lord Hardwick observed that, if there be no other words to restrain the meaning of "rents and profits" and confine them to the receipt of rents and profits as they accrue, the court, to obtain the end which the party intended, by raising the money, has by the liberal construction of the words taken them

to amount to a direction to sell. *Schermerhorne v. Schermerhorne* (N. Y.) 6 John. Ch. 70, 73.

#### **PROFIT À PRENDRE.**

A "profit à prendre" consists of a right to take a part of the soil or produce of the land in which there is a supposable value. *Payne v. Sheets*, 55 Atl. 656, 659, 75 Vt. 335.

"Profit à prendre" is defined to be the right of taking soil, gravel, minerals, and the like from the land of another. *Black v. Elkhorn Mining Co.* (U. S.) 49 Fed. 549, 551 (citing Washb. Easem. 11).

Rights exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof, such as rights of pasture or digging sand, are termed "profits à prendre." *Bingham v. Salene*, 14 Pac. 523, 524, 15 Or. 208, 3 Am. St. Rep. 152.

The right to profits denominated "profits à prendre" consists of a right to take a part of the soil or produce of the land in which there is a supposable value. It is in its nature corporeal, and is capable of livery, while easements are not, and may exist independently without connection with or being appendant to other property. *Pierce v. Keator*, 70 N. Y. 419, 422 (citing 2 Washb. Real Prop. 26 [3d Ed.] 276).

Where a grant involves an easement of going upon the land of the grantor to take the necessary timber, it is a "profit à prendre" in the grantee in respect of the land of the grantor—a mere right to take the product of the grantor's land—and when it is coupled with a conveyance of title to some interest in the land of the grantor, as, for instance, the minerals in, under, or upon the same, it is a profit à prendre appurtenant to the interest conveyed, and is in the nature of an easement appurtenant. *Kennedy Stave & Cooperage Co. v. Sloss-Sheffield Steel & Iron Co.*, 84 South. 372, 373, 137 Ala. 401.

#### **Easement distinguished.**

Profit à prendre in the land of an owner, when not granted in favor of some dominant tenement, cannot properly be said to be an easement, but an interest or estate in the land of another. *Post v. Parsall* (N. Y.) 22 Wend. 425, 433; *Bingham v. Salene*, 14 Pac. 523, 524, 15 Or. 208, 3 Am. St. Rep. 152.

The strict and technical definition of an easement excludes a right to the products or proceeds of land, or, as they are generally termed, "profits à prendre." But that such a right is in the nature of an easement, and, although capable of being transferred in gross, may also be attached to land as an appurtenance, and pass as such, is shown by various authorities. Washburn says distinctly: "This right of profit à prendre, if enjoy-

ed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate;" and further says: "It would be difficult to treat of easements or servitudes without embracing these rights, as well as that of taking profits in another's land, which one may enjoy in connection with the occupancy of the estate to which such right is united." *Huntington v. Asher*, 96 N. Y. 604, 610, 48 Am. Rep. 652.

"Profits à prendre" are rights exercised by one man in the soil of another, accompanied with participation in the profits thereof, such as rights of pasture, or digging sand; while an easement is a mere right of convenience, without profit. *Crabb, Real Prop.* 125, c. 1. The property in animals *feræ naturæ*, while they are on the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them by grant of hunting, shooting, and fowling. That right may be granted by the owner of the fee simple, and such a grant is a license of a profit à prendre. *Ewart v. Graham*, 7 H. L. Cas. 334. However, the right of profit à prendre, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such an estate; while, if it applied to one apart from any ownership of other lands, it has the character of an interest in the lands itself. *Washb. Easem.* 7. The right to enter the lands of another to cut grass, or for the purpose of hunting, is an interest in the land. *Wickham v. Hawker*, 7 Mees. & W. 63; *Waters v. Lilley*, 21 Mass. (4 Pick.) 145, 16 Am. Dec. 333. And so a grant of a right to shoot wild fowl on the waters of a grantor, with the privilege of ingress and egress, is a grant of a profit à prendre. *Bingham v. Salene*, 14 Pac. 523, 527, 15 Or. 208, 3 Am. St. Rep. 152.

A right of drainage is said to be an easement, which gives the owner of the land the right to bring down water from its source or from any other place; while the right to enter upon the land of another for the purpose of growing crops, cutting grass, wood, or timber, or the like, or derive a profit from the product of the land, or, as it is called, the right of "profit à prendre," is not considered an "easement" in the strict sense of the word. *Nellis v. Munson*, 15 N. E. 739, 740, 108 N. Y. 453.

## PROFITS ON CARGO.

The expression "profits on cargo," as used in a charter party stating that the freight should be valued on "profits on cargo," means the improved value of the cargo when it has been landed at its destined port. *Halhead v. Young*, 6 El. & Bl. 312, 324.

## PROGRESS.

See "In Progress."

## PROHIBIT.

The word "prohibit," when used in a grant of police power to a city, giving it a right to prohibit certain occupations, etc., is not materially different from the word "prevent." In fact, "prevent" is the stronger word, conveying the idea of prohibition and the use of means necessary to give it effect. *In re Jones*, 78 Ala. 419, 425.

The word "prohibited," as used in Acts 1895, p. 248, § 4, requiring saloons to be located on the ground floor and so arranged that the entrance may be seen from the street, and forbidding obstruction of the view of the room during hours and days when sales are prohibited, means all hours and seasons when sales are forbidden, always, everywhere, to all. *Nelson v. State*, 46 N. E. 941, 942, 943, 17 Ind. App. 403.

The words "prohibited from," as used in a policy of marine insurance containing a condition that the insured vessel is prohibited from entering certain waters and ports, is equivalent to a warranty against entering such waters or ports. *Odiorne v. New England Mut. Marine Ins. Co.*, 101 Mass. 551, 553, 3 Am. Rep. 401.

"Prohibited from running at large," in a statute relating to animals, means substantially the same thing as "confined," in another act of the same nature. *Osborne v. Kimball*, 21 Pac. 163, 164, 41 Kan. 187.

### As conferring power to license.

The power to "prohibit" the sale of intoxicating liquors, conferred on cities having special charters under Laws 1868, c. 164, § 2, includes the power to license such sale. *City of Keokuk v. Dressell*, 47 Iowa, 597, 599.

A power to "license, regulate, and prohibit" the selling or giving away of spirituous liquors, conferred upon cities by Rev. St. Ill. c. 24, includes the power to prohibit the sale of such liquors in quantities of one gallon or more without first obtaining a license. *Miller v. Ammon*, 12 Sup. Ct. 834, 145 U. S. 421, 36 L. Ed. 759.

### Partial prohibition.

A general power to prohibit the sale of liquor is sufficient to authorize any partial prohibition deemed advisable. *Gunnarssolhr v. City of Stirling*, 92 Ill. 569, 573.

An act authorizing cities to restrain and prohibit tippling houses confers power to keep them within certain limits as to number and order, the word "prohibit" meaning that the council might prohibit the existence of such houses altogether, if deemed best. *City of St. Louis v. Smith*, 2 Mo. 113; *State v. Fay*, 44 N. J. Law, 474, 476.

A power given to villages to "license, regulate, and prohibit" the sale of intoxicating



liquors has been held to authorize the licensing of the sale of liquor in one part of such a village and the prohibition of such sales in other parts. *People v. Cregier*, 28 N. E. 812, 815, 138 Ill. 401.

#### **As conferring power to punish.**

St. 1885, conferring on the city of Denver power, by ordinance, to "prohibit and suppress" disorderly houses, means that the city is given the right to provide a punishment to be inflicted on those maintaining such houses. *Rogers v. People*, 12 Pac. 843, 845, 9 Colo. 450, 59 Am. Rep. 146.

#### **As regulate.**

The "prohibition" of a business is to prevent the business being engaged in or carried on, entirely or partially, and is incongruous with "regulate," which implies that the business regulated may be engaged in and carried on subject to established rules or methods. *Miller v. Jones*, 80 Ala. 89, 97.

Where a Michigan act was enacted to regulate the sale of spirituous liquors, the word "prohibit," as used in an amendatory section which prohibited the sale thereof within certain specified limits, should not be construed as synonymous with the word "regulate," as used in the title of the act. *People v. Gadway*, 28 N. W. 101, 103, 61 Mich. 285, 1 Am. St. Rep. 578.

According to the doctrine that the greater includes the less, a power to prohibit the manufacture and sale of intoxicating liquors includes the power to prohibit such manufacture and sale unless certain rules are complied with. *Cantini v. Tillman* (U. S.) 54 Fed. 969, 974.

"Prohibit," as used in an ordinance enacted to prohibit animals from running at large, etc., should not be construed as synonymous with "restrain" or "regulate," so as to permit the animals, under certain conditions imposed by the city, to run at large. *Stebbins v. Mayer*, 16 Pac. 745, 747, 38 Kan. 573.

#### **PROHIBITION (Writ of).**

Prohibition issues, says Bacon, out of the superior courts of common law, to restrain the inferior courts on a suggestion that the jurisdiction of the matter belongs not to such courts. And, in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges that give it, are in such superior courts punishable, sometimes at the suit of the King, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case. *Mayo v. James* (Va.) 12 Grat. (Va.) 17, 23.

A writ of prohibition is to prevent the exercise of jurisdiction by a tribunal pos-

sessing judicial powers over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance, and is a proper remedy in a case where the court having jurisdiction assumes to exercise an unauthorized power. It is a remedy provided by the common law against the encroachment of jurisdiction, and is the proper remedy in cases where the court exceeds the bounds of its jurisdiction, or takes cognizance of matters not arising within its jurisdiction. 8 Bac. Abr. 230, tit. "Prohibition." The writ is not to be resorted to except in cases of usurpation or abuse of power, and not then unless other remedies are ineffectual to meet the exigencies of the case. The writ may be issued where the inferior court is proceeding without jurisdiction, or where the jurisdiction assumed belongs to another court, or where it transcends its jurisdiction. The fact that the court is attempting to exercise control over a case in which it has no right to act is a sufficient ground for prohibition, whether any other court would have jurisdiction or not. The writ does not lie to prevent a court from deciding erroneously, or to prevent the enforcement of an erroneous judgment in a case in which the court had a right to adjudicate, but to prevent the usurpation of judicial power by a court which has no authority to decide the case in which it assumes the right to act judicially, and it can only be interposed in a clear case of excess of jurisdiction, and may lie to a part, and not to other matters. *People v. Judge of Superior Court of Detroit* (Mich.) 2 N. W. 919.

A writ of prohibition is an extraordinary writ issuing out of a court of superior jurisdiction, and directed to an inferior court, or some other inferior tribunal exercising some judicial or quasi judicial power, commanding it to cease entertaining jurisdiction in a cause or proceeding over which it has no control, or where such inferior tribunal assumes to entertain a cause over which it has jurisdiction, but goes beyond its legitimate powers and transgresses the bounds prescribed to it by law. *State v. Ward*, 72 N. W. 825, 70 Minn. 58.

Anciently, a writ of prohibition was an original writ, and, like other original writs, could only issue out of chancery. In later times that practice became obsolete, and the application is now in the first instance made in the common-law courts, stating the proceedings in the inferior court, and concluding with a prayer for the writ. Being a common-law writ, it has been accepted in the United States as part of the system, and employed in practice wherever it is suited to the arrangement of the judicial system. *Planters' Ins. Co. v. Cramer*, 47 Miss. 200, 202.

Prohibition, like all other extraordinary remedies, is to be resorted to only in cases

where the usual and ordinary forms of remedy are insufficient and inadequate to afford redress, and it issues only in cases of extreme necessity, and before it can be granted it must appear that the party aggrieved has no available remedy in the inferior tribunals. It is an original writ, and is the remedy afforded by the common law against encroachments of jurisdiction by inferior courts, and is used to keep such courts within the limits and bounds prescribed for them, and should therefore in all proper cases be applied without hesitation, but it does not lie for error or grievances which may be redressed in the ordinary course of judicial proceedings by appeal or writ of error. It is a fundamental principle, and one which will be strictly enforced, that this writ is never allowed to usurp the functions of a writ of error or certiorari, and can never be employed as a process for the correction of errors of inferior tribunals. *Johnston v. Hunter*, 50 W. Va. 52, 53, 40 S. E. 448.

A prohibition is a writ issuing out of the superior courts, directed to inferior judicial tribunals, commanding them to cease from the prosecution of a suit upon a suggestion that either the cause originally, or some collateral matter therein, does not belong to that jurisdiction, but to the cognizance of some other court. *State v. Road Com'rs* (S. C.) 1 Mill, Const. 55, 57, 12 Am. Dec. 596; *Washburn v. Phillips*, 43 Mass. (2 Metc.) 296, 298; *Maurer v. Mitchell*, 53 Cal. 289, 291; *People v. Board of Election Com'rs*, 54 Cal. 404, 406; *Camron v. Kenfield*, 57 Cal. 550, 553.

A writ of prohibition lies only to an inferior court, and only for a usurpation or unlawful exercise of jurisdiction. It has been held to lie to tribunals and persons that were not, strictly speaking, courts. The definition given in *Thomson v. Treacy*, 60 N. Y. 31, is more nearly conformable to actual practice in the use of this proceeding. It is: "A writ of prohibition is to prevent the exercise, by a tribunal possessing judicial powers, of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance." And yet even this definition does not comprehend all the cases in which the writ has been allowed. In *Brazle v. Fayette County Com'rs*, 25 W. Va. 213, 219, it was held that "the writ of prohibition lies from a superior court, not only to inferior judicial tribunals, properly and technically denominated such, but also to inferior ministerial tribunals possessing, incidentally, judicial powers, or tribunals such as are known in the law as 'quasi judicial tribunals,' and even in extreme cases to purely ministerial bodies when they usurp judicial powers." A writ of prohibition will lie when the commissioners, while sitting as a board of canvassers after an election, in the exercise of judicial functions of such

board, are proceeding in excess of their judicial powers, or are usurping judicial powers which do not belong to them. *Fleming v. Commissioners*, 31 W. Va. 608, 612, 613, 8 S. E. 267, 270.

A writ of prohibition is to prevent the exercise by a tribunal of powers of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters in which it has cognizance. *People v. Doyle*, 59 N. Y. Supp. 959, 963, 28 Misc. Rep. 411.

The writ of prohibition issues only to courts and judicial officers, acts only on legal proceedings pending before those tribunals, almost invariably involves pure questions of law, and aims only to procure a stay of proceedings. *People v. Goldfogle*, 30 N. Y. Supp. 296, 23 Civ. Proc. R. 417, 420.

A writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction. Civ. Code, § 479; *Hoke v. Richie*, 18 Ky. Law Rep. 523, 524, 37 S. W. 83.

A writ of prohibition proposes only to prevent usurpation and the unseemly conflict between jurisdictions which would necessarily arise if there was not an adequate or speedy remedy, and also to save the citizen from having his rights drawn in question by a tribunal without capacity to adjudicate and enforce them. The only inquiry presented for the writ is whether the proceeding complained of is before a tribunal having cognizance of it. *Reid v. Moulton*, 51 Ala. 255, 273.

A writ of prohibition issues usually to courts to keep them within the limits of their jurisdiction, but it may also issue to an officer to prevent the unlawful exercise of judicial or quasi judicial power. Three things are essential to justify the writ: (1) That the court, the officer, or person is about to exercise judicial or quasi judicial power; (2) that the exercise of such power by such court, officer, or person is unauthorized by law; (3) that it will result in injury for which there is no other adequate remedy. *State v. Young*, 29 Minn. 474, 523, 9 N. W. 737, 738.

The writ of prohibition at common law issued from the superior court to an inferior court to restrain the latter from excess of jurisdiction. Its object was to keep within the limits and bounds of their several jurisdictions the various courts of the realm. The mayor of a city, when acting as chief executive officer of the city, is in no sense or to any degree the inferior of the corporation court, nor is he in any wise subject to its superintendence, as they are distinct and co-ordinate departments of the government, and therefore a writ of prohibition will not lie to restrain the mayor from proceeding with

his duties with reference to supervising the other officers of the city. *Burch v. Hardwicke* (Va.) 23 Grat. 51, 58, 59.

It was an original remedial writ, provided as a remedy for the encroachment of jurisdiction. Its office was to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. *Maurer v. Mitchell*, 53 Cal. 289, 291; *People v. Board of Election Com'rs*, 54 Cal. 404, 406; *Spring Valley Waterworks v. City and County of San Francisco*, 52 Cal. 111; *Camron v. Kenfield*, 57 Cal. 550, 553; *People v. Nussbaum*, 66 N. Y. Supp. 129, 130, 32 Misc. Rep. 1; *McConiha v. Guthrie*, 21 W. Va. 134, 144; *State v. Malone*, 23 South. 575, 576, 40 Fla. 129.

"Our writ of prohibition is the writ known to the common law, and its office is to restrain subordinate courts and inferior judicial tribunals from exceeding jurisdiction." *Hevren v. Reed*, 58 Pac. 536, 537, 126 Cal. 219.

The writ of prohibition only lies where there is a want of jurisdiction, or where a court, judge, or other tribunal is proceeding in excess of the jurisdiction conferred. *Appo v. People*, 20 N. Y. 531; *People v. Sherman*, 66 App. Div. 231, 72 N. Y. Supp. 718; *People v. Doyle*, 28 Misc. Rep. 411, 59 N. Y. Supp. 959; *Id.*, 44 App. Div. 402, 403, 60 N. Y. Supp. 1088; *Id.*, 162 N. Y. 659, 57 N. E. 1122; *People v. Williams*, 64 N. Y. Supp. 457, 458, 51 App. Div. 102; *Thomson v. Tracy*, 60 N. Y. 31; *People v. Nichols*, 79 N. Y. 582; *People v. Petty*, 32 Hun. 443; *People v. Fitzgerald*, 15 App. Div. 539, 44 N. Y. Supp. 556; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. St. 570, 29 L. Ed. 601. We find it stated by some judicial writers, following the old English cases, that the writ may also be issued to prohibit the court, judge, or other tribunal from proceeding contrary to "the general law of the land." This, doubtless, means nothing more than passing upon personal or property rights without a hearing. It embraces cases where a petition, pleading, or objection is duly served or filed in accordance with the settled law or practice, and a court, judge, or other tribunal having jurisdiction, and whose duty it is to hear and determine the matter, is proceeding to a determination without a hearing. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, affirming 145 N. Y. 126, 39 N. E. 841, 39 L. R. A. 449. That, I take it, would be an excess of jurisdiction, and I do not understand that the phrase "contrary to the general law of the land," as thus used by the courts, means anything more than an excess of jurisdiction. *People v. Fitzgerald*, 76 N. Y. Supp. 865, 868, 73 App. Div. 339.

Prohibition lies, in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject-mat-

ter in controversy, or, having such jurisdiction, exceeds its legitimate powers. *Sperry v. Sanders*, 50 W. Va. 70, 73, 40 S. E. 327. "It is the means by which the superior court exercises its supervisory power over the inferior court and keeps it within the limits of its rightful jurisdiction." *State v. Ward*, 72 N. W. 825, 70 Minn. 58.

A writ of prohibition is the order from the superior to the inferior court of limited jurisdiction, prohibiting the latter from acting in a manner out of its jurisdiction. *Gibbs v. Board of Aldermen of Louisville*, 26 S. W. 186, 95 Ky. 471.

Prohibition has always been regarded as an existing legal remedy in Virginia. In the Code, in the new Constitution, and in the legislation under it, the remedy is fully recognized, and various provisions are made in regard to it. There must be a rule to show cause why the prohibition should not issue before the writ is issued. This rule to show cause operates as a prohibition until the further action of the court. *Mayo v. James* (Va.) 12 Grat. 17, 18.

Laws 1895, p. 119, §§ 29, 30, provide: Section 29. "The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceeding of any tribunal, corporation, board or person, when such proceedings are without, or in excess of, the jurisdiction of such tribunal, corporation, board or person." Section 30. "It may be issued by any court, except police or justice courts, to an inferior tribunal, or to a corporation or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested." *State v. Superior Court of Spokane County*, 47 Pac. 31, 34, 15 Wash. 668, 37 L. R. A. 111, 55 Am. St. Rep. 907.

The writ mentioned in the California Constitution is the writ of prohibition as known to the common law, and its office is to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. *Maurer v. Mitchell*, 53 Cal. 289, 291; *Camron v. Kenfield*, 57 Cal. 550, 553.

The "writ of prohibition" is defined by statute in Kentucky to be an order of a circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction. "We do not understand from this definition," says the court, "that the writ will lie only in a matter which was never or could not have been within the jurisdiction of the court prohibited, but includes also a matter which may have been, but at the time the writ was issued had passed out of its jurisdiction." *Clark County Court v. Warner* (Ky.) 76 S. W. 828, 830.

High, Extr. Rem., defines a "writ of prohibition" as an extraordinary judicial writ, issuing out of a court of superior jurisdiction, and directed to an inferior court, for the purpose of preventing the inferior tribunal from exercising a jurisdiction with which it is not legally vested. Section 762. It does not lie for grievances which may be redressed in the ordinary course of judicial proceedings by appeal or writ of error. Section 765. If an inferior court has jurisdiction of the subject-matter in controversy, a mistaken exercise of that jurisdiction, or of its acknowledged powers, will not justify a resort to the extraordinary remedy of prohibition. *State ex rel. Morse v. Burckhardt*, 87 Mo. 533, 536.

Rev. St. § 4994, defining the office and purpose of a writ of prohibition, says: "It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without, or in excess of, the jurisdiction of such tribunal, corporation, board, or person." A writ does not lie to arrest an action in the district court on a mere question of pleadings. *William v. District Court in and for Alturas County*, 35 Pac. 692, 4 Idaho, 11.

A writ of prohibition is a state writ. It issues only to courts and judicial officers, and acts only upon legal proceedings pending before those tribunals, and almost invariably involves pure questions of law, and aims only to procure a stay of proceedings. Code Civ. Proc. § 2951 et seq., which provide for the discontinuance of an action in a justice's court when the answer sets up a claim of title to land, do not apply to summary proceedings, and therefore a writ of prohibition will not issue to stay summary proceedings pending in the justice's court. *People v. Goldfogle*, 30 N. Y. Supp. 296, 23 Civ. Proc. R. 417.

The writ of prohibition is an appropriate remedy to restrain the exercise of jurisdiction by a subordinate court over a subject-matter when it has none, and is called for when such jurisdiction is asserted against a court that has jurisdiction and is asserting it, and when the officers of each, acting under its orders, are liable at any moment to come into physical conflict over the possession of the subject-matter in controversy. *State ex rel. Merriam v. Ross*, 25 S. W. 947, 954, 122 Mo. 435, 23 L. R. A. 534.

A writ of prohibition, under Code Civ. Proc. § 1980, is an arrest of proceedings of any tribunal when they are without or in excess of the jurisdiction of such tribunal. It is the process by which any superior court prevents an inferior court from exercising jurisdiction with which it has not been vested by law. Negative in its manner of operation, its command is "you stop doing," while mandamus positively says "you shall

do." *State v. Second Judicial District Court*, 56 Pac. 219, 223, 22 Mont. 220.

Rev. St. 1887, c. 4994, defines the writ of prohibition as "a counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or persons, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person." *Williams v. Lewis*, 54 Pac. 619, 620, 6 Idaho, 184.

"A writ of prohibition is an extraordinary writ, issuing out of a court of superior jurisdiction, and directed to the inferior court, commanding it to cease entertaining jurisdiction in a cause or proceeding over which it has no control, or where such inferior tribunal assumes to entertain a cause over which it has jurisdiction, but goes beyond its legitimate powers and transgresses the bonds prescribed to it by law. \* \* \* It should be issued only in a case of necessity, and not for grievances which may be redressed by ordinary proceedings at law or in equity. \* \* \* It is the means by which the superior court exercises its supervisory power over the inferior court." *State v. Evans*, 60 N. W. 433, 435, 88 Wis. 255.

#### Adequacy of other remedy.

The writ of prohibition is that process by which a superior court prevents an inferior court or tribunal from usurping or exercising a jurisdiction with which it has not been vested by law. It is an extraordinary writ, because it only issues when the party seeking it is without other adequate means of redress for the wrong about to be inflicted by the act of the inferior tribunal. In general, it only lies when the court either has no jurisdiction of the subject-matter, or, having that, exceeds it in some incidental matter, or in rendering judgment, and no appeal or writ of error or other remedy is at all available, or, if so, is not adequate to afford the redress to which the injured party is entitled. Before a writ of prohibition will be granted to a court, it must have determined adversely to petitioner a motion or suggestion based on its lack of jurisdiction. *State v. District Court of Weston County*, 39 Pac. 749, 751, 5 Wyo. 227.

The writ of prohibition is the appropriate remedy only where the court is acting entirely without jurisdiction or in clear excess of its jurisdiction. It is not applicable where the party has a complete and adequate remedy in some other and a more ordinary form. It will not lie to determine whether a petition for contempt is defective, any more than mandamus or certiorari will lie to determine whether the declaration, information, or indictment is defective. In such cases the circuit courts have full jurisdiction to pass upon the validity of the pleadings, and the proper course is by writ

of error, appeal, or certiorari after the proceedings are concluded. The principle is thus stated: "The broad governing principle is that a prohibition lies where a subordinate tribunal has no jurisdiction at all to deal with the cause or matter before it, or where, in the progress of a cause within its jurisdiction, some point arises for decision which the inferior court is incompetent to determine; but a prohibition will not lie where the inferior court has jurisdiction to deal with the cause and with all matters necessarily arising therein, however erroneous its decisions may be upon any point." *Nichols v. Judge of Superior Court of Grand Rapids*, 89 N. W. 691, 130 Mich. 187 (citing *Heard's Shortt, Extr. Rem.* 436).

A writ of prohibition, if issuable, is only for excess of jurisdiction. It cannot be issued to restrain any action of inferior courts which can be reviewed by any of the ordinary methods. *People v. Circuit Court*, 11 Mich. 393, 404, 83 Am. Dec. 754.

The writ of prohibition is an extraordinary remedy, and not intended to be a remedy for the correction of errors that may be investigated and determined by appeal. *People v. Williams*, 64 N. Y. Supp. 457, 458, 51 App. Div. 102; *State v. Malone*, 23 South. 575, 576, 40 Fla. 129; *McConiha v. Guthrie*, 21 W. Va. 134, 136. It cannot take the place of a writ of error or other proceeding to review judicial action, or a suit in equity to prevent or redress fraud. *Thomson v. Tracy*, 60 N. Y. 31, 37.

#### **Certiorari distinguished.**

The writ of certiorari can be issued only to a tribunal or person exercising judicial functions, whereas the writ of prohibition can be issued against one exercising either judicial or ministerial functions. The certiorari can be issued only when there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy; whereas the statute says that prohibition may be resorted to where there is not a plain, speedy, and adequate remedy in the ordinary course of law. *People v. House*, 10 Pac. 838, 841, 4 Utah, 369.

#### **As collateral proceeding.**

The remedy by a writ of prohibition is not a part or continuation of the prohibited proceeding, by removing it from one court to another for the purpose of adjudication in the latter; but it is wholly collateral to that proceeding, and is intended to arrest it and prevent its being further prosecuted in a court having no jurisdiction of the subject. It is, in effect, a proceeding between two courts, a superior and an inferior, and is the means whereby the superior exercises its due superintendence over the inferior, and keeps it within the limits and bounds of the

jurisdiction prescribed to it by law. *Mayo v. James (Va.)* 12 Gratt. 17, 23.

#### **As discretionary writ.**

A writ of prohibition is not a writ of right. Before it is granted, two things must appear: First, that the law sanctions it; and, second, that a sound judicial discretion commends it. *Davidson v. Hough*, 65 S. W. 731, 733, 165 Mo. 561.

The writ of prohibition is not demandable as a matter of right, but of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. *State v. Ward*, 72 N. W. 825, 70 Minn. 58.

Prohibition is a preventative remedy provided by the common law to restrain the action of courts in excess of their jurisdiction or as to matters outside of their jurisdiction, may be applied for by either party, is granted not as a matter of strict right, but in sound judicial discretion, goes only to the excessive jurisdiction, can be resorted to only when other remedies are ineffectual, and to authorize its issuance it must appear that the party applying has appealed in vain for relief to the court against which the writ is asked. *Hudson v. Judge of Supreme Court*, 42 Mich. 239, 248, 8 N. W. 850, 913.

The writ of prohibition, though it may be of right in the sense that upon an application being made in proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the court, is not a writ of course, like a writ of summons in an ordinary action, but is a subject of a special application to the court upon affidavit. *City of London v. Cox*, L. R. 2 H. L. loc. cit. 252. In Blackstone's Commentaries, the grievance to be remedied by prohibition is stated to be that of encroachment of jurisdiction, or calling one coram non iudice to answer in a court that has no legal cognizance of the cause. *State ex rel. Anheuser-Busch Brewing Ass'n v. Eby*, 71 S. W. 52, 60, 170 Mo. 497.

#### **As injunction.**

The word "prohibition," as used in Gen. St. 1865, c. 167, § 24, relating to a remedy by writ of injunction or prohibition, spoken of in the act concerning injunctions, should be construed in the general sense of a restraint by injunction, and not in the technical sense of a writ of prohibition, and hence the clerk of a circuit court in vacation had no power or authority to issue a writ of prohibition. *Casby v. Thompson*, 42 Mo. 133, 137.

#### **As mandamus.**

The writ of prohibition is the counterpart of the writ of mandamus. It arrests the proceedings of any tribunal, corporation,

board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. Rev. Codes N. D. 1899, § 6123; Code Civ. Proc. S. D. 1903, § 777; Rev. St. Utah 1898, § 3654; Code Civ. Proc. Cal. 1903, § 1102.

#### **Lies to all judicial officers.**

Prohibition is directed, not only against courts, but also against persons whose characters and functions are of a judicial character; therefore it lies against commissioners of the public roads, whose functions are of a judicial character. *State v. State Com'rs* (S. C.) 1 Mill, Const. 55, 57, 12 Am. Dec. 596.

Referees appointed, under a statute, to hear and determine the question of the right of way sought by one person over the lands of another, so far partake of the character of a judicial body as to be amenable to the writ of prohibition. *Brazie v. Fayette County Com'rs*, 25 W. Va. 213, 218.

The writ of prohibition lies from a superior court, not only to inferior judicial tribunals, but to inferior ministerial tribunals possessing, incidentally, judicial power, and known as quasi judicial tribunals. *Brazie v. Fayette County Com'rs*, 25 W. Va. 213, 218.

#### **Past acts.**

"The writ of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something which the court is informed he is about to do. If the thing be before done, it is manifest that the writ cannot undo it, for that would require an affirmative act, and the only effect of the writ is to suspend all action and to prevent any further proceeding in the prohibited direction." *State ex rel. McLeod v. Potts*, 23 South. 97, 98, 50 La. Ann. 109 (quoting *United States v. Hoffman*, 71 U. S. [4 Wall.] 158, 18 L. Ed. 354); *State v. District Court of Weston County*, 39 Pac. 749, 751, 5 Wyo. 227.

The object of the writ of prohibition is the prevention of the exercise by an inferior court of a jurisdiction with which it has not been vested by law, and the writ issues in such case only when the party seeking it is without other adequate means of redress for the wrong about to be inflicted. It is granted to prevent action, and not to undo what has been done. *State v. Ausherman* (Wyo.) 72 Pac. 200, 204 (citing *State v. District Court of Weston County*, 5 Wyo. 227, 39 Pac. 749).

The writ of prohibition, as said by the Supreme Court in *United States v. Hoffman*, 71 U. S. (4 Wall.) 158, 18 L. Ed. 354, as its name imports, is one which commands the person to whom it is directed not to do something which by suggestion of the relator the court is informed he is about to do. If the

thing be already done, it is manifest that the writ cannot undo it. *Sanford v. District Court of Pima County* (Ariz.) 71 Pac. 906.

#### **As prerogative writ.**

The writ of prohibition is a prerogative writ, to be used, with great caution and forbearance, for the furtherance of justice, and for securing order and regularity in all the tribunals where there is no other regular and ordinary remedy. In a clear instance of excess of jurisdiction by which the party complaining is aggrieved, or there is no other adequate remedy in the ordinary course of procedure, it is the duty of the court to issue the writ. *Sherwood v. New England Knitting Co.*, 87 Atl. 388, 389, 68 Conn. 543.

Prohibition is a prerogative writ, issued from a superior tribunal to an inferior one, to prevent the usurpation of power by the latter. One who holds a position under the protection of the United States civil service law is not entitled to the remedy of prohibition to prevent his unauthorized removal therefrom. *Priddle v. Thompson* (U. S.) 82 Fed. 186, 189.

#### **Prevention of ministerial acts.**

The writ of prohibition does not lie to restrain a ministerial act. *Thomson v. Tracy*, 60 N. Y. 31, 37.

The office of a writ of prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial power. Prohibition will in no case lie to an inferior court to restrain the issuing of an execution, for this is a ministerial and not a judicial act. *Ex parte Braudlacht* (N. Y.) 2 Hill, 367, 368, 38 Am. Dec. 593.

A writ of prohibition, by the provisions of section 479, Civ. Code, is an order of the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction. At common law the writ only lay to restrain judicial tribunals from unauthorized judicial acts. It could not be used to prevent the performance of ministerial acts, nor could it be used to restrain executive officers or private persons or corporations. So that, under a provision of the charter that the validity of an ordinance shall be tried by writ of prohibition from the circuit court, the writ will not lie against a private corporation and prohibit it from acting under the ordinance, but only against the judge in a case where he was attempting to enforce the same. *Campbellsville Tel. Co. v. Pateson* (Ky.) 69 S. W. 1070, 1071.

The action of the board of election commissioners of San Francisco in ordering an election of freeholders to prepare and propose a charter to be submitted to the voters of the city was not judicial, and therefore a

writ of prohibition would not lie to prevent such action. *People v. Board of Election Com'rs*, 54 Cal. 404, 406.

It was held in the case of *Ex parte State*, 59 Ala. 177, 8 South. 74, that the Supreme Court would not award a prohibition to a judge to prevent action under an illegal order where such order was a ministerial act, the court being only authorized to grant such a writ to restrain unauthorized judicial acts. *State v. Bradley*, 33 South. 339, 340, 134 Ala. 549.

The office of a writ of prohibition at common law was to prevent courts from going beyond their jurisdiction, and it is seldom, if ever, granted to restrain the proceedings of other bodies or officers. *Home Ins. Co. of St. Paul v. Flint*, 13 Minn. 244, 248 (Gil 228, 231).

A prohibition is a writ issuing properly out of the Court of the King's Bench, but for the furtherance of justice it may now also be had in some cases out of the Court of Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, on suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction. Under Rev. St. c. 158, §§ 8-13, relating to the writ of prohibition, as well as at common law, the writ of prohibition does not issue to restrain the acts of executive or administrative officers, but only those of the court or other inferior tribunal exercising judicial power which it has no legal authority to exercise. *State v. Gary*, 33 Wis. 93, 97.

#### **Regulation of proceedings of lower court.**

It is not the office of a writ of prohibition to regulate the admission or rejection of evidence or the proceedings before an inferior court, judge, or other tribunal having jurisdiction of an action or proceeding. Where jurisdiction exists, errors of law or procedure must be corrected by such appeal or other review as the law affords. *People v. Fitzgerald*, 76 N. Y. Supp. 865, 868 (citing *People v. Nichols*, 79 N. Y. 582; *People v. Doyle*, 28 Misc. Rep. 411, 59 N. Y. Supp. 959; *People v. Petty*, 32 Hun, 443, supra; *People v. Fourth Judicial Dist. Court in City of New York*, 13 Civ. Proc. R. 134).

#### **As suit.**

See "Suit (noun)."

#### **PROHIBITORY.**

"Prohibitory," as used in an information charging incest, and alleging that defendants were related within the prohibitory degrees of consanguinity, should be construed to

mean "prohibited." *State v. Gulton*, 24 South. 784, 785, 51 La. Ann. 155.

#### **PROJECT.**

The right given cities by Act March 24, 1890, to "project and extend" their streets over tide lands, confers merely the right to continue existing streets in the same direction and with the same width. *Seattle & M. Ry. Co. v. State*, 34 Pac. 551, 553, 7 Wash. 150, 22 L. R. A. 217, 38 Am. St. Rep. 866.

#### **PROJECTED STREET.**

"Projected street," as used in a deed of land by the owner while making a street, bounding the land conveyed upon the projected street, does not mean a designed, intended, or contemplated street merely, but a street already projected and then in process of construction. *Greenhood v. Carroll*, 114 Mass. 588, 591.

#### **PROJECTION.**

See "Usual Projections."

Other projections, see "Other."

#### **PROLIXITY.**

See "Unnecessary Prolivity."

#### **PROMISE.**

See "Collateral Promise"; "Conditional Promise"; "Express Promise"; "Implied Promise"; "Naked Promise"; "New Promise"; "Original Promise"; "Special Promise."

To agree; to pledge one's self; to engage; to assure or make sure; to pledge by contract. *Knecht v. Mutual Life Ins. Co.*, 90 Pa. 118, 121, 35 Am. Rep. 641.

A promise is a declaration which gives to a person to whom it is made a right to expect or claim the performance or nonperformance of some particular thing. *Taylor v. Miller*, 18 S. E. 504, 505, 113 N. C. 340.

A "promise" is defined to be "a declaration, verbal or written, made by one person to another for a good and valuable consideration, by which the promisor binds himself to do or forbear some act, and gives to the promisee a legal right to demand and enforce a fulfillment." *Newcomb v. Clark* (N. Y.) 1 Denio, 226, 228.

To "promise any reward," as used in the act of 1825, regulating the general election, and imposing a penalty upon any one who shall "promise any reward" to a voter, to bribe or influence him, means to make a declaration or acknowledgment that a re-

ward shall be given. *State v. Harker* (Del.) 4 Har. 559, 561.

In legal definition, a "promise" is a declaration, verbal or written, made by one person to another, for a good consideration, by which the promisor binds himself to do or not to do some act, and gives to the promisee a legal right to demand and enforce fulfillment. One definition, according to Worcester, is "assurance of a benefit." An advertisement in an English newspaper: "Wanted, first-class weavers on fine work. \* \* \* First-class weavers can earn per week 35s. to 2 pounds"—was within Act March 3, 1891, c. 551, § 3, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1295], amending the Alien Contract Labor Law (Act Feb. 26, 1885, c. 164, § 1, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290]), and making it penal to "assist or encourage" migration of aliens "by promise of employment through advertisements" published in a foreign country, provided this shall not apply to states advertising the inducements they offer for immigration to such states. *United States v. Baltic Mills Co.*, 124 Fed. 38, 41, 59 C. C. A. 558 (reversing 117 Fed. 959, 961).

A promise is an express undertaking or agreement to carry into effect the purpose which a man forms in his own mind. *Stewart v. Reckless*, 4 Zab. (N. J.) 427. Whether statements of a debtor that a debt was an honest one, that he always intended to pay it, and that he would pay it certain, although he refused to execute a note, on the ground of false recitals therein, constituted a promise to pay the debt, was a question for the jury. *Shaw v. Burney*, 86 N. C. 331, 333, 41 Am. Rep. 461.

The law recognizes two kinds of promises—express and implied promises. The first is the express stipulation of the party making it, to do or not to do a particular thing; the second the law presumes from some benefit received by the party against whom it is raised, or, to illustrate it by the old rule to take a case out of the statute of limitations, payment or acknowledgment of the justice of the debt implied a promise to pay it. *Foute v. Bacon*, 24 Mass. (2 Cush.) 156, 164.

#### **Agree synonymous.**

See "Agree."

#### **As false pretense.**

See "False Pretense."

#### **Intention distinguished.**

An intention is but the purpose a man forms in his own mind. A promise is an express undertaking or agreement to carry the purpose into effect. The intention may begin and end with the person who forms

it; a promise, supported by a good consideration, can only be rescinded by the act of both parties to it; for to make a binding promise there must be a promisee as well as a promisor. The expression of an intention to do a thing is not a promise to do it. Conversations made by a bankrupt after his discharge, in which he declares his intention to pay a certain debt, do not amount to a promise binding on the bankrupt. *Steward v. Reckless*, 24 N. J. Law (4 Zab.) 427, 430.

The intention necessary on the part of a debtor in binding himself to the payment of a debt is the purpose the man forms in his own mind, and the promise is an express undertaking or agreement to carry that purpose into effect, and the simple expression of the intention to pay the debt is insufficient. *Shockey v. Mills*, 71 Ind. 288, 292, 36 Am. Rep. 196.

It is not easy to define the difference between a "promise" and an "expression of intention." Perhaps it lies in this, that the latter is merely an evidence of the condition of the mind with regard to future action, which concerns only the individual entertaining it, and which no one has the right to require him to execute, while the former is intended to give some other person an assurance, which he will be expected to rely on, that the act will actually be done or refrained from. Where the jury might have believed that defendant, by the language used, meant to inspire another with confidence that a debt would be paid, and to relieve such other's anxiety by inducing her to rely upon it, this would be a promise upon which the law would attach the obligation, whether defendant was aware that he incurred it or not. *Lanagin v. Nowland*. 44 Ark. 84, 89, 90.

#### **As promised.**

The use of the word "promise," in an indictment setting out a promissory note according to its purport and effect, as stating that "I promise," etc., is supported by evidence of a note written "I promised," etc., as "I promised" would be construed to mean "I promise." *Belcher v. Ward*, 22 Mass. (5 Pick.) 278, 279.

### **PROMISE OF MARRIAGE.**

See "Under Promise of Marriage."

As contract, see "Contract."

A promise of marriage is an engagement to marry another. A promise of marriage need not be expressed in any set form or in any particular words. It is enough if language is used which implies such a promise, and is intended to convey that meaning and is in fact so understood. *State v. Brinkhaus*, 25 N. W. 642, 643, 34 Minn. 285.



A promise to marry is in law like any other contract. The promise must, in general, be reciprocal and obligatory on both parties. It is not necessary to prove an express promise totidem verbis, but the contract must be evidenced by the unequivocal conduct of the parties, and by a definite understanding between the parties themselves, their friends, and relatives, that a marriage is to take place; and, when the promise of the man is proved, evidence of the woman having demeaned herself as if she concurred is sufficient to establish her promise to marry. *Broyhill v. Norton*, 74 S. W. 1024, 1027, 175 Mo. 190 (citing *Cole v. Holliday*, 4 Mo. App. 94).

#### **PROMISE TO ANSWER FOR DEBT, DEFAULT, ETC.**

A promise to answer for the debt, default, or miscarriage of another, within the statute of frauds, providing that no promise to answer for the debt, default, or miscarriage of another shall be valid unless in writing and signed by the party to the charge, is a promise added to the subsisting liability of another to answer for his debt, default, or miscarriage, and, in case of such default, without the original cause of action being discharged. *Combs v. Harshaw*, 63 N. C. 198.

#### **PROMISE TO PAY.**

A promise to pay is an acknowledgment of an indebtedness by necessary implication, and is an admission that a debt is due and unpaid. *Barrett v. Barrett*, 8 Me. (8 Greenl.) 353, 355.

A promise to pay in installments is a qualified promise, and hence a creditor whose debt is barred cannot avail himself of such promise to sue on the debt unless a breach of the promise has occurred. *Wiley v. Brown*, 30 Atl. 464, 465, 18 R. I. 615.

#### **PROMISE TO PAY DEBT OF ANOTHER.**

A promise to pay the debt of another, when there has been an assumption of the debt by the promisor in consideration of a conveyance from the debtor, is to be treated as an independent undertaking, notwithstanding the continuance of the original liability. *Keyes v. Allen*, 27 Atl. 819, 320, 65 Vt. 667.

A "promise to pay the debt of another," as used in 29 Car. II, c. 3, § 4, requiring a promise to pay the debt of another to be in writing, means promises made to the creditor, and does not include promises to the debtor. *Eastwood v. Kenyon*, 11 Adol. & E. 438.

### **PROMISSORY NOTE.**

Various definitions have been given of a "promissory note." In general terms, it may be defined to be a written promise by one person to pay to another person therein named, or order, a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive. *Lowe v. Bliss*, 24 Ill. 168, 170, 76 Am. Dec. 742; *Chicago Ry. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; *Story, Prom. Notes*, p. 2; 3 Kent, Comm. 74.

A promissory note is a written promise by one person to pay another person therein named, or order, a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive. *Dorsey v. Wolff*, 32 N. E. 495, 496, 142 Ill. 589, 18 L. R. A. 428, 84 Am. St. Rep. 99 (citing *Story, Prom. Notes*); *Stapleton v. Louisville Banking Co.*, 23 S. E. 81, 95 Ga. 802; *McDowell v. Keller*, 44 Tenn. (4 Cold.) 258, 261; *Wexel v. Cameron*, 31 Tex. 614, 617; *Mereness v. First Nat. Bank*, 83 N. W. 711, 712, 112 Iowa, 11, 51 L. R. A. 410, 84 Am. St. Rep. 818.

A "promissory note" is defined to be a plain and direct acknowledgment, in writing, to pay a sum specified, at the time therein limited, to the person therein named or sufficiently indicated, or to his order or to bearer. 2 *Broom & Hadley's Comm.* (Am. Ed.) 163. Substantially the same definition is found in 3 Kent, Comm. (9th Ed.) 92, note 1. *Newton Wagon Co. v. Diers*, 4 N. W. 995, 996, 10 Neb. 284.

A "promissory note" is defined by Byles on Bills to be "an absolute promise in writing, signed but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named or designated, or to his order, or to the bearer." *Morgan v. Edwards*, 11 N. W. 21, 23, 53 Wis. 599, 40 Am. Rep. 781.

A "promissory note" may be defined to be a written engagement by one person to pay absolutely and unconditionally to another person therein named, or to his order or to the bearer, a certain sum of money at a specified time, or on demand, or at sight. *Hall v. Farmer* (N. Y.) 5 Denio, 484, 487; *Bank of Peru v. Farnsworth*, 18 Ill. (8 Peck) 563, 565.

A promissory note is a promise or acknowledgment, in writing, to pay a specified sum, etc., to a person therein named, or order, or to bearer. *Augusta Bank v. City of Augusta*, 49 Me. 507, 518.

A promissory note is an open promise, in writing, by one person to pay to another person therein named, or to his order or to bearer, a specified sum of money absolutely

and at all events. *New York Security & Trust Co. v. Storm*, 30 N. Y. Supp. 605, 606, 81 Hun, 33.

A promissory note is "a written engagement by one person to pay to another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." *Klauber v. Biggerstaff*, 3 N. W. 357, 47 Wis. 551, 32 Am. Rep. 773; *Ballard v. Burnside* (N. Y.) 49 Barb. 102, 105; *Cayuga County Nat. Bank of Auburn v. Purdy*, 22 N. W. 83, 56 Mich. 6.

A promissory note, or note of hand, as it is often called, is an open promise, in writing, by one person to pay another person, or his order or bearer, a specified sum of money absolutely and at all events. 1 Daniel, Neg. Inst. § 28. "In order to fulfill the definition given, the paper must carry this full history on its face, and embrace the following requisites: (1) It must be open; that is, unsealed; (2) the engagement to pay must be certain; (3) the fact of payment must be certain; (4) the amount to be paid must be certain; (5) the medium of payment must be money; (6) the contract must be only for the payment of money; (7) it is essential to the operation of the instrument that it should be delivered." 1 Daniel, Neg. Inst. § 30. To constitute an instrument negotiable as a promissory note, the maker's liability must be absolute and unconditional for the payment of a definite sum of money. *Hegeler v. Comstock*, 45 N. W. 331, 334, 1 S. D. 138, 8 L. R. A. 393.

"A promissory note is a written promise to pay a sum of money at a certain definite time." *Adams v. Rutherford*, 8 Pac. 896, 899, 13 Or. 78.

A promissory note is a promise to pay money, reduced to writing. *Longwell v. Day*, 1 Mich. N. P. 286, 288.

A promissory note is merely a promise to pay money in the future, and when without consideration is but a promise to make a gift in the future, and the gift is not completed until the note is paid. *Brooks v. Owen*, 19 S. W. 723, 725, 112 Mo. 251; *Conrad v. Manning's Estate*, 83 N. W. 1038, 125 Mich. 77.

A promissory note is an unconditional promise, in writing, to pay a specified sum of money to another at some time certain to arrive. Negotiability is not an essential of a promissory note, and no definition requires the use of the words "value received." *Carnwright v. Gray*, 11 N. Y. Supp. 278, 280.

"Promissory note negotiable by the law merchant," as used in 18 Stat. 470, providing that the Circuit or District Court shall not have cognizance of any suit founded on a contract in favor of an assignee, unless a suit might have been prosecuted in such court to

recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange, is to be construed to mean "notes having the qualities of promissory notes negotiable by the law merchant, namely, notes which, in the hands of a bona fide purchaser for value before maturity, were subject to no equities in favor of the maker." *Gregg v. Weston* (U. S.) 10 Fed. Cas. 1192, 1193.

A promissory note is an instrument, negotiable in form, whereby the signer promises to pay a specified sum of money. Civ. Code Cal. 1903, § 3244; Civ. Code S. D. 1903, § 2274; Civ. Code Mont. 1895, § 4210; Rev. St. Okl. 1903, § 3698; Rev. St. Utah 1898, § 1658; Rev. St. Wyo. 1899, § 2433; Civ. Code Idaho 1901, § 2958; *Outcalt v. Collier*, 58 Pac. 642, 644, 8 Okl. 473.

A "negotiable promissory note," within the meaning of the chapter relating to negotiable instruments, is an unconditional promise, in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. *Bates' Ann. St. Ohio* 1904, § 3177u; Code Supp. Va. 1898, § 2841a.

A promissory note is a written promise made by one or more to pay to another, or order, or bearer, at a specified time, a specified amount, or other articles of value. Civ. Code Ga. 1895, § 3677.

Every promise in writing whereby any person or body politic or corporate promises or agrees to pay a sum of money, or acknowledges the same to be due, shall be deemed and treated as a promissory note, and the sum of money therein mentioned shall be deemed to be due to the payee and his assigns. Code Miss. 1892, § 3502.

A promissory note must be for the payment of a certain sum of money, and it is held that an instrument by which the makers promise to pay to the order of the payees, at a time and place named, a specific sum of money with current exchange on New York, is a promissory note, being in effect an agreement to pay a stipulated sum at New York, the exchange only to be added in case the note is paid at some other place. *Smith v. Kendall*, 9 Mich. 241, 242, 80 Am. Dec. 83.

It is essential to the validity of a promissory note that it contain no contingency or uncertainty as to the person by whom it is payable or to whom it is payable. *Frazier v. Moore's Adm'r*, 11 Tex. 755, 759.

An instrument in the following form: "Due J. F. \$200, borrowed October 21. C. W."—implies a promise to pay, and constitutes a promissory note. *Cummings v. Freeman*, 21 Tenn. (2 Humph.) 143.

**Absolute and unconditional payment.**

No contract or agreement is a promissory note, either negotiable or nonnegotiable, which does not provide for payment absolutely and unconditionally. *Chicago Trust & Savings Bank v. Chicago Title & Trust Co.*, 60 N. E. 586, 588, 190 Ill. 404, 83 Am. St. Rep. 138.

To be a promissory note, the money specified in the instrument must be payable absolutely, unconditionally, and at all events, *Corbett v. State*, 24 Ga. 287, 288.

No particular form of words is essential to constitute a valid promissory note, but there are certain essential elements that every valid promissory note must contain, and the principal among them is a promise to pay a certain sum of money unconditionally. The notes must be kept free of all conditions and singular stipulations, so that a stipulation for the payment of all costs and charges incurred in collection of a note introduces an element of uncertainty inconsistent with the degree of certainty required as to the sum to be paid, so as to render such a note nonnegotiable. *Maryland Fertilizing & Manufacturing Co. v. Newman*, 60 Md. 584, 585, 45 Am. Rep. 750.

**Certainty as to time of payment.**

Of the essential elements of a promissory note, one is certainty as to the time of payment. A note payable within a limited time after a man's death is sufficiently certain as to the time of payment, because the event must occur which will make this definite. A written promise to pay a certain sum of money at the death of a party to the indebtedness, or at a limited time after the death of such party or of a third person, is a valid promissory note, because it must inevitably become due, since all men must die, although the exact period is uncertain. *Conn v. Thornton*, 46 Ala. 587, 588.

A note is none the less negotiable because it is made payable on or before a named day. *Dorsey v. Wolff*, 32 N. E. 495, 496, 142 Ill. 589, 18 L. R. A. 428, 34 Am. St. Rep. 99; *Chicago Ry. Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 10 Sup. Ct. 999, 1004, 34 L. Ed. 349; *Ernst v. Steckman*, 74 Pa. (24 P. F. Smith) 13, 15 Am. Rep. 542; *Clsue v. Chidester*, 85 Ill. 523.

**Consideration.**

A valuable consideration, although it may be wholly inadequate, is sufficient to support a note. In *re Flagg's Estate*, 59 N. Y. Supp. 167, 169, 27 Misc. Rep. 401.

**Costs of collection, etc.**

A note payable to the order of a named payee, containing a stipulation to pay "all costs and 10 per cent. on amount for coun-

sel fees, if placed in the hands of an attorney for suit," does not destroy its character as a negotiable instrument. *Stapleton v. Louisville Banking Co.*, 23 S. E. 81, 95 Ga. 802.

According to *Blackstone*, a promissory note was an engagement, in writing, to pay a sum specified. 2 Bl. Comm. 467. A written promise to pay, containing a stipulation that, "in case suit is instituted to collect this note or any portion thereof," the makers would pay such additional sum as the court might adjudge reasonable as attorney's fees, was not a promissory note, as it contained a contingent addition. *Kendall v. Parker*, 37 Pac. 401, 402, 103 Cal. 319, 42 Am. St. Rep. 117.

A promissory note is an unconditional written promise, signed by the maker, to pay, absolutely and at all events, a sum certain in money, either to the bearer, or to the person therein designated or his order; but when it contains a stipulation providing for the payment of attorney's fees in case suit be instituted for the collection thereof, it is not negotiable. *Altman v. Rittershofer*, 36 N. W. 74, 75, 68 Mich. 287, 18 Am. St. Rep. 341.

A promissory note containing a stipulation to "pay all taxes assessed against the real estate and the mortgagee's interest therein, described in the mortgage given to secure this note until it is paid," is not negotiable. *Walker v. Thompson*, 66 N. W. 584, 108 Mich. 688.

Notes consisting of a series, of which one was for a certain "principal sum" therein expressed, "with interest thereon" at a certain rate authorized by law, "payable half-yearly" at certain dates therein designated, which installments of interest were further evidenced by certain interest notes or coupons of even date therewith, were promissory notes. *Abbott v. Stone*, 50 N. E. 328, 329, 172 Ill. 634, 64 Am. St. Rep. 60.

**Express promise to pay.**

A "promissory note" may be defined to be a written promise to pay money, and, while the word "promise" need not be used, words of equivalent import are required, the fair construction of which would be tantamount to a promise, express or implied. *Rice's Adm'r v. Rice*, 68 Ala. 216, 217.

No particular form of words is necessary to constitute a promissory note. There need not be a promise in express terms, it being sufficient if an undertaking to pay is implied in the contents of the instrument. An instrument signed in the presence of an attesting witness, which provided as follows: "On demand with interest please pay J. S. or order \$55. George F. Winslow"—is a promissory note. *Almy v. Winslow*, 126 Mass. 342, 343.

An instrument may be a promissory note though it contains no direct promise to pay, if it contains equivalent words. *Johnson School Tp. v. Citizens' Bank of Greenfield*, 81 Ind. 515, 517.

#### **Form.**

To constitute a good promissory note, no precise words of contract are necessary, providing it amounts in legal effect to a promise to pay. In other words, if, over and above the mere acknowledgment of a debt, there may be collected from the words used a promise to pay, the instrument may be regarded as a promissory note. *Cowan v. Hallack*, 13 Pac. 700, 701, 703, 9 Colo. 572.

No particular form of words is necessary to constitute a promissory note. Any form of expression containing an absolute promise to pay a certain amount at a certain time constitutes such a note. *Bank of Peru v. Farnsworth*, 18 Ill. (8 Peck) 563, 565.

"A promissory note is an unconditional promise, in writing, to pay a specified sum of money to another at some time certain. No definition of it requires the use of the words 'value received.'" *Carnright v. Gray*, 11 N. Y. Supp. 278, 280, 57 Hun, 518; *Townsend v. Derby*, 44 Mass. (3 Metc.) 363, 364.

A note is a good promissory note under the statute although it does not contain words of negotiability. *Townsend v. Derby*, 44 Mass. (3 Metc.) 363, 364.

#### **As instrument in writing.**

The term "promissory note" necessarily imports that there is a written instrument. *Pierson v. Townsend* (N. Y.) 2 Hill, 550, 551.

A promissory note is a written promise to pay money at all events. There is no such thing as a verbal promissory note, so that an indictment charging with forging a "certain promissory note" charges the forging of a written promissory note. *State v. Greenwood*, 78 N. W. 1042, 1043, 76 Minn. 211, 77 Am. St. Rep. 632.

#### **Negotiable instrument.**

A promissory note may, in brief, be defined to be a written promise, not under seal, to pay a certain sum of money unconditionally. At common law such note was not transferable, and by the decision of the courts it was not allowed to acquire, by custom among merchants, the quality of negotiability. *Buller v. Crips*, 6 Mod. 29. But by St. 3 & 4 Anne, c. 9, it was provided that such notes might be assignable or indorsable over in the same manner as inland bills of exchange, and by such statute, therefore, such notes were made commercial instruments, and, when made payable to order or bearer, they are indorsable and transferable as commercial paper. *Maryland Fertilizing & Mfg. Co. v. Newman*, 60 Md. 584, 585, 45 Am. Rep. 750.

Originally promissory notes were not recognized as mercantile instruments, but were treated as common choses in action. *De Hass v. Dibert* (U. S.) 70 Fed. 227, 229, 17 C. C. A. 79, 30 L. R. A. 189.

The words "promissory note," as used in an answer, without more, are insufficient to imply a negotiable note. *Webster v. Bainbridge*, 13 Hun, 180.

The term "promissory note," as used in Pub. St. c. 197, § 6, providing that actions on contract must be brought within six years, except on promissory notes signed in the presence of an attesting witness, applies to any note in writing by which one promises to pay money to another, whether the note is negotiable or not, though the note, within the meaning of the statute, need not be negotiable. It must, however, contain an undertaking to pay a certain sum absolutely. *Moore v. Edwards*, 44 N. E. 1070, 1071, 167 Mass. 74. See, also, *Commonwealth Ins. Co. v. Whitney*, 42 Mass. (1 Metc.) 21, 22; *Daggett v. Daggett*, 124 Mass. 149, 150.

#### **Payee.**

Ordinarily a promissory note may be defined as a written promise made by a certain person to pay a certain sum of money at a certain time to a certain person, but, if there should be a blank space left for the name of the payee in the written instrument, which has all the other requisites of a promissory note, such an instrument may well be termed a promissory note, and would be properly described as such in an indictment for forgery of such instrument. In writing of the essential elements of a negotiable promissory note and of the subject of certainty as to the payee, *Parsons* says, "The name of the payee may be left blank, and this will authorize any bona fide holder to insert his own name." 1 *Parsons, Bills & N.* 33. In *Greenhow v. Boyle* (Ind.) 7 Blackf. 56, it was held by this court that if a bill of exchange, or what purports to be one, is issued with a blank for the payee's name, any bona fide holder may insert his name either before or after acceptance. *Harding v. State*, 54 Ind. 359, 362.

A written promise to pay a certain sum of money to A. or B. is not a promissory note. *Osgood v. Pearsons*, 70 Mass. (4 Gray) 455, 456.

An instrument purporting to be signed by J. S., which is made payable to the order of J. S., is not a promissory note until indorsed. *Commonwealth v. Dallinger*, 118 Mass. 439, 441.

#### **Payment of money only.**

A promissory note is a contract for the payment of money only. *Gill v. Buckingham*, 52 Pac. 903, 7 Kan. App. 237 (citing *Grant v. Dabney*, 19 Kan. 390, 391).

To constitute a good promissory note, it must be for the payment of money in specie—that is, not that the words “in specie” must be included in the note, but it must be for the payment of money generally without limitation or restriction, which will then in legal acceptance mean gold and silver; so where a note is made payable in current bank notes of Tennessee it is not a promissory note within the meaning of the law merchant. *Whiteman v. Childress*, 25 Tenn. (6 Humph.) 303, 306.

An instrument for a specified sum of money, and also for the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, is not a note. *Dorsey v. Wolff*, 32 N. E. 495, 496, 142 Ill. 589, 18 L. R. A. 423, 34 Am. St. Rep. 99.

A contract which is not simply a promise to pay money, but a stipulation concerning the title to property, and a promise in reference to the future disposition of such property, is not a negotiable promissory note. It is essential to the negotiability of paper that there is in it but the single promise to pay money. You may not incorporate with such a promise a stipulation and agreement as to other matters, and then say that the absolute promise to pay money lifts the contract into the region of negotiable paper. *Killam v. Schoeps*, 26 Kan. 310, 312, 40 Am. Rep. 313.

A written promise to pay county scrip is not a promissory note, and the assignor of such instrument is not liable as an indorser of a note for the payment of money, but only after the maker has been prosecuted to insolvency, or shown to be so notoriously insolvent as to render suit against him useless. *Jones v. State*, 40 Ark. 344, 346.

An instrument in writing agreeing to pay to a certain person \$100 at such times and in such articles as she might need for her support, was not a promissory note, because not payable absolutely in money, but at such times and in such articles as the payee might need for her support. *Corblitt v. Stonemetz*, 15 Wis. 170.

Under Rev. St. 1879, § 663, providing, “All instruments of writing made and signed by any person or his agent, whereby he shall promise to pay to any other or his order or unto bearer, any sum of money or property therein mentioned shall import a consideration and be due and payable as therein specified,” a written promise “to pay to the bearer the sum of 20,000 feet of good salable lumber for value received of him,” is a promissory note. *Spears v. Bond*, 70 Mo. 467, 470.

#### **As sufficient description of stolen property.**

An indictment for larceny of “one promissory note of the value of \$300 and one piece

of paper of the value of \$300 of the goods and chattels of,” etc., is sufficient, without a fuller description of the stolen property, since promissory notes are made the subject of larceny by Gen. St. c. 161, § 18. *Commonwealth v. Brettun*, 100 Mass. 206, 207, 97 Am. Dec. 95.

#### **Bank bill or note.**

An allegation that defendant, indicted for swindling, fraudulently obtained divers promissory notes current as money, is satisfied by proof that he obtained bank bills. *Commonwealth v. Ashton*, 125 Mass. 384, 386. So, also, under an indictment for larceny, describing the property taken as divers promissory notes payable to bearer on demand, current as money in the commonwealth. *Commonwealth v. Gallagher*, 126 Mass. 54, 56.

Under Rev. Laws, 290, § 20, relating to robbery of bills of exchange, promissory notes for payment of money, or notes for the payment of any specific property, or paper bills of credit, the words “promissory notes for the payment of money” will embrace bank notes of any banking corporation. It is unquestionably true that a bank note is a promissory note by a banking corporation to pay a specific sum of money, and comes, therefore, strictly within the meaning of the generic term “promissory note.” They are in verity promissory notes, possessing all the properties which constitute such instruments. *Damewood v. State*, 2 Miss. (1 How.) 262, 264; *Commonwealth v. Butts*, 124 Mass. 449, 452. Contra, see *Oulp v. State* (Ala.) 1 Port. 33, 35, 26 Am. Dec. 357.

The words “bank bill” and “promissory note” in a statute (Rev. St. c. 96, § 4) providing against the offense of passing counterfeit bank bills, etc., are synonymous, so that the words “bank note” have the same signification, and an indictment which charges respondent with having uttered a counterfeit bank note is sufficient within that section. *State v. Wilkins*, 17 Vt. 151, 155.

#### **As cash or credits.**

See “Cash”; “Credits.”

#### **Certificate of deposit.**

A certificate of deposit issued by a bank or other depository to a depositor on his paying to the former a sum of money in general, or, as sometimes called, an “irregular deposit,” stating that the depositor has deposited that sum of money, payable to himself or order on demand or on return of the certificate properly indorsed, is a promissory note. *Poorman v. Mills*, 35 Cal. 118, 120, 95 Am. Dec. 90. Contra, see *Patterson v. Poindexter* (Pa.) 6 Watts & S. 227, 233, 40 Am. Dec. 554.

An ordinary certificate of deposit is within the definition of promissory notes. And

It is generally held that such certificates are, in effect, promissory notes, and governed, with certain exceptions, by the same rules. As a demand certificate of deposit is, in effect, a promissory note, limitations begin to run against it from its date; it being due on its date. *Mereness v. First Nat. Bank*, 83 N. W. 711, 712, 112 Iowa, 11, 51 L. R. A. 410, 84 Am. St. Rep. 318. See, also, *Baker v. Leland*, 41 N. Y. Supp. 399, 400, 9 App. Div. 365.

A certificate of deposit drawn in the usual form seems to fulfill in every particular the definition of a promissory note, to wit, an unconditional promise in writing for the payment of a certain sum of money absolutely and at all events. *Dietrich v. Rothenberger* (Ky.) 75 S. W. 271.

#### **Choses in action distinguished.**

See, also, "Chose in Action."

"A promissory note is different from almost all other kinds of choses in action. They may be transferred from one person to another by assignment or by indorsement, or by mere delivery. \* \* \* They have such an independent situs that they may be taxed where they were situated." *Dykes v. Lockwood Mortg. Co.*, 43 Pac. 268, 272, 2 Kan. App. 217.

#### **Duebill distinguished.**

A promissory note not negotiable is a simple express promise to pay money in a stereotyped form familiar to all. A writing in the nature of a duebill is an acknowledgment of debt common to all. They are informal memoranda, sometimes here, as in England, in the form of "I O U." They are not the promissory notes which are classed with specialties in the statute of limitations. The law implies, indeed, a promise to pay from such acknowledgments, but the promise is simply implied, and not expressed, and a dated instrument reciting a given sum with a statement, "Due C. & B. \$17.14, value received," is not a promissory note. *Currier v. Lockwood*, 40 Conn. 349, 350, 16 Am. Rep. 40.

Both promissory notes and duebills are held to import a promise to pay, but in one class the promise is verbally expressed, while in the other class the promise is usually implied, and no day for performance specifically mentioned. *Lee v. Balcom*, 11 Pac. 74, 76, 9 Colo. 216.

#### **Judgment distinguished.**

In an action in which it is sought to levy an execution on a promissory note it was contended that a decision holding that an execution could not be levied on a judgment was binding, but the court held that the distinction between a judgment and a promissory note was plain. The judgment is a

matter of record. It is the record evidence of the debt due by the judgment debtor. It is not capable of being taken out of the book where it is recorded and personally delivered. The sheriff cannot seize the judgment, take possession of it, and sell it; but a promissory note negotiable in form, which passes in the commercial world by indorsement and delivery, and is subject to sale, is quite different. *Hoxie v. Bryant*, 63 Pac. 153, 155, 131 Cal. 85.

#### **As money.**

See "Money."

#### **Municipal bond.**

Act March 3, 1875, c. 137, § 1, giving the United States Circuit Court jurisdiction of actions brought on "promissory notes and bills of exchange," includes all negotiable paper, regardless of the fact that it is known by other technical names; and hence it includes negotiable municipal bonds. *Porter v. City of Janesville* (U. S.) 37 Fed. 617, 619; *New Providence Tp. v. Halsey*, 6 Sup. Ct. 764, 765, 117 U. S. 336, 29 L. Ed. 904.

#### **As personal goods or property.**

See "Personal Goods"; "Personal Property."

#### **Silver certificates or treasury notes.**

The term "promissory note," as used in Code, art. 30, § 101, providing for the punishment of any one who shall steal any promissory note, does not include a silver certificate. "A silver certificate is not, in common parlance, a promissory note; and to charge one with stealing a promissory note would not, under such an instruction, inform the accused as to the nature of the offense for which he is called upon to answer, nor would the jury before whom the case was tried know it was the offense which the grand jury intended to present." *Stewart v. State*, 62 Md. 412, 416.

Treasury notes issued by authority of Act Oct. 12, 1838, were promissory notes within the meaning of Act March 3, 1825, prohibiting or providing a penalty for concealing such notes, or receiving them knowing them to be stolen. They contain a promise to pay money by the United States, and are substantially a demand imposed by the law. *United States v. Hardyman*, 38 U. S. (13 Pet.) 176, 178, 10 L. Ed. 113.

## **PROMISSORY OATH.**

A "promissory oath" is one where the affiant swears that he will perform some duty to be performed subsequent to the taking of the oath; as where an officer, on taking an official oath, swears that he will well and faithfully discharge the duties of his office. *Case v. People* (N. Y.) 6 Abb. N. C. 151, 163.

## PROMISSORY REPRESENTATIONS.

In the law of insurance "promissory representations" are those which are made by the insured concerning what is to happen during the term of the insurance, stated as matters of expectation, or, it may be, of contract. It is a promise to be performed after the contract has come into existence. *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 46 Atl. 777, 778, 64 N. J. Law, 580.

## PROMISSORY WARRANTY.

A "promissory warranty" is one which requires the performance or omission of certain things or the existence of certain facts after the taking out of the insurance. *King v. Tioga County Patrons' Fire Relief Ass'n*, 54 N. Y. Supp. 1057, 1058, 35 App. Div. 58.

"Promissory warranties" in the law of insurance refer to what the insurer engages to do in the future, and a stipulation that the assured should at all times keep his books in a fireproof vault was a promissory warranty, the breach of which avoided the policy. *Goldman v. North British Mercantile Ins. Co.*, 19 South. 132, 133, 48 La. Ann. 223; *Virginia Fire & Marine Ins. Co. v. Morgan*, 18 S. E. 191, 192, 90 Va. 290.

Warranties are of two kinds—affirmative and promissory. Affirmative consist of representation in the policy of facts; promissory are those that require that something shall be or shall not be done after the policy takes effect. If the affirmative warranty is false, it avoids the contract; and, if a promissory warranty is not complied with, it avoids the policy. *Maupin v. Scottish Union & National Ins. Co.*, 45 S. E. 1003, 1004, 53 W. Va. 557.

"Warranties," as is said by May in his work on Insurance, are distinguished into two kinds, affirmative and promissory, which require that something shall be done or omitted after the insurance takes effect and during its continuance, and avoid the policy if the thing to be done or omitted be not done or omitted. *McKenzie v. Scottish Union & National Ins. Co.*, 44 Pac. 922, 924, 112 Cal. 548 (citing *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92).

A warranty in insurance may be either affirmative or it may be in the nature of a promise, as where the insured agrees to perform some executory stipulation—as that the ship shall sail on a certain day. *Hendricks v. Commercial Ins. Co. (N. Y.)* 8 Johns. 113 (citing 1 Marsh. Ins. [2d Ed.] 248, p. 346, c. 9, § 1).

## PROMOTE.

A person who prints, vends, or has possession of with intent to vend, lottery tickets,

or who wrongfully permits the setting up or managing of a lottery, or exchange or sale of lottery tickets or the advertising of lottery tickets, "promotes a lottery," within the meaning of Gen. St. c. 29, art. 23, § 2-5, prohibiting any person from promoting the disposing of money and other things of value by way of lottery. *Miller v. Commonwealth*, 76 Ky. (13 Bush) 731, 739.

Const. art. 1, § 8, subd. 8, authorizing Congress to pass copyright and patent laws to "promote the progress of science and the useful arts," does not authorize the copyrighting of a dramatic composition which is grossly indecent, and calculated to corrupt the morals of the people. *Martinetti v. Maguire (U. S.)* 16 Fed. Cas. 920, 922.

## PROMOTER.

The name "promoters" is given to a certain class of people who travel through the mining regions for the purpose of obtaining options of purchasing mining property within a given time upon complying with the terms of the contract giving them the option, and who expect to market the same in the money centers of the world. *Snow v. Nelson (U. S.)* 113 Fed. 353, 355.

### Corporation.

The word "promoter" has no technical meaning, and applies to any person who takes an active part in inducing the formation of a company, whether he afterwards becomes connected with the company or not. *Ex-Mission Land & Water Co. v. Flash*, 32 Pac. 600, 604, 97 Cal. 610.

A promoter is a person who brings about an organization of a corporation by bringing together the persons who become interested in the enterprise, aids in procuring subscriptions, and setting in motion the machinery which leads to the formation itself. *Bosher v. Richmond & H. Land Co.*, 16 S. E. 360, 362, 89 Va. 453, 37 Am. St. Rep. 879; *Whaley Bridge Calico Printing Co. v. Green*, 28 Wkly. Rep. 351, 352; *Yale Gas-Stove Co. v. Wilcox*, 29 Atl. 303, 307, 64 Conn. 101, 25 L. R. A. 90, 42 Am. St. Rep. 159; *Densmore Oil Co. v. Densmore*, 64 Pa. (14 P. F. Smith) 43, 49; *Dickerman v. Northern Trust Co.*, 20 Sup. Ct. 311, 319, 176 U. S. 181, 44 L. Ed. 423; *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Burbank v. Dennis*, 35 Pac. 444, 446, 101 Cal. 90.

A promoter is a person who organizes a corporation, and who intends to sell his property, or to subscribe for stock, or take an active part in its management and business. The word had its origin in the methods by which joint-stock companies were formed in England, where, by law, they were declared partnerships. Subsequently, when the era of railroad building began in that country, the business of "promoting" the organization of such companies assumed definite form.

**St. Louis, Ft. S. & W. R. Co. v. Tiernan**, 15 Pac. 544, 558, 37 Kan. 606.

Promoters are those who bring about the organization of a corporation. They are not the corporation itself. *Battelle v. Northwestern Cement & Concrete Pavement Co.*, 33 N. W. 327, 328, 37 Minn. 89.

Where persons owning property which is adapted to business uses bring about the formation of a company for the purpose of selling the property to the company and providing the means to pay the purchase price by inducing others to subscribe for shares, they are termed "promoters." *Huron Printing & Bindery Co. v. Kittleson*, 57 N. W. 233, 235, 4 S. D. 520.

A promoter is treated as standing in a confidential relation to the proposed company, and is bound to the exercise of the utmost good faith. The promoter is the agent of the corporation, and subject to the disabilities of an ordinary agent. *Dickerman v. Northern Trust Co.*, 20 Sup. Ct. 311, 319, 176 U. S. 181, 44 L. Ed. 423 (citing *Densmore Oil Co. v. Densmore*, 64 Pa. [14 P. F. Smith] 43; *Bosher v. Richmond & H. Land Co.*, 16 S. E. 360); *Ex-Mission Land & Water Co. v. Flash*, 32 Pac. 600, 604, 97 Cal. 610; *Burbank v. Dennis*, 35 Pac. 444, 446, 101 Cal. 90; *Whaley Bridge Calico Printing Co. v. Green*, 28 Wkly. Rep. 351, 352; *Yale Gas-Stove Co. v. Wilcox*, 29 Atl. 303, 307, 64 Conn. 101, 25 L. R. A. 90, 42 Am. St. Rep. 159.

The term "promoter" is not a term of law, but of business, usefully summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. *Whaley Bridge Calico Printing Co. v. Green*, 5 Q. B. Div. 109. The term is one of accepted use, commonly employed to designate persons who take some part in procuring the formation of a corporation, or in inducing others to join it, and who, in so doing, assume such a position that a relation of a fiduciary nature between themselves and the corporation is created. *Alger's Law Promoters & Prom. Corp. § 1*. The term "promoter" involves the idea of exertion for the purpose of getting up and starting a company, (or what is called "floating it"), and also the idea of some duty toward the company imposed by or arising from the position which the so-called promoter assumes toward it. *Pitts v. D. M. Steele Mercantile Co.*, 75 Mo. App. 221, 226 (citing *Mining Co. v. Lewis*, 4 C. P. Div. loc. cit. 407).

## PROMOTION.

Appointment distinguished, see "Appointment—Appointment."

A devise of property to trustees to be applied for the "promotion of agricultural or

horticultural improvements" is to be construed as meaning "the acquisition and dissemination of knowledge, the study and inculcation of principles affecting those departments of industry or of sciences relating thereto." *Rotch v. Emerson*, 105 Mass. 431, 433.

## PROMPT.

"Prompt" is convertible with "at once," and in its ordinary acceptation means at the same point of time; immediately; without delay; at one and the same time; simultaneously; directly. *Lewis v. Hojer*, 16 N. Y. Supp. 534, 536.

"Prompt shipment," as used in a contract as providing that certain rails should be promptly shipped from Europe to New York, means with expedition, directly, or at once. It admits of less delay than would be permitted under a covenant to act merely within a reasonable time. *Tobias v. Lisberger*, 12 N. E. 13, 15, 105 N. Y. 404, 59 Am. Rep. 509.

Under a contract for the sale of iron rails, providing that the same would be promptly shipped, it is held that the word "promptly" implies expedition, and admits of less delay than would be permitted under a covenant to act merely within a reasonable time. "Prompt" is synonymous with "quick," "sudden," "precipitate." One who is "ready" is said to be prepared at the moment, one who is "prompt" is said to be prepared beforehand. In the contract under consideration it was held that a shipment of the rails at a point on a river forty miles from the sea, at a time when the ice was three feet thick, and remained so for three months, when the shipment could have been made from any other port as well, was not a prompt shipment. *Tobias v. Lissberger*, 8 N. Y. St. Rep. 43, 47.

"Prompt" is synonymous with "quick," "sudden," "precipitant"; indeed, one who is ready, is said to be prepared at the moment, one who is prompt is said to be prepared beforehand. *Tobias v. Lissberger*, 105 N. Y. 404, 412, 12 N. E. 13, 15, 59 Am. Rep. 509.

"Prompt" means ready, quick, expeditious; and is so used in section 13 of the election act, providing that the decisions of the officer with whom the certificates of nomination are filed shall be open to review if prompt application be made; so that diligence is required to secure a review. *McKnight v. Whipple*, 55 Pac. 182, 183, 25 Colo. 469.

## PROMPT PAYMENT.

To guaranty "full and prompt payment" would meet the case of a note on usual bank time, actually to be paid in full at maturity. *Gay v. Ward*, 34 Atl. 1025, 1026, 67 Conn. 147, 32 L. R. A. 818; *National Exch. Bank*



v. Gay, 17 Atl. 555, 556, 57 Conn. 224, 4 L. R. A. 343.

### PROMPTLY.

The word "promptly," as used in a lease providing that the taxes should be promptly paid, was meant to emphasize that the taxes would be paid as soon as they became due. Certain it is that the word "promptly" means something more definite and covers a shorter time than a reasonable time. Words denoting that quick action was intended have received judicial interpretation. Thus an English statute required that immediately after certain trials application should be made for a certificate, etc. On the conclusion of a trial the judge adjourned court to his lodgings, and there within 15 minutes granted the certificate. This was held to be sufficient. The statute was interpreted with a little more breadth than the literal meaning of the word "immediately" would indicate, for its literal meaning would be "instantaneously," which would be perhaps impossible; but it is clearly seen from the opinion of the judges that there must not be delay. *Thompson v. Gibson*, 8 Mees. & W. 281. And in *Streeter v. Streeter*, 43 Ill. 155, 165, the word "immediately" was held not to be enlarged into "practically" in the performance of a contract; and in *Duncan v. Topham*, 8 C. B. 225, the proof showed that a contract provided that goods were to be shipped "directly," and the court held that "within a reasonable time" was a much more protracted period than was meant by the word "directly"; so that defendant's covenant to pay the taxes promptly cannot be extended into or interpreted to mean within a reasonable time after due. *Metropolitan Land Co. v. Manning*, 71 S. W. 696, 699, 98 Mo. App. 248.

"Promptly" is defined as "quickly" or "expeditiously," so that an instruction that a city was chargeable with the duty to promptly repair an alleged defect in a street is erroneous, as the city is responsible only for a reasonable diligence, and "reasonable diligence" is not equivalent to "promptly." *City of Denver v. Moewes*, 60 Pac. 986, 987, 15 Colo. App. 28.

### PROMPTNESS.

See "Reasonable Promptness."

### PROMULGATE.

In regard to the necessity of a railway company formulating and promulgating rules, "promulgate" means to make known; that the rules shall be brought to the attention of the service affected thereby, or that it be given such publicity as that the servant, in the proper discharge of his duties, is bound to take notice of it. *Wooden v. Western New York & P. R. Co.*, 18 N. Y. Supp. 768, 769.

### PRONOUNCE.

"Pronounce" means to utter formally, officially, or solemnly; to declare or affirm; and as used in Code Cr. Proc. 1895, art. 840, providing that when a defendant has been convicted in two or more cases, and the punishment in each is confinement in the penitentiary the judgment and sentence shall be rendered and "pronounced" in each case in the same manner as if there had been but one conviction, means to utter formally and solemnly the judgment of the court and order the same to be carried into execution. *Ex parte Crawford*, 36 S. W. 92, 36 Tex. Cr. R. 180.

### PROOF.

See "Affirmative Proof"; "Burden of Proof"; "Clear Evidence or Proof"; "Collateral Proof"; "Competent Proof"; "Convincing Proof"; "Due Proof"; "Final Proof"; "Full Proof"; "Judicial Proof"; "Positive Proof"; "Satisfactory Proof."

Precise proof, see "Precise."

"Proof" is merely that quantity of evidence which produces a reasonable assurance of the existence of the ultimate fact. *Missouri, K. & T. Trust Co. v. McLachlan*, 61 N. W. 560, 562, 59 Minn. 468.

The word "proof," as defined by Webster, means the act of testing the strength of alcoholic spirits; also the degree of strength as high proof, first, second, third, and fourth proofs. In the internal revenue law of the United States the word "proof"—such as "proof gallon" or "proof spirits"—is used in the sense of "degree of strength." *Louisville Public Warehouse Co. v. Collector of Customs (U. S.)* 49 Fed. 561, 568, 1 C. C. A. 371.

Proof is defined as a sufficient reason for assenting to a proposition. *Orth v. St. Paul, M. & M. Ry. Co.*, 47 Minn. 384, 389, 50 N. W. 363.

Proof is that quantity of appropriate evidence which produces assurance and certainty. *Buffalo & State Line R. Co. v. Reynolds (N. Y.)* 6 How. Prac. 96, 98.

Proof is that degree and quality of evidence that produces conviction. Whenever all the evidence is of such a character as to convince an intelligent and conscientious man of a fact, then that fact is proved. *Nevling v. Commonwealth*, 98 Pa. 322, 328.

The word "proof," as used in Act March 9, 1842, providing that in any action founded on contract the defendant might be held to bail on proof to the satisfaction of a justice of the Supreme Court or a commissioner to take bail and affidavits that the defend-

ant was about to remove his property out of the jurisdiction of the court with intent to defraud creditors, etc., is a technical word, used in a technical sense, and implies the application, to some extent, of those rules under which evidence is ordinarily admitted, as thus: A party to the record, and having a direct interest in the event of the suit, cannot be a witness for himself at the trial against the adverse party. The affidavit of the party or his agent is neither competent nor sufficient. *Hunt v. Hill*, 20 N. J. Law (Spencer) 476, 478.

Under a statute providing that the confession of a person accused of crime is insufficient for the conviction without other proof that the crime has been committed, the term "proof" means not corroboration merely, but the corpus delicti must be proved beyond a reasonable doubt by evidence other than confessions of the prisoner. *State v. Laliyer*, 4 Minn. 368 (Gil. 277).

#### **Belief.**

An affidavit of belief is not "proof" under the law of 1837, which provides that the party shall verify the truth of his plea or notice by affidavit. *Kingsland v. Cowman* (N. Y.) 5 Hill, 608, 610.

#### **Evidence distinguished.**

Evidence is the medium of proof. Proof is the effect of evidence. *People v. Beckwith*, 15 N. E. 53, 55, 108 N. Y. 67.

"Proof" and "evidence" are often used indifferently as synonymous with each other, but the most accurate logicians apply the word "proof" to the effect of evidence, and not to the medium by which truth is established. *Tift v. Jones*, 8 S. E. 399, 401, 77 Ga. 181 (citing 1 Greenl. Ev. § 1); *State v. Thomas*, 23 South. 250, 252, 50 La. Ann. 148.

"There is an obvious difference between the words 'evidence' and 'proof.' The former, in legal acceptation, includes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. The latter is the effect or result of evidence. 1 Greenl. Ev. § 1. These words are often used indifferently as expressive of the same thing. *Schloss v. His Creditors*, 31 Cal. 201, 203.

In a legal sense "proof" signifies the effect of evidence as contradistinguished from evidence, which implies a medium or means of proof. But in ordinary language the terms are used interchangeably, and the word "proof" is used when "evidence" only is meant. *Perry v. Dubuque Southwestern Ry. Co.*, 36 Iowa, 102, 106.

The words "proof" and "evidence" are not synonymous, and therefore the interchangeable use of the words in a criminal

instruction is improper, though such use is frequently adopted by the best writers. *Snowden v. State*, 62 Miss. 100, 105; *Glenn v. State*, 2 South. 109, 110, 64 Miss. 724.

Proof, taken literally, is the perfection of evidence, or is the effect of evidence. But as, in common use, the end is often confounded with the means, so in language, "proof" is often used as a synonym with "evidence," and in this ordinary sense is manifestly used in Rev. St. p. 497, under which a judgment may be set aside on satisfactory proof. *Hill v. Watson*, 10 S. C. (10 Rich.) 263, 273.

Proof is that which convinces. Evidence is that which tends to convince. Evidence is the medium of proof. Proof is the effect of evidence. So that in the statute providing that, if the defendant in action for slander or for publication of libel shall give notice, in his justification, that the words spoken or published were true, such notice shall not in any case be of itself proof of malice charged in the declaration, the Legislature must be understood to have used the word "proof" in its well-understood definition, and did not take away the right to consider whether an unsustained notice of justification might not be evidence tending to show malice, when taken in connection with the other facts established. *Jastrzembski v. Marxhausen*, 79 N. W. 935, 937, 120 Mich. 677.

As relates to concealment after the act, evidence of concealment is admissible, as it goes to show criminal intent, and as such it should be weighed; but it is proper on request to instruct the jury that it does not necessarily constitute proof. It admits of no question. Concealment after the fact is not proof conclusive of intent to commit murder. For instance, in a case of manslaughter, the slayer may seek to conceal the body of his victim without its being an evidence of the previous intent to murder. *State v. Thomas*, 23 South. 250, 252, 50 La. Ann. 148.

"Proof" is the effect of evidence, the establishment of a fact by evidence. Code Civ. Proc. Cal. 1903, § 1824; B. & C. Comp. Or. § 677; *People v. Bowers* (Cal.) 18 Pac. 660, 665.

Proof, in civil process, is a sufficient reason for the truth of a judicial proposition by which a party seeks either to maintain his own claim or to defeat the claim of another. *Powell v. State*, 29 S. E. 309, 317, 101 Ga. 9. 65 Am. St. Rep. 277 (citing Whart. Ev. § 1).

Proof is the perfection of evidence, for without evidence there is no proof, though there may be evidence which does not amount to proof. *Schultz v. Plankinton Bank*, 40

Ill. App. 462, 469 (citing *Town of Duanesburgh v. Jenkins* [N. Y.] 40 Barb. 574).

#### As legal evidence.

It is generally held that the word "proof," when used in a legislative enactment, means competent and legal evidence, or, in other words, testimony that conforms to the fundamental rules of proof. *Inglis v. Schreiner*, 32 Atl. 131, 132, 58 N. J. Law (29 Vroom) 120; *Githens v. Mount*, 44 Atl. 851, 64 N. J. Law, 186.

Where a statute requires proof to be made, it must be by legal evidence, unless it is apparent that the Legislature intended that the fact might be shown by affidavit, or in some other manner. *Buffalo & State Line R. Co. v. Reynolds* (N. Y.) 6 How. Prac. 96, 98.

The word "proof," as used in the act (Sess. 31, c. 204, § 4) providing that "if the plaintiff shall prove to the satisfaction of any justice that the defendant is about to depart," etc., "he may have a warrant," etc., means legal evidence, and that cannot be by the party's own oath, unless the statute expressly says so. *Brown v. Hinchman* (N. Y.) 9 Johns. 75.

#### Probability distinguished.

"There is a difference between 'probability' and 'proof.' The object of both words is to express a particular effect of evidence, but 'proof' is the stronger expression. It is not erroneous to instruct that the jury must not found their verdict on conjecture or probability." *Brown v. Atlanta & C. Air Line Ry. Co.*, 19 S. C. 39, 59.

#### As statement of facts.

"Proof by affidavit," as used in Act 1863, amending the several acts authorizing town subscriptions to the stock of a railroad corporation (section 1), providing that in any case where the commissioners of any town authorized to subscribe to such stock should have filed in the town and county clerk's offices "proof by affidavit" of a consent of a majority of the taxpayers of such town preliminary to a subscription on behalf of the town to the stock, such proof by affidavit should be valid and conclusive to authorize the subscription, can only be made by a statement and verification of such facts as are required to establish the principal fact sought to be maintained. Proof is the perfection of evidence, for without evidence there is no proof. Although there may be evidence, it does not amount to proof. Verifications of conclusions are not proof of any fact. *Town of Duanesburgh v. Jenkins* (N. Y.) 40 Barb. 574, 583.

#### PROOF IS EVIDENT.

See "Evident."

#### PROOF OF CLAIM.

The "proof of a claim" in bankruptcy must not be confused with the "allowance of the claim." Those are two distinct acts or proceedings, and the allowance, absolute or conditional, may or may not result from and follow the proof of the claim. Nothing in the act suggests or takes for granted that the words "proved" and "allowed," or the words "provable" and "allowable" are equivalents, or are to be given the same meaning. They are not yoked together, but connected by the conjunction "and." The distinction between "proved" and "allowed" is always made apparent. A claim must be proved before it can be allowed, and it is provable whether it may be allowed or not. *In re Hornstein* (U. S.) 122 Fed. 266, 274.

Under Bankr. Law July 1, 1898, c. 541, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], it is provided that a proof of claim shall consist of a statement under oath in writing, signed by a creditor, setting forth the claim, the consideration therefor, and whether any, and if so what, securities are held therefor, and whether, and if so what, payments have been made thereon, and that some claim is justly owing from the bankrupt to the creditor. *Buder v. Columbia Distilling Co.*, 70 S. W. 508, 96 Mo. App. 558.

#### PROOF OF LOSS.

A "proof of loss" under an insurance policy is a specification of the property destroyed. *Gould v. Dwelling House Ins. Co.*, 19 Atl. 793, 794, 134 Pa. 570, 19 Am. St. Rep. 717.

Proofs of loss are no part of a contract of fire insurance, nor do they create the liability to pay a loss. They serve to fix the time when it becomes payable, and when an action may be commenced to enforce a liability the assured is not estopped from showing that a statement in proofs of loss was a mistake so far as it states facts going to annul the policy. *Bentley v. Standard Fire Ins. Co.*, 23 S. E. 584, 590, 98 Ga. 576.

A policy of insurance on goods contained a clause that the loss was to be paid 30 days after proof thereof. The property having been captured, the insured abandoned, and as proof of the loss and interest laid before the insurers the protest of the master in the usual form stating the loss and the bill of lading and invoice. This was held to be sufficient preliminary proof within the meaning of the policy to entitle the plaintiff to bring his action after the expiration of 30 days; the court observing that while proof, in strict legal construction, means evidence before a court or jury in a judicial way, strict technical proof, or the oath of the party or of the witnesses, was not requisite under the terms of the policy. *Lenox v.*

United Ins. Co. (N. Y.) 3 Johns. Cas. 224, 225.

Proof, within the meaning of the clause in a life policy, providing that "proof" that death is the result of disease or accident, occurring without the voluntary act of insured, must be furnished, etc., clearly means not the proof required as a preliminary to bring suit on the policy, but the proof necessary to establish the liability of the insurer. Connecticut Mut. Life Ins. Co. v. Akena, 14 Sup. Ct. 155, 156, 150 U. S. 468, 37 L. Ed. 1148.

The term "proof," as used in a marine policy stipulating that the loss, if any, shall be paid three months after proof made thereof, is to be taken in its mercantile sense, and does not mean evidence on the trial in an action on the policy. Camberling v. McCall (Pa.) 2 Yeates, 281, 283, 1 Am. Dec. 341.

#### Notice of loss distinguished

An insurance policy provided that in case of loss the assured shall forthwith notify the secretary in writing, and shall, as soon as may be, render to the company a particular statement in writing, signed and sworn to by him, of the property lost or damaged, and the value of the same; also that all losses should be paid within 60 days after the first meeting of the board of directors held subsequent to notice as aforesaid of such loss. The notice of the loss which the insured is required to give in writing forthwith and the statement or proof of loss to be rendered as soon as may be are distinct. The one is essentially a notice, and is so designated in the requirement to notify the secretary; the other, which in the policy is called a statement, is not of the character of a mere notice. In the law of insurance it has come to be known as the "proof of loss," or "preliminary proof," and is elsewhere in the policy referred to as "the proofs herein required." The most natural, if not the necessary, construction of the instrument, is to read the words "notice as aforesaid of such loss" as referring to the notice of loss, and not to the proof of loss. Cargill v. Millers' & Manufacturers' Mut. Ins. Co., 22 N. W. 6, 7, 33 Minn. 90.

#### PROPAGATING.

The words "contriving, propagating, and spreading," in an indictment charging the defendants with conspiring to occasion a fall and decline in the market price of certain stock by contriving, propagating, and spreading divers false and injurious rumors, statements, imputations, etc., regarding and impugning the management and financial condition of the corporation, is equivalent to the word "circulating" as used in Pen. Code, § 435, making it criminal for any one, with

intent to affect the market price of stocks, to knowingly circulate any false statement, rumor, or intelligence; and they further charge motive, intent, and guilty knowledge. People v. Goslin, 73 N. Y. Supp. 520, 523, 67 App. Div. 16.

#### PROPER.

See "Necessary and Proper"; "Think Proper."

"Proper," as used in the federal Constitution, declaring that Congress shall have power to make all laws which shall be necessary and proper to carry into execution the foregoing powers, is neither synonymous with "necessary," nor is it a superfluous addition to it, as it would be if its import was merely "fitting" or "appropriate" or "adaptable," which is the meaning of "necessary," but as a chosen means may be prohibited by the letter or the spirit and aim of the Constitution, however adaptable, and in that sense "necessary," it may not be "proper," and therefore it must be adjudged unconstitutional, as being thus prohibited. The true test of proper means is whether a preferred means is adapted to the end of an express power, and is also unprohibited, or, in other words, is congenial with the spirit and purpose of the Constitution. The test constructively excludes from necessary and proper means all power that is intrinsically substantive and independent, the nondelegation of which implied that the states and people intended to reserve it to themselves, or, in any event, to withhold it from Congress. Griswold v. Hepburn, 63 Ky. (2 Duv.) 20, 25.

The term "necessary and proper," in the clause of the Constitution giving Congress the authority to make all laws which shall be necessary and proper for carrying into execution the specific powers vested in Congress, and all other powers vested by the Constitution in the United States, or in any department or officer thereof, cannot be limited to mean indispensably necessary. In United States v. Fisher, 6 U. S. (2 Cranch) 358, 2 L. Ed. 304, this court, speaking by Chief Justice Marshall, said that in construing it it would be incorrect, and would produce endless difficulties, to say that no law was authorized which was not indispensably necessary to give effect to a specified power. Congress, said this court, must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of power granted by the Constitution. Knox v. Lee, 79 U. S. (12 Wall.) 457, 533, 20 L. Ed. 287.

Definitions slightly different have been given by different jurists to the words "necessary and proper," employed in the clause of the Constitution conferring upon Con-

gress the power to pass laws for carrying the express grants of power into execution; but no one ever pretended that a construction or definition could be sustained that the general clause would authorize the employment of such means in the execution of one express grant as would practically nullify another or render another utterly nugatory. Circumstances made it necessary that Mr. Hamilton should examine the phrase at a very early period after the Constitution was adopted, and the definition he gave to it is as follows: "All the means requisite and fairly applicable to the attainment of the end of such power which are not precluded by restrictions and exceptions specified in the Constitution, and not contrary to the essential ends of political society." Twenty-five years later the question was examined by the Supreme Court, and authoritatively settled, the Chief Justice giving the opinion. His words were: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *Knox v. Lee*, 79 U. S. (12 Wall.) 457, 611, 20 L. Ed. 287.

Where a corporation is authorized by law to pass such laws as are necessary and proper, it is held that the word "proper" means consistent with propriety; the other signification of appropriate or suited to being rendered inapplicable by the word "necessary." *Overseers of Westfield v. Overseers of Warren*, 8 N. J. Law (3 Halst.) 249, 251.

An allegation in an application for mandamus that relator had sought to enter into a "proper" contract with respondent, which was alleged to be a corporation controlling a monopoly to admit relator as one of its patrons, is of too vague and indefinite meaning to furnish the basis for a judgment. *State v. Associated Press*, 60 S. W. 91, 93, 159 Mo. 410.

"Proper," as used in an ordinance for a cement sidewalk, providing that it should be constructed under the supervision of the inspector, and that the space for the walk should be excavated to the proper depth and width, does not within itself prescribe the width of the walk, nor does it so refer to the width prescribed by the general ordinance as to make such general ordinance a part of the ordinance specially providing for the walk in question. *People v. Hills*, 61 N. E. 1061, 1062, 193 Ill. 281.

#### Competent synonymous.

The words "competent" and "proper," in Pub. St. c. 38, § 25, providing that a sale shall not be held void on account of any irregularity, "provided it shall appear that

the guardian was licensed to make the sale by the proper court," are used synonymously, or at any rate the expression "proper probate court" is used synonymously with "probate court of competent jurisdiction." *Montour v. Purdy*, 11 Minn. 384 (Gil. 278, 299), 83 Am. Dec. 88.

#### PROPER AUTHORITIES.

"Proper authorities," as used in an act incorporating a railroad, which provides that it shall be lawful for any county or town interested therein to subscribe to the capital stock of the company in such manner as the proper authorities of such county shall determine, means county commissioners. *Glenn v. York County Com'rs*, 6 S. C. (6 Rich.) 412, 418.

The expression "proper executive authority," as used in the treaty with Great Britain of August, 1842, authorizing the extradition of fugitives from justice from an English vessel on a certificate made to the "proper executive authority," means the state department. *In re Sheazle*, 21 Fed. Cas. 1214, 1217.

#### PROPER BOOKS OF ACCOUNT.

Bankr. Act, requiring merchants to keep "proper books of account," construed to require the keeping of an intelligent record of the merchant's business with that reasonable degree of accuracy and care to be expected from an intelligent man in that business, and hence mere casual mistakes therein will not prevent the tradesman's discharge in bankruptcy. *In re Windsor*, 16 N. B. R. 152, 156.

The expression "proper books of account" means such books as will enable a competent person examining them to ascertain the true state of the insolvent's affairs; and the fact that an insolvent failed to keep a separate cash book or cash account did not invalidate a discharge as a matter of law. *Wilkins v. Jenkins*, 136 Mass. 38, 39.

Rev. St. § 5110, cl. 7, requiring that a bankrupt shall have kept proper books in order to entitle him to discharge, means books from which a competent accountant could ascertain the bankrupt's condition; the form in which such books are kept is not material. *In re Bartenbach*, 2 Fed. Cas. 956.

Under Insolvent Act April 16, 1880, providing that no discharge shall be granted if the debtor, being a merchant or tradesman, has not kept proper books of account, an application by a firm for discharge will be denied where it appears that, owing to the omission of certain entries of moneys loaned to the firm to its use in its business, the firm was wrongfully made to appear solvent, though such omissions were made in good

faith, for proper books of account should show the true condition of affairs. In re Good, 78 Cal. 399, 20 Pac. 860, 861.

### PROPER CARE.

Reasonable and proper care and caution is that degree of care and caution that reasonably prudent persons should exercise. *Gawlack v. Michigan Cent. R. Co.*, 11 Ohio Cir. Ct. R. 59, 64.

### PROPER CASE.

The term "proper case," as used in a constitutional provision relative to the issuance of injunction against the chief executive, etc., is held to mean a case in which the courts have jurisdiction of the subject-matter and the parties for the purposes of the case, in whole or in part. *Slack v. Jacob*, 8 W. Va. 612, 660.

### PROPER CAUSE.

"Proper cause for criminal prosecution" means reasonable cause. It does not mean prima facie evidence, or evidence which, in the absence of exculpatory proof, would justify conviction. It means less evidence than that. *United States v. One Sorrel Horse*, 22 Vt. 655, 657, 27 Fed. Cas. 315.

### PROPER CIVIL ACTION.

Gen. St. § 85, declares that the lien of an attorney may be enforced by a "proper civil action." Held, that such term did not limit an attorney to an action at law to enforce his claim for services, but that a suit in equity might also be a proper civil action, within the section, by which he could enforce payment of his fees. *Fillmore v. Wells*, 15 Pac. 343, 348, 10 Colo. 228, 3 Am. St. Rep. 567.

### PROPER CLERK.

"Proper," as used in Rev. St. c. 24, art. 9, § 19, as amended in 1887, providing that a local improvement to be paid for by special assessment might be described in the ordinance ordering it either by setting forth the same in the ordinance itself, or by reference to maps, plats, or specifications thereof on file in the office of the proper clerk, cannot be construed to give the word "clerk" the wider meaning than the city or village clerk, on the ground that without the use of the word "proper" it would have been understood that the city or village clerk was meant, and so that the city engineer must be regarded as a proper clerk, because the making of plans, etc., is his proper work, and therefore his office the proper place for filing them. The word "proper," which qualifies the word "clerk," refers back to the words

"council in cities or boards of trustees in villages," and was intended to designate the clerk proper for or appropriate to the character of the municipality passing the ordinance. *City of Alton v. Middleton's Heirs*, 41 N. E. 926, 928, 158 Ill. 442.

"Proper clerk," as used in Rev. St. 1874, c. 30, § 20, providing that where a deed is acknowledged or proved before a justice of the peace of another state there shall be added a certificate of the proper clerk, under the seal of his office, of the official character of such justice, means one in whose office the evidence of the official character of justices of the peace is kept and preserved by law, and he is not required to certify that he is a clerk of a court of record. *Grand Tower Min., Mfg. & Transp. Co. v. Gill*, 111 Ill. 541, 543.

### PROPER CONVEYANCE.

A contract to "execute a proper conveyance for the conveying and assuring the fee simple" of certain premises is not satisfied by the mere execution of such conveyance, the grantor not having title at the time of the conveyance. The grantor having no title, it could be but a conveyance proper for conveying and assuring no title at all. *Traver v. Halsted (N. Y.)* 23 Wend. 66, 69.

### PROPER COUNTY.

Laws 1881, c. 40, provides that where, in mandamus pending in the Supreme Court, there is an issue or fact not finally heard or determined, the defendant shall be entitled, on the request of his attorney, to have the record transmitted to the district court of the "proper county." Held, that the phrase "proper county" meant the county in which the defendant might reside or in which the material facts contained in the warrant for mandamus should be alleged to have taken place. *State v. Town of Lake*, 10 N. W. 17, 28 Minn. 362.

"Proper county," as used in Laws 1885, c. 483, § 8 (Collateral Inheritance Tax Act), providing that every tax shall be paid to the treasurer of the proper county, and that when the treasurer of any county has reason to believe that any tax is due he shall notify the attorney of the proper county, etc., means the county of the surrogate first properly acquiring jurisdiction. In re *Keenan*, 5 N. Y. Supp. 200, 201, 1 Con. Sur. 226.

"Proper county," as used in Code Civ. Proc. § 396, providing that unless the defendant appears either by answer or demurrer, and files an affidavit of merits, and demands in writing a transfer to the "proper county," he shall be deemed to have waived his right to change the place of trial, etc., means the county in which actions are re-

quired to be tried, subject to the power of the court to change the place of trial. *Cook v. Pendergast*, 61 Cal. 72, 78.

The term "proper county," in the statute directing that the plaintiff shall not proceed against the bail until execution has been returned that defendant is not to be found in his proper county, must be taken to be the county in which the defendant is found when suit is brought; so that if there are several defendants against whom a suit, if prosecuted to judgment, arrested in as many different counties, a ca. sa. could not properly issue against all to the county where the judgment was rendered, but one should issue to each county in which a defendant was arrested. Nor can the change of residence pending the action make it necessary to follow a defendant with process to any county in which he may have settled himself. *Kennedy v. Spencer* (Ala.) 4 Port. 428, 432.

The proper county, within which it is required by Rev. c. 115, § 19, that the ca. sa. shall issue before charging the bail, is the county in which the original writ was executed. *Finley v. Smith*, 14 N. C. 247, 248.

Under Rev. St. 1881, § 1132 (Rev. St. 1894, § 1146), providing that "the information may be filed by the prosecuting attorney in the circuit court of the proper county," the proper county is the county of the defendant's usual residence. *Eel River R. Co. v. State*, 42 N. E. 617, 143 Ind. 231.

The words "proper county," in Act April 20, 1874, providing for the incorporation of certain companies, and requiring a notice to be published in a newspaper of the proper county, means the county within which the powers and privileges conferred are to be exercised; and, where an act of incorporation was sought for a ferry over a stream which was the boundary between two counties, the notice should be published in each county. *In re Chartiers Ferry Co.*, 2 Chest. Co. Rep. 91, 92.

### PROPER COURT.

The term "proper court" is said by Wait in his work on *Fraudulent Conveyances*, § 422, to mean not merely a duly constituted tribunal, but one having authority over the subject-matter of the particular case in question. *Wells v. Clarkson*, 5 Pac. 894, 896, 5 Mont. 336.

"Proper court," as used in Act Cong. Feb. 22, 1889, dividing Dakota into two states, providing for the creation of District and Circuit Courts of the United States, and providing that in all civil actions, cases, and proceedings transfers shall not be made to the Circuit and District Courts of the United States except upon a written request of one of the parties to such action or proceeding filed in the "proper court," etc., means the

court where the files and records of the case are found at the time the request is to be filed. *Sargent v. Kindred* (U. S.) 49 Fed. 485, 488.

United States admiralty rule 54 provides that when a vessel is libeled, or her owner is sued, he may file a libel or petition for a limitation of liability in the "proper District Court" of the United States. Held, that the "proper District Court," as used in such rule, was the District Court in which the vessel was libeled, or, if she was not libeled, then the District Court for any district in which the owner may be sued in that behalf; there being nothing in the rule to authorize the taking of jurisdiction by a District Court on a petition thereunder, where that court could not have had original cognizance in admiralty of a suit in rem or in personam to recover for the loss or damage involved. *Ex parte Phenix Ins. Co.*, 7 Sup. Ct. 25, 31, 118 U. S. 610, 30 L. Ed. 274.

### PROPER CUSTODY.

Documents are said to be in the "proper custody" if they are in the place in which, and under the care of the person with whom, they should naturally be. *Nowlin v. Burwell*, 75 Va. 551, 554 (citing *Steven's Digest*, p. 148).

### PROPER DELIVERY.

"Proper delivery," as used in the Harter Act (2 Supp. Rev. St. 1881), prohibiting the insertion in a bill of lading of any exemption from liability for failure in the "proper delivery" of goods, includes a timely delivery, and cannot mean any kind of delivery that may be stipulated for, however unreasonable the stipulation may be; since that would thwart the very purpose of the first section of the statute, which is designed to protect shippers against the imposition of unreasonable stipulations in bills of lading to the prejudice of their interests. *Calderon v. Atlas S. S. Co.* (U. S.) 64 Fed. 874, 876.

### PROPER ELECTION.

The phrase "the first proper election" in Rev. St. § 11, providing that when a person is appointed to fill a vacancy in an office his successor shall be elected at the first proper election that is held more than 30 days after the occurrence of the vacancy, was construed in *State v. Barbee*, 45 Ohio St. 347, 13 N. E. 731, to mean the first election appropriate to the office; that is, the election at which such officers are regularly and properly elected. *State v. Nash*, 64 N. E. 558, 560, 66 Ohio St. 612.

### PROPER GIFT.

The term "proper gift" is sometimes used to denote a *donatio inter vivos*. It ex-

ists "when one out of mere liberality bestows a thing upon another, there being no law to compel him to it." *Fiak v. Flores*, 43 Tex. 340, 343 (citing 2 Colquhoun, Roman Civil Law, 109).

#### PROPER INDORSEMENT.

"Proper indorsement," as used with reference to an indorsement on a negotiable instrument, means such an indorsement as the law merchant requires in order to authorize payment to the holder. If presented by the original payee, no indorsement would be proper, or at least necessary. If presented by another, a proper indorsement to show such other's title would be requisite. *Kirkwood v. First Nat. Bank*, 58 N. W. 1016, 1018, 40 Neb. 484, 24 L. R. A. 444, 42 Am. St. Rep. 683.

#### PROPER INFLUENCE.

"Proper influence is the influence which one person gains over another by acts of kindness and attention and by correct conduct." *Millican v. Millican*, 24 Tex. 426, 446.

#### PROPER MANNER.

Plaintiff contracted with defendant company to construct a bridge, the contract providing that "in case the contractor shall not well and truly comply with and perform all the terms herein stipulated, or in case it should appear to the engineer of the defendant company that the work does not progress with a sufficient speed or in a proper manner," the defendant may annul the contract if it sees fit, and the unpaid part of the value of the work done shall be forfeited. Held, that the words "in a proper manner" should be construed to authorize the company to annul the contract whenever it appeared to its engineer that the work was not progressing with sufficient speed or in a proper manner, without question by, or previous notice to, the contractor. The proper construction of the clause depends upon the meaning of the phrase "or in a proper manner," and the connection in which it should be used. Obviously it, like a connecting phrase "with sufficient speed," refers to and qualifies the verb "progress," and consequently the simple inquiry is whether it can be made to work where it is hitched, as it evidently is not needed elsewhere. It seems to us to have been put where it is to give a better guaranty of completion of the work within the time fixed than was afforded without it, and thus to serve a purpose and have a meaning; for to assure completion of the masonry within the time fixed, less than two years, acquired methods adopted to, and materials and appliances provided and kept on hand suitable and sufficient for, the great undertaking. *Henderson Bridge Co. v. O'Connor*, 11 S. W. 18, 21, 88 Ky. 303.

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#### PROPER MEANS.

A covenant for the collection of a bond and mortgage providing that the party covenanting is "to take proper means" therefor, should be construed to make him responsible for the laches of every agent employed by him in proceedings for the collection. *Hoard v. Garner*, 10 N. Y. (6 Seld.) 261, 267.

#### PROPER MIXTURE.

A lessee of furnaces, iron works, and iron stone mines covenanted to work the furnace effectually unless prevented by inevitable accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not of itself or "with a proper mixture" or process make good, common pig iron. Held, that the "proper mixture" referred to was not necessarily of ingredients procurable on the demised premises. *Foley v. Addenbrooke*, 13 Mees. & W. 174.

#### PROPER NOTICE.

In an action to recover for an injury to a person on a highway, an admission that the "proper notice was given" was, in effect, an admission that a sufficient notice was given; and it could not be contended that the admission did not embrace the sufficiency of the notice by reason of the fact that they were qualified by the statement that the notice admitted was the one alleged in the complaint, which was alleged to have been insufficient. *Hein v. Village of Fairchild*, 58 N. W. 413, 414, 87 Wis. 258.

#### PROPER OFFICER.

"Proper" is defined as that which is essential, suitable, adapted, and correct; so that, as used in *Ballinger's Ann. Codes & St. §§ 5871, 5872*, relating to foreclosure of mortgages, and providing that certain notices shall be placed in the hands of the sheriff or other proper officer, means one who is suitable and adapted to the execution of the power conferred with accuracy and technical precision, and will not be held to include the constable, who has no special training or skilled advice. *Pickle v. Smalley*, 58 Pac. 581, 582, 21 Wash. 473.

#### PROPER ORDINANCE.

Under Pol. Code, § 2643, subd. 3, providing that the board of supervisors must by "proper ordinance" abolish such roads as are not necessary, and sections 2619 and 2621, providing that roads may be abandoned by order of the board, a road may be abandoned by order, as the words "proper ordinance" in the first section quoted require nothing more than a proper order. *Keena*



v. Placer County Sup'ra, 26 Pac. 615, 616, 89 Cal. 11.

### PROPER PARTY.

Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject-matter of the litigation. *Tatum v. Roberts*, 60 N. W. 848, 849, 59 Minn. 52; *Lumbermen's Ins. Co. v. City of St. Paul*, 80 N. W. 357, 358, 77 Minn. 410; *Rosina v. Trowbridge*, 17 Pac. 751, 755, 20 Nev. 105.

"Proper parties" are all other than those who have an interest in the controversy, that a final decree between the parties before the court cannot be made without affecting their interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. *Donovan v. Campion* (U. S.) 85 Fed. 71, 72, 29 C. C. A. 30.

Every party who has an interest in the controversy or the subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America* (U. S.) 82 Fed. 124, 126, 27 C. C. A. 73.

A "proper party," as distinguished from one whose presence is necessary to the determination of the controversy, is one who has an interest in the subject-matter of the litigation, which may be conveniently settled therein. *Kelley v. Boettcher* (U. S.) 85 Fed. 55, 64, 29 C. C. A. 14.

#### Necessary party distinguished.

See "Necessary Parties."

### PROPER PERSON.

Other proper person, see "Other."

### PROPER REPRESENTATIVE.

In a statute providing that in case of the death of the creditor pending an action to foreclose a mortgage an action may be revived and continued against his proper representatives, the term "proper representatives" means the successor in interest of the mortgagor, which includes the widow and heir, and not merely the administrator. *Zaegel v. Kuster*, 7 N. W. 781, 783, 51 Wis. 31.

### PROPER RESIDENCE.

"Proper residence," as used in Rev. St. § 590, which provides that the support of an

insane person shall be charged to the proper county when his "proper residence" shall have been ascertained, means the place in which he has taken up his abode with the present intention of remaining; the place where he expects to reside; where he would exercise his political right to vote if an elector; where his personal property would be taxable. The words were used in the statutes in very much the same sense as the words "acquired domicile" in some authorities; that is, a place where a person has voluntarily fixed his abode, not merely for a mere special or temporary purpose, but with the present intention of making it his home. *State v. Dodge County*, 13 N. W. 680, 682, 56 Wis. 79.

### PROPER TITLE.

The words "proper title," in Act 1874, § 1, Gen. St. § 2186, declaring that "every person in the peaceable and undisputed possession of lands, who shall for five continuous years continue in such possession, etc., shall be held and adjudged to be the legal owner of said lands, to the extent and according to the purport of his or her proper title or pre-emption," means a "paper title." *Knight v. Lawrence*, 36 Pac. 242, 244, 19 Colo. 425.

### PROPER TOOLS OR IMPLEMENTS.

Rev. Code, §§ 3304, 3305, exempting from execution, etc., the "proper tools or implements of a farmer," should be construed to include only the ordinary and usual tools of husbandry, and not to extend to a threshing machine owned by a farmer to thresh his own grain and that of others for hire. *Meyer v. Meyer*, 23 Iowa, 359, 375, 92 Am. Dec. 432.

### PROPERLY.

An instruction in a suit for damage to cattle while in the hands of a carrier, requiring the jury to take as the basis of calculation of damages the condition of the cattle if "properly handled and transported," means a handling with reasonable care. *Missouri, K. & T. Ry. Co. v. Chittim*, 60 S. W. 284, 285, 24 Tex. Civ. App. 599.

Laws 1889, c. 560, § 6, requiring employers to see that all dangerous machinery is "properly guarded," means so guarded as to meet the demands and requirements of reasonable care. *Spaulding v. Tucker & Carter Cordage Co.*, 34 N. Y. Supp. 237, 238, 13 Misc. Rep. 398.

A finding that a load was properly placed on a wagon meant that it was carefully and prudently placed. *Davis v. Town of Guilford*, 55 Conn. 351, 356, 11 Atl. 350, 353.

**PROPERLY AUTHENTICATED.**

The words "properly and legally authenticated" in a statute requiring certain instruments to be so authenticated in order to render them admissible in evidence are properly to be construed as if the expression were "so properly and legally authenticated as to entitle them to be admitted in evidence"; that is, "so properly and legally authenticated that they would be entitled to be admitted in evidence." This authentication in regard to original papers may be made by oral proof as to the verity and identity of the original, and that they would be given their alleged effect in the courts of the country where they were used. *In re Fowler* (U. S.) 4 Fed. 303, 311.

**PROPERLY EXECUTED.**

All that is necessarily included in the words "properly executed" in an entry of the justice, "summons was returned properly executed," is that it was served at some time in the manner prescribed by law, as by delivering a copy thereof to defendant or to a member of his family, or by posting at his residence. *Horner v. Huffman*, 43 S. E. 132, 135, 52 W. Va. 40.

**PROPERLY MADE.**

The words "properly made," as used in Rev. St. art. 3921, providing that all surveys properly made by virtue of valid land certificates, and not in conflict with any other claim, shall be deemed valid, etc., "though they may apply to the mathematical correctness with which lands embraced in surveys returned are delineated, are as aptly applied to the legality of surveys, to the legal right by survey to appropriate the land covered by it." *Adams v. Houston & T. C. Ry. Co.*, 7 S. W. 729, 741, 70 Tex. 252.

**PROPERLY PROVISIONED.**

"Properly provisioned," as used in the rule that every master, when sailing to or from a foreign port, is bound to see before he sets sail that his vessel is properly provisioned for the intended voyage, does not mean bare sufficiency for a quick passage. It means a reasonable provision for what is liable to happen upon the seas, though it be unexpected. A master is bound to provide for such storms, such delays, such calms as often happen which may prolong a voyage. *United States v. Reed* (U. S.) 86 Fed. 308, 311.

**PROPERLY SHOD.**

"Properly shod," as used in a warranty that a horse was sure-footed when properly shod, means that the horse's organic peculiarities and low gait should be taken into the

account in shoeing, so as to obviate their tendency to make him stumble, so far as possible. *Morse v. Pitman*, 4 Atl. 880, 881, 64 N. H. 11.

**PROPERTY.**

See "Abandoned Property"; "Absolute Property"; "After-acquired Property"; "Agricultural Property"; "Ancestral Property"; "Church Property"; "Community Property"; "Corporate Property"; "Entire Property"; "Ganancial Property"; "General Property"; "Household Property"; "Injury to Property"; "Joint Property"; "Landed Property"; "Literary Property"; "Loose Property"; "Lost Property"; "Mill Property"; "Mixed Property"; "Perishable Property"; "Personal Property"; "Private Property"; "Public Property"; "Railroad Property"; "Real Property"; "Right of Property"; "Separate Property"; "Special Property"; "Taxable Property"; "Visible Property"; "Willful Injury to Property"; "Wrecked Property."

All my property, see "All."

All other property, see "All Other."

All property, see "All."

Any property, see "Any."

Chattel property, see "Chattel."

Immovable property, see "Immovable."

Limited property, see "Limited."

Movable property, see "Movables."

Other property, see "Other."

The terms "life," "liberty," and "property," as employed in the fifth amendment of the Constitution, are representative terms, and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, the right to buy and sell as others may; all our liberties, personal, civil, and political; in short, all that makes life worth living. *State v. Julow*, 31 S. W. 781, 782, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443.

Property is nomen generalissimum, and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other incorporeal hereditaments. *Lawrence v. Hennessy*, 65 S. W. 717, 719, 165 Mo. 659; *Boston & L. R. Corp. v. Salem & L. R. Co.*, 68 Mass. (2 Gray) 35; *Scranton v. Wheeler*, 21 Sup. Ct. 48, 59, 179 U. S. 141, 45 L. Ed. 126; *Caro v. Metropolitan El. Ry. Co.*, 46 N. Y. Super. Ct. (14 Jones & S.) 164, 168; *Metropolitan City Ry. Co. v. Chicago W. D. Ry. Co.*, 87 Ill. 317; *Illinois Cent. R. Co. v. Commissioners of Highways of Town of Mattoon*, 43 N. E. 1100, 1101, 161 Ill. 247; *Southern Kansas Ry. Co. v. Oklahoma City*, 69 Pac. 1050, 12 Okl. 82.

Property signifies every species of property. It is nomen generalissimum, and comprehends all a man's worldly possessions. *Rossetter v. Simmons* (Pa.) 6 Serg. & R. 452.

In its proper sense property includes everything which goes to make up one's wealth or estate. *Carlton v. Carlton*, 72 Me. 115, 116, 39 Am. Rep. 307.

The term "property" means everything of exchangeable value. In *re Tiburcio Parrott* (U. S.) 1 Fed. 481, 506; *Butchers' Benev. Ass'n v. Crescent City Livestock Landing & Slaughter-House Co.*, 83 U. S. (16 Wall.) 36, 127, 21 L. Ed. 394; *Harbison v. Knoxville Iron Co.*, 53 S. W. 955, 957, 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682.

"Property," according to the definition in *Jacob*, is the highest right a man can have to anything, being used for that right which one hath to lands or tenements, goods or chattels, which in no way depend on another man's courtesy. *Reed v. Belfast*, 20 Me. pt. 1 (2 App.) 246, 249.

"Property," when unrestricted, includes every class of property which a man can own, but it is generally used in a less comprehensive sense. *Wilson v. Beckwith*, 140 Mo. 359, 41 S. W. 985, 988. See, also, *Wilson v. Beckwith*, 117 Mo. 61, 74, 22 S. W. 639.

The word "property" in Act Jan. 24, 1853, entitled "An act to amend Code, § 1848," relating to attachments of a debtor's property, is a generic term including all the others, meaning that the defendant has property, namely, goods or land, etc. The word "property" is absolutely general, and specifies no kind; and hence an affidavit for attachment alleging that the defendant has property, goods, or money, or lands and tenements, or choses in action, which he refuses to give in payment or security of the debt, is sufficient without specifying in what it consists. *Bates v. Robinson*, 8 Iowa (3 Clarke) 318, 320.

A contract for the sale of real estate provided that a part of the purchase money, payment of which was to be deferred for a year, should be secured by mortgage on property worth at least two for one. Held, that the word "property" was too indefinite as to the kind of property to justify a decree for specific performance. It could not refer to perishable property, as vegetables and the like; and neither could it embrace bonds, stocks, and the like, as in that case the term "mortgage" would hardly have been used, but rather the expression "collaterals" or "pledge," or both the term "mortgage" and one of the latter. *Horton v. McKee* (U. S.) 68 Fed. 404.

Property, even as distinguished from property in intellectual production, is not,

in its modern sense, confined to that which may be touched by the hand or seen by the eye. What is called "tangible property" has come to be, in most great enterprises, but the embodiment physically of an underlying life; a life that in its contribution to success is immeasurably more effective than mere physical embodiment. Such, for example, are properties built upon franchises, on grants of government, on good will on trade-names, and the like. It is needless to say that to every ingredient of property thus made up, the intangible as well as the tangible, that which is discernible to mind only as well as that susceptible to physical touch, equity extends appropriate protection. *National Tel. News Co. v. Western Union Tel. Co.* (U. S.) 119 Fed. 294, 299, 56 C. C. A. 198, 60 L. R. A. 805.

Property in any determinate article consists of several things—right to possession, title, enjoyment, and disposal of the object. *City of St. Louis v. Hill*, 116 Mo. 527, 533, 22 S. W. 861, 21 L. R. A. 226.

"Property" is a general term, used to designate the right of ownership, and includes every subject, of whatever nature, upon which such a right can legally attach. *Pell v. Ball* (S. C.) *Speers, Eq.* 48, 83.

Property has certain legal incidents of which it cannot be divested, and one of these incidents is its liability for the debts of its owner. *Nickell v. Handly* (Va.) 10 Grat. 336, 345.

Property is either corporeal or incorporeal. *Rehfuss v. Moore* (Pa.) 26 Wkly. Notes Cas. 105, 107.

By the Constitution it is provided that the term "property," as used in the chapter with reference to taxation, shall include monies, credits upon stocks, demands, franchises, and all other matters and things real, personal, and mixed, capable of private ownership. *Security Sav. Bank v. City and County of San Francisco*, 132 Cal. 599, 600, 64 Pac. 898; *Savings & Loan Soc. v. City and County of San Francisco*, 63 Pac. 665, 667, 131 Cal. 362; *City and County of San Francisco v. La Société Française d'Épargne et de Prévoyance Mutuelle*, 131 Cal. 612, 614, 63 Pac. 1016; *County of Santa Clara v. Southern Pac. R. Co.* (U. S.) 18 Fed. 385, 390. This section, in its definition of that which may be made subject to taxation, is sufficiently comprehensive to include all matters and things, visible and invisible, tangible and intangible, corporeal and incorporeal, capable of private ownership. *Northwestern Mut. Life Ins. Co. v. Lewis and Clarke County*, 72 Pac. 982, 983, 28 Mont. 484. See, also, *Pol. Code Idaho* 1901, § 1313, subd. 1; *Rev. St. Utah* 1898, § 2505.

The term "property," as used in relation to the crime of theft, includes money; bank

bills; goods of every description commonly sold as merchandise; every kind of agricultural produce; clothing; any writing containing evidence of an existing debt, contract, liability; promise or ownership of property, real or personal; any receipts for money, discharge, release, acquittance, and printed book or manuscript; and, in general, any and every article commonly known as and called personal property, and all writings of every description, provided such property possesses any ascertainable value. *Pen. Code Tex.* 1895, art. 866.

The term "property," as used in the title relating to the revenue, includes moneys, credits, bonds, stocks, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; but this must not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state, and has been taxed. *Pol. Code Mont.* 1895, § 3680, subd. 1.

The term "property," as used in the chapter defining and punishing embezzlement, includes any and every article commonly known and designated as personal property, and all writings of every description that may possess any ascertainable value. *Pen. Code Tex.* 1895, art. 941.

The term "property" includes both real and personal property, things in action, money, bank bills, and all articles of value. *Gen. St. Minn.* 1894, § 6842, subd. 9.

The term "property," as used in the revenue act, includes moneys, credits, bonds (except of railroad or quasi public corporations), stocks, dues, franchises, and all other matters and things, real, personal and mixed, capable of private ownership. *Pol. Code Cal.* 1903, § 3617, subd. 1.

The term "property," wherever used in the chapter relating to the revenue, shall be held to mean and include every tangible or intangible thing, being the subject of ownership, whether animate or inanimate, real or personal. *Rev. St. Mo.* 1899, § 9123.

The word "property" includes real, personal, and mixed estates and interests. *Bates' Ann. St. Ohio* 1904, §§ 1536-907.

The word "property," as used in the section relating to the appointment of receivers, includes the rents, profits, or other income, and the increase, of real or personal property. *Code Civ. Proc. N. Y.* 1899, § 713.

The word "property," as used in the mechanics' lien laws, means the estate in fee; the freehold, leasehold, or other estate or interest therein, with the structure or other improvement thereon, and the fixtures and other personal property used in fitting up

and equipping the same for the purpose for which it is intended; all of which belong to the owner, and against which the claim is filed as a lien. *P. & L. Dig. Laws Pa.* 1897, vol. 4, col. 1150, § 6.

#### As all property.

The terms "property" and "all property," in a statute relating to taxation of railroad and canal companies, are not interchangeable terms, and one cannot be substituted for the other. *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 604, 48 N. J. Law (19 Vroom) 146.

"Property," as used in an amendment to the Constitution which requires that property shall be assessed for taxes under general laws and by uniform rules, means all property. *Central R. Co. v. State Board of Assessors*, 2 Atl. 789, 798, 48 N. J. Law (19 Vroom) 1, 57 Am. Rep. 516.

The term "property," as used in Act March 3, 1797, c. 74, § 5, declaring that the claim of priority on the part of the United States shall accrue in a case where a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof, means all the property which the debtor possesses. *United States v. Hooc*, 7 U. S. (3 Cranch) 73, 91, 2 L. Ed. 370.

In a statute which makes it a ground for attachment that defendant has disposed of his property with the intent to hinder and delay his creditors, or is about to do so (*Mansf. Dig. Ark. c. 9, § 309*), the word "property" does not mean all the debtor's property; and hence there is no inconsistency in alleging in the affidavit for attachment that defendants have disposed of their property, and they are about to dispose of it. *Salmon v. Mills* (U. S.) 68 Fed. 180, 181, 15 C. C. A. 356.

As used in *Rev. St. U. S.* 1874, § 728, applicable to the District of Columbia, providing that "any married woman may convey, devise, and bequeath her property, or any interest therein, in the same manner and with like effect as if she were unmarried," the word "property" includes every right and interest which a person has in lands and chattels, and is broad enough to include everything which one person can own and transfer to another, without distinction as to the manner in which the title was acquired, and includes property received by a wife as a gift from her husband, as well as all her other property. *Hamilton v. Rathbone*, 20 Sup. Ct. 155, 158, 175 U. S. 414, 44 L. Ed. 219.

The term "property," within the meaning of an open fire policy on property contained in specified buildings, will cover articles kept for use, as well as those kept for sale. *Burgess v. Alliance Ins. Co.*, 92 Mass. (10 Allen) 221.

The word "property," as used in Const. § 238, providing that no property situated between the river and the levee should be taxed for levee purposes, did not include any species of intangible property which is in no wise affected by the overflow of the river. *Board of Levee Com'rs for Yazoo & Mississippi Delta v. Houston*, 33 South. 491, 81 Miss. 619.

The words "real and personal property," as used in Const. art. 5, § 3, which provides that laws shall be passed, taxing by a uniform rule all moneys and credits, and also all real and personal property according to its true value in money, include every kind of property whatsoever; and therefore, when a municipal corporation exercises the taxing power, it must tax, without regard to charter provisions, according to its true value in money, and by a uniform rule, all property within the corporate limits, both real and personal, including moneys, credits, etc. *Redmond v. Commissioners of Town of Taboro*, 10 S. E. 845, 850, 851, 106 N. C. 122, 7 L. R. A. 539.

#### As both real and personal.

The word "property" includes both real and personal property. Code Civ. Proc. Cal. 1903, § 17, subd. 1; Pol. Code Cal. 1903, § 17, subd. 1; Pen. Code Cal. 1903, § 7, subd. 10; Civ. Code Cal. 1903, § 14, subd. 1; Laws N. Y. 1892, c. 677, § 2; Code W. Va. 1899, p. 134, c. 13, § 17; Code Ala. 1896, § 2; Sand. & H. Dig. Ark. 1893, § 7209; Gen. St. Kan. 1901, § 7342, subd. 10; Gen. St. Kan. 1901, § 2313; Rev. St. Okl. 1903, § 2699; Rev. St. Okl. 1903, § 2808; Rev. St. Tex. 1895, art. 3270; Pen. Code Ariz. 1901, par. 7, subd. 10; Rev. St. Mo. 1899, § 4160; Shannon's Code Tenn. 1896, § 63; *Woodridge v. Page*, 68 Tenn. (9 Baxt.) 325, 331; Ann. Codes & St. Or. 1901, § 2185; Pol. Code Mont. 1895, § 16, subd. 1; Code Civ. Proc. Mont. 1895, § 3463, subd. 1; Pen. Code Mont. 1895, § 7, subd. 10; Civ. Code Mont. 1895, § 4662, subd. 1; Rev. St. Utah 1898, § 2498; Rev. Codes N. D. 1899, § 7726; Pen. Code S. D. 1903, § 821; Rev. Codes N. D. 1899, § 5135; Civ. Code S. D. 1903, § 2469; Code N. C. 1883, § 3765, subd. 6; Code Civ. Proc. S. C. 1902, § 446; Pen. Code Ga. 1895, § 2; Rev. St. Wis. 1898, § 4972; *Horner's Rev. St. Ind.* 1901, § 1285; Code Iowa 1897, § 48, subd. 10; *Briggs v. Briggs*, 29 N. W. 632, 633, 69 Iowa, 617; *State v. Topeka Water Co.*, 60 Pac. 337, 342, 61 Kan. 547, 561; *Campbell v. Perry*, 9 N. Y. Supp. 330, 333, 56 Hun. 639; *Butts v. Dickinson* (N. Y.) 12 Abb. Prac. 60, 63; *Wing v. Disse* (N. Y.) 15 Hun. 190, 194; *Woodridge v. Page*, 69 Tenn. (1 Lea) 135, 142; *Worth v. Wright*, 122 N. C. 335, 336, 29 S. E. 361; *Durboraw v. Durboraw*, 72 Pac. 566, 567, 67 Kan. 139; *State v. Barr*, 28 Mo. App. 84, 85; *Winfree v. Bagley*, 9 S. E. 198, 199, 102 N. C. 515; *Aurora Nat. Bank v. Black*,

29 N. E. 396, 397, 129 Ind. 595; *Fears v. State*, 29 S. E. 463, 465, 102 Ga. 274.

"Property" is a generic term of extensive application. It includes real and personal estate, and the right and title to and interest in the same. *Russell v. Ralph*, 10 N. W. 518, 519, 53 Wis. 328; *McKeon v. Bisbee*, 9 Cal. 137, 142, 70 Am. Dec. 642; *Primm v. City of Belleville*, 59 Ill. 142, 144.

The word "property," when used in a will directing the disposition of testator's property, will, in the absence of explanatory words, be construed to include both real and personal property. *White v. Commonwealth*, 1 Atl. 33, 34, 110 Pa. 90; *Fosdick v. Town of Hempstead*, 8 N. Y. Supp. 772, 773, 55 Hun. 611; *Fry v. Shipley*, 29 S. W. 6, 8, 94 Tenn. (10 Pickle) 252; *Brawley v. Collins*, 88 N. C. 605, 607.

The term "property" embraces both real and personal estate, and under it, when used in a general residuary clause in a will, the real estate of the testator not attempted to be specifically disposed of is included. *White v. Keller* (U. S.) 68 Fed. 796, 800, 15 C. C. A. 683 (citing *Morris v. Henderson*, 37 Miss. 492).

The word "property," when used without qualifying words, embraces within its meaning both real and personal estate. It signifies the right one has in lands, and is expressly used in that sense by the learned and unlearned, and by men in all stations of life. When used in last wills and testaments, or other instruments of conveyance, it is regarded as a term including all classes of property. *Mason v. Hackett* (N. Y.) 35 Hun. 238, 240.

The word "property" is comprehensive enough to embrace both real and personal property, under Code, § 1956, providing that property exempted by law from sale under execution or attachment shall, on the death of a husband, descend to his widow and children; but it must be here restricted to real property, so as to give effect to Code 1871, § 1290, giving to a widow the exempt personal property of her deceased husband. *Hickman v. Ruff*, 55 Miss. 549, 550.

The word "property," as used in the treaty between the United States and the Mexican Republic, allowing Mexicans in territories previously belonging to Mexico, but which remained for the future within the United States, to move to Mexico, retaining the property which they possessed in said territories, is to be taken in its most general and liberal sense, as applying to lands as well as movable possessions. *Pino v. Hatch*, 1 N. M. 125, 143.

"Property" is defined to mean "estate," and "estate" to mean "property," and it is otherwise said that property is the right a

man can have to anything, real or personal. The word "property" comprehends the meaning of both words, and hence it is held that where an officer made a return under the statute that he could find no corporate property wherein to satisfy the execution, using the words of the statute, "corporate property or estate," it was held to be sufficient. *Stanley v. Stanley*, 26 Me. 191, 199.

The word "property," as used in How. & H. Code, p. 626, § 43, providing that in all cases the property of the defendant shall be bound and liable to any judgment that may be entered up from the time of entering such judgment, includes not only personal estate, but every estate, interest, or right in lands, tenements, and hereditaments. *Moody v. Farr's Lessee*, 33 Miss. 192, 195.

The word "property" is frequently used in our laws relating to the execution of a judgment in civil actions as a general term denoting both real and personal property, and it is so defined in Comp. Laws 1888, § 2997; and we are of the opinion that such is its meaning as used in Comp. Laws 1888, § 3450, providing that if a purchaser of property at an execution sale fails to recover possession because of an irregularity in the sale, or if the property was not subject to execution and sale, the court must revive the original judgment for the amount paid, etc. *Utah Nat. Bank v. Beardsley*, 37 Pac. 586, 587, 10 Utah, 404.

By "all property," as used in Rev. St. 1894, § 2673, providing that the appointment of a guardian shall extend to all of the property of the minor, is meant not only personal property, but real estate. *Kinsley v. Kinsley*, 49 N. E. 819, 821, 150 Ind. 67.

Code, § 3765, subsec. 6, provides that in construing statutes the word "property" shall include all property, both real and personal, unless manifestly contrary to the legislative intent. *Durham Fertilizer Co. v. Little*, 24 S. E. 664, 665, 118 N. C. 808.

The term "property," as used in Act April 9, 1811, re-enacted in Rev. St. 1830, p. 600, §§ 9, 10, providing that upon the dissolution of any corporation, unless other persons shall be appointed by competent authority, the directors of the corporation shall be the trustees of the creditors and stockholders, with full power to collect and pay the outstanding debts, and divide among the stockholders the money and other property that may remain, includes both real and personal property, as the term "property," in the statute, must be deemed to have been used in its general and popular sense, and, so used, it includes both lands and chattels. *Owen v. Smith* (N. Y.) 31 Barb. 641, 646.

A clause in a fire policy provided that if the property should be sold or transferred,

or any change take place in the title or possession by voluntary transfer or conveyance, or if the interest of the insured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, should not be truly stated, etc., held, that the word "property" referred to both real and personal property, and not merely to real property. *Girard Fire & Marine Ins. Co. v. Hebard*, 95 Pa. 45, 51.

Code 1873, § 2459, provides that "property given by an intestate by way of advancement to an heir shall be considered part of the estate, so far as regards the division and distribution thereof, and shall be taken by such heir towards his share of the estate at what it would now be worth if in the condition in which it was so given to him." Held, that the word "property" covers every description of property, both real and personal, and there is nothing to indicate that the Legislature intended advancements of personalty to be taken from the personal estate, and advancements of real estate from the real. *West v. Beck*, 64 N. W. 599, 600, 95 Iowa, 520.

The term "property" includes personal property, and also every estate, interest, and right in lands, tenements, and hereditaments. Code Miss. 1892, § 1514; Comp. Laws Mich. 1897, § 11794.

#### Enjoyment, use, and disposition.

The term "property" has a most extensive signification, and, according to its legal definition, consists in the free use, enjoyment, and disposition by a person of all his acquisitions, without any control or diminution, save only by the laws of the land. *Stevens v. State*, 2 Ark. 291, 299, 35 Am. Dec. 72; *Crow v. State*, 14 Mo. 237, 262; *Dixon v. People*, 48 N. E. 108, 110, 168 Ill. 179, 39 L. R. A. 116; *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, 396; *In re Comingore* (U. S.) 96 Fed. 552, 557; *Fears v. State*, 29 S. E. 463, 465, 102 Ga. 274.

Property, considered as an exclusive right to a thing, contains not only the right to use it, but a right to dispose of it, either by exchanging it for another thing, or by giving it away to any other person without any consideration, or even throwing it away. *Sherman v. Elder*, 24 N. Y. 381, 384; *Bank of Toledo v. Bond*, 1 Ohio St. 622, 662; *Wynehamer v. People*, 13 N. Y. 378, 396.

Among the incidents of property in land or in anything else, the right to enjoy its beneficial use, and so far to control it as to exclude others from that use, is the most beneficial and the most real. *Grand Rapids Booming Co. v. Jarirs*, 30 Mich. 308, 320.

Property is a thing over which a man may have dominion, and power to do with it as he pleases as long as he does not violate

the law. *Smith v. Campbell*, 10 N. C. 590, 597.

The right of property includes the power to dispose of it according to the will of the owner. *The Slaughterhouse Cases*, 83 U. S. (16 Wall.) 36, 127, 21 L. Ed. 394; *Harbison v. Knoxville Iron Co.*, 53 S. W. 955, 957, 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682.

Webster defines "property" to be the exclusive right of possessing, enjoying, and disposing of a thing; ownership; an estate, whether in lands, goods, or money. *Spring Valley Waterworks v. Schottler*, 62 Cal. 69, 72, 84. See, also, *Banning v. Sibley*, 3 Minn. 389, 404 (Gil. 282); *McKeon v. Bisby*, 9 Cal. 137, 142, 70 Am. Dec. 642.

Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it. *Low v. Rees Printing Co.*, 59 N. W. 362, 366, 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670. The term "property" includes every interest one may have in any and every thing that is the subject of ownership by man, together with the right to freely possess, use, enjoy, and dispose of the same. *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79; *Gillespie v. People*, 58 N. E. 1007, 1009, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176; *Booth v. People*, 57 N. E. 798, 799, 186 Ill. 43, 50 L. R. A. 762, 78 Am. St. Rep. 229; *Bailey v. People*, 60 N. E. 98, 99, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116; *State ex rel. Star Pub. Co. v. Associated Press Co.*, 60 S. W. 91, 98, 159 Mo. 410, 51 L. R. A. 151, 81 Am. St. Rep. 368; *Staton v. Norfolk & C. R. Co.*, 16 S. E. 181, 184, 111 N. C. 278, 17 L. R. A. 838.

The term "property," as used in the Constitution, is not confined to tangible objects which can be passed from hand to hand, but includes those rights of possession, disposal, management, and of contracting with reference thereto, which render property useful, valuable, and a source of happiness, the right to the pursuit of which is preserved. *State v. Kreutzberg*, 90 N. W. 1098, 1100, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934.

"Property," in the legal sense, is no more than the exclusive right of possession, enjoyment, or disposition of a thing, which, of course, includes the use of the thing. *Chicago & W. I. R. Co. v. Englewood Connecting Ry. Co.*, 4 N. E. 246, 249, 115 Ill. 375, 56 Am. Rep. 173. See, also, *People v. Havnor*, 43 N. E. 541, 542, 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep. 707. The most absolute

land title is a perpetual right of exclusive occupation and perpetual right of use. *Smith v. Furbish*, 44 Atl. 398, 408, 68 N. H. 123, 47 L. R. A. 226. It has also been said that property, in its legal sense, is not the thing itself, but certain rights in and over the thing, those rights being (1) user; (2) exclusion; (3) disposition. *Dixon v. People*, 48 N. E. 108, 110, 168 Ill. 179, 39 L. R. A. 116 (citing *Lewis*, Em. Dom. § 54).

There is no definition of "property" which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Indeed, if any one can define "property" eliminated of its attributes, incapable of sale and place, without the protection of the law, it were well that the attempt be made. *Wynhamer v. People*, 13 N. Y. 378, 396.

The exclusive right of using and transferring property follows as a natural sequence from the admission of the right itself. *Ex parte Law*, 35 Ga. 285, 294, 295, 15 Fed. Cas. 3 (citing *Grotius*, bk. 2, c. 6, § 1). See, also, *Bank v. Divine Grocery Co.*, 37 S. W. 390, 392, 97 Tenn. 603.

"Property," in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others. *Rigney v. City of Chicago*, 102 Ill. 64, 77; *Jaynes v. Omaha St. Ry. Co.*, 74 N. W. 67, 74, 53 Neb. 631, 39 L. R. A. 751; *De Lander v. Baltimore County Com'rs*, 50 Atl. 427, 428, 94 Md. 1. "Property" is defined as the dominion or indefinite right of user or disposition which one may exercise over particular things or subjects. This is its appropriate meaning, and that which it has in the Constitution, although it is not infrequently used to indicate the thing, rather than the right, and much of the uncertainty and confusion observable in the decisions have arisen from overlooking this distinction. *Waters v. Wolf*, 29 Atl. 646, 652, 162 Pa. 153, 42 Am. St. Rep. 815; *Illinois Cent. R. Co. v. City of Chicago*, 41 N. E. 45, 47, 156 Ill. 98.

"Property" does not properly mean the material thing—the land or chattel owned—but means only the right of the owner in relation to it. It denotes a right over a determinate thing. Property is the right of any person to possess, use, enjoy, and dispose of a thing. The right of indefinite user is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504, 511, 12 Am. Rep. 147.

Though "property," in its legal significance, includes the right of any person to possess, use, enjoy, or dispose of a thing, Act March 16, 1901, making a sale of a

stock of goods in bulk fraudulent and void unless the vendee receives from the vendor a written statement of the names and addresses of all his creditors, is not unconstitutional, as restricting the right of an owner to dispose of his property. *McDaniels v. J. J. Connelly Shoe Co.*, 71 Pac. 37, 38, 30 Wash. 549, 60 L. R. A. 947, 94 Am. St. Rep. 889.

The right to the use and enjoyment of money is property. Under a statute restricting arrest of women to actions for willful injuries to property, etc., a woman may be arrested in an action for damages for inducing the plaintiff, by false and fraudulent palming of worthless securities, to lend her money. This is destroying his use and enjoyment of the money, which is property. *Eypert v. Bolenius* (N. Y.) 2 Abb. N. C. 193, 195.

#### As interest or right.

The term "property" may be defined to be the interest which can be acquired in external objects or things. The things themselves are not, in a true sense, property, but they constitute its foundation and material; and the idea of property springs out of the connection or control or interest which according to law may be acquired in them or over them. This interest may be absolute, or it may be limited and qualified. It is absolute when a thing is objectively and lawfully appropriated by one to his own use in exclusion of all others. It is limited or qualified when the control acquired falls short of the absolute. *Griffith v. Charlotte, C. & A. R. Co.*, 23 S. C. 25, 38, 55 Am. Rep. 1.

In *Morrison v. Semple* (Pa.) 6 Bin. 94, Chief Justice Tilghman said that property signified the right or interest which one has in lands or chattels, and that it was used in that sense by the learned and unlearned—by men of all ranks and conditions. *Stief v. Hart*, 1 N. Y. (1 Comst.) 20, 24; *Jackson v. Housel* (N. Y.) 17 Johns. 281, 283.

"Property" is defined to be the highest right a man can have to anything; being use for that right which one hath to lands or tenements, goods or chattels, which in no way depends on another man's courtesy. *Jackson v. Housel* (N. Y.) 17 Johns. 281, 283 (citing *Jac. Law Dict.*); *Stief v. Hart* (1 Comst.) 1 N. Y. 20, 24.

"In a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign." *Legal Tender Cases*, 79 U. S. (12 Wall.) 457-551, 20 L. Ed. 287.

The term "property," as used in Const. art. 1, § 17, forbidding the taking of property for public use without adequate compensation being made therefor, means not only the thing owned, but also every right which ac-

companies ownership and is its incident. *Gulf, C. & S. F. Ry. Co. v. Fuller*, 63 Tex. 467, 469; *Ft. Worth & R. G. Ry. Co. v. Jennings*, 13 S. W. 270, 76 Tex. 373, 8 L. R. A. 180.

Property is defined to be the right and interest which a man has in lands and chattels, to the exclusion of others. *Estes Park Tollroad Co. v. Edwards*, 32 Pac. 549, 550, 3 Colo. App. 74. "The word 'property' denotes the interest one may have in lands and chattels to the exclusion of others." *Ayers v. Lawrence*, 59 N. Y. 192, 198; *McKeon v. Bisbee*, 9 Cal. 137, 142, 70 Am. Dec. 642.

The term "property" comprehends everything of which a man may legally have the absolute and exclusive domain. *People v. City of Brooklyn* (N. Y.) 9 Barb. 535, 546.

"The term 'property,' in its broad sense, signifies that to which one has an unrestricted and exclusive right, including all that is one's own, whether corporeal or incorporeal." *King v. Gotz*, 11 Pac. 656, 657, 70 Cal. 236 (quoting *Bouv. Law Dict.* tit. "Property"); *Spring Valley Waterworks v. Schottler*, 62 Cal. 69, 72, 84.

According to a standard elementary author, property consists of those things which belong to us by that exclusive right which enables us to exclude all others from having anything at all to do with them. *Bank of Toledo v. Bond*, 1 Ohio St. 622, 662 (citing *Rutherford's Inst.* p. 20; *Puffendorf's Laws of Nature*, p. 220).

Property is defined to be "the unrestricted and exclusive right to a thing; the right to dispose of a substance of a thing in every legal way; to use and exclude every one else from interfering with it." *Burr. Law Dict.* To hold that one man may lawfully, for his own pleasure or convenience, make use of, or in any way interfere with, the property of another without his permission, would be to introduce into the law of property a doctrine both novel and dangerous. *Bruch v. Carter*, 32 N. J. Law (3 Vroom) 554, 561.

#### As the thing owned.

The term "property," although frequently applied to the thing itself, in strictness means only the rights in relation to it. *Wynehamer v. People*, 13 N. Y. 378, 396; *Ex parte Law*, 35 Ga. 285, 294; *Smith v. Furbish*, 44 Atl. 398, 408, 68 N. H. 123, 47 L. R. A. 226.

The word "property" means everything which is the subject of ownership. *Stanton v. Lewis*, 26 Conn. 444, 449; *Boston & L. R. Corp. v. Salem & L. R. Co.*, 68 Mass. (2 Gray) 135; *Scranton v. Wheeler*, 21 Sup. Ct. 48, 59, 179 U. S. 141, 45 L. Ed. 126; *Washington County v. Weld County*, 20 Pac.



273, 274, 12 Colo. 152; *In re Comingore* (U. S.) 96 Fed. 552, 557.

The word "property" is among the most comprehensive of those in use to signify things which are owned and subject to be owned and enjoyed. *Adams v. Jones*, 59 N. C. 221, 223.

The term "property," as commonly used, denotes any external object over which the right of property is exercised. In this sense it is a very wide term, and includes every class of acquisitions which a man can own or have an interest in. *Wilson v. Ward Lumber Co.* (U. S.) 67 Fed. 674, 677. Property is legally understood to include every case of acquisitions which a man can own or have an interest in. *In re Fixen* (U. S.) 102 Fed. 295, 296.

Property is a thing owned; that to which a person has or may have a legal title. The word may have different meanings, depending upon the connection in which, and the purposes for which, it is used, as indicating the intention of the parties. *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 395, 3 Am. Rep. 711.

In the assessment law, the term "property" is used, not in the sense of the right of ownership, but of the thing owned, which is listed for taxation opposite the name of the owner. *State v. South Penn Oil Co.*, 24 S. E. 688, 695, 42 W. Va. 80.

The term "property," as used in Act 1879, § 2, providing that special assessments for the improvement of public streets may be made upon contiguous property abutting on such streets, should be construed as indicating the res or subject of property, rather than the property itself. "Property," in its appropriate sense, means that dominion or definite right of user and disposition which one may lawfully exercise over particular things or subjects, but it is often used to indicate the res or subject of the property, rather than the property itself. *South Park Com'rs v. Chicago, B. & Q. R. Co.*, 107 Ill. 105, 108; *Rigney v. City of Chicago*, 102 Ill. 64, 77.

"Property," in its appropriate sense, denotes the interest one may have in lands or chattels to the exclusion of others; also the word is frequently employed to indicate the subject of the property, rather than the property itself. A chattel may be the subject of distinct property held by several persons. One may have the right to possession or use, or both, while another holds the legal title to the corporeal thing, subject to the interest of the possessor. The one has the special, and the other the general, ownership. The one has the right to the chattel, and the other has an interest in it, but the right or interest of each is his personal

property. *Willson v. Harris*, 54 Pac. 46, 49, 21 Mont. 374.

When the word property is used in the clause of an insurance policy forbidding alienation. It is used to designate the thing insured, and not the interest of the insured. *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389, 395, 3 Am. Rep. 711; *Oakes v. Manufacturers' Fire & Marine Ins. Co.*, 131 Mass. 164, 165.

The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In the Civil Code the thing of which there may be ownership is called "property." Civ. Code Cal. 1903, § 654.

In the Civil Code the thing of which there may be ownership is called "property." Civ. Code Mont. 1895, § 1070.

The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this compilation, the thing of which there may be ownership is called "property." Rev. St. Okl. 1903, § 4017.

#### **After-acquired property.**

"Property," within the meaning of a lease giving a lien on the property of the lessee, is to be construed to have reference only to the property the lessee owned at the date of the lease, and does not include after-acquired property. *Borden v. Croak*, 22 N. E. 793, 795, 131 Ill. 68, 19 Am. St. Rep. 23.

#### **Anticipated profits.**

Anticipated profits are not, and cannot be held and regarded as, property in the ownership or possession of him who owns the article out of which profits are expected to flow. The property is one thing, and remains untouched. The profits are in esse, and cannot be claimed as property. *Munn v. People*, 69 Ill. 80, 91.

#### **Business, occupation, or profession.**

A calling, business, or profession chosen and followed is property, within the meaning of a constitution prohibiting the taking of property without compensation. *State v. Chapman*, 55 Atl. 94, 95, 69 N. J. Law, 464.

The word "property," as used in the Constitution in connection with "taxation," says the court in *Aulanier v. Governor*, 1 Tex. 653, cannot by any forced construction be tortured into meaning an occupation, calling, or profession. The word "property," in connection with the revenue laws, is sometimes employed in its comprehensive sense, and as synonymous with "subjects," and will be so construed when required by the context, or when the manifest purpose of the law will be otherwise defeated. "Property," when employed in connection with an as-

assessment and levy of taxes, has received a judicial interpretation which it will be presumed was in the contemplation of the framers of the organic law. In *Lott v. Ross*, 38 Ala. 156, it was held that every subject of taxation under state laws cannot be considered as embraced by the terms "taxable property," and that the distinction between property liable for taxes and other subjects of taxation was clearly drawn, and the taxes upon the gross amount of sales of merchandise was an occupation or privilege tax, and not a tax on property. *Western Union Tel. Co. v. State Board of Assessment*, 80 Ala. 273, 275, 60 Am. Rep. 99. And the Supreme Court of California, in *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581, held that a similar provision did not operate as a limitation of the taxing power of the Legislature, and apply to every species of tax, but that the Legislature, in its discretion, might discriminate in imposing taxes on certain classes of persons, occupations, or species of property—taxing some and exempting others. In *re Lipschitz* (N. D.) 95 N. W. 157, 159.

In the case of *Bank v. City of Savannah* (Ga.) Dud. 130, it is said every man's private business, pursuit, or calling are things in which he has an interest, and many species of employments are legitimate subjects of taxation, and are taxed. Still they are not property. They are the means from which income is derived, property made. But there is a greater distinction between the employment and income or profits, and a constitutional restriction on taxation of property does not apply to taxes upon a profession or business, such as the business done by an insurance company. *Home Ins. Co. v. City Council of Augusta*, 50 Ga. 530, 543.

The business of an attorney is his property, and he cannot be deprived of it, unless by the judgment of his peers or the law of the land. *Ex parte Steinman*, 95 Pa. 220, 237, 40 Am. Rep. 637.

A man's profession is his property, and where a priest had no specific salary, but derived his income from rents of pews, Sunday collections, subscriptions, and offerings, and was by order of the bishop forbidden to exercise any priestly function, and removed from the church, though, as alleged, not by way of punishment, on accusation, hearing, or trial, he was deprived of his right of property as pastor of that particular church, and his means of support elsewhere. *O'Hara v. Stack*, 90 Pa. 477, 491.

The right to entertain lodgers in a lodging house, and to fix by contract with them the price to be paid for such accommodation and the number who shall occupy the same room at the same time for sleeping purposes, is a liberty, and also a property right. *Bailey v. People*, 60 N. E. 98, 99, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116.

It is generally assumed that injury to a business is not an appropriation of property which must be paid for. No doubt, a business may be property, in a broad sense of the word, and property of great value; but a business is less tangible in nature, and more uncertain in its vicissitudes, than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by construction of a more popular street, into which travel was diverted, as well as by competition, but there would be as little claim in the one case as in the other. *Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702. So that injury to an established business in consequence of the carrying out of the metropolitan water supply act is not an appropriation of property under the right of eminent domain, for which the Constitution requires that compensation shall be made. *Sawyer v. Commonwealth*, 65 N. E. 52, 53, 182 Mass. 245, 59 L. R. A. 726.

#### Bank bills or notes.

The word "property" is of so comprehensive a signification that it may include bank bills. *Citizens' Bank v. Nantucket Steamboat Co.* (U. S.) 5 Fed. Cas. 719, 731; *Whitton v. Old Colony Ins. Co.*, 43 Mass. (2 Metc.) 1, 3.

The word "property" being a term of more extensive signification than the words "corporeal personal property," and comprehending the latter and every other description of property, an indictment for theft may, in the allegation of ownership, use the general word "property," instead of the phrase "corporeal personal property." National bank notes and United States treasury notes are both property and money, within the provisions of a Code defining theft as a fraudulent taking of corporeal personal property belonging to another, and defining corporeal personal property as including money, bank bills, goods of every description commonly sold as merchandise; every kind of agricultural produce; clothing; any writing containing evidence of an existing debt, contract, liability, promise, or ownership of property; any receipt for money, discharge, release, acquittance; any printed book or manuscript; and, in general, any and every article commonly known as and called personal property, and all writings of every description, providing the property possesses any ascertainable value. *Sansbury v. State*, 4 Tex. App. 99, 100.

#### Beer.

The statute law, as well as the common law, recognizes beer as property, and the brewing of beer as a lawful business, and

protects this property as it does any other lawful product, and any one who steals it or converts it to his own use is liable for its value, whatever his motives. *Kreiter v. Nichols*, 28 Mich. 496, 498.

#### Bees.

Bees, according to Blackstone, are *feræ naturæ*, but, when hived and reclaimed, a qualified property may be acquired in them. 3 Bl. Comm. 392. Bracton says that hiving or inclosing bees gives property in them. *Gillet v. Mason* (N. Y.) 7 Johns. 16, 17.

"Bees are *feræ naturæ*, but, when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation (that is, hiving or enclosing them) gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature by experience and practice has become essentially subjected to the art and power of man. And any reclaimed swarm, like all other wild animals, belongs to the first occupant—in other words, to the person who first hives them. But if a swarm fly from a hive of another, his qualified property continues so long as he can keep them in sight and possess the power to pursue them. Under these circumstances, no one else is entitled to them." *Goff v. Kilts* (N. Y.) 15 Wend. 550, 551.

#### Claim for alimony.

A claim for alimony made by a married woman in a suit for divorce pending at the time of her bankruptcy was not property which she could have disposed of, such as would vest in her trustee, and her failure to schedule the same did not amount to a concealment of property, defeating her right to a discharge. Alimony is not founded on contract, express or implied, and a right to alimony creates no interest in property; it being merely an allowance out of the estate of the husband for the maintenance of the wife after dissolution of the marriage relation. *In re Le Claire* (U. S.) 124 Fed. 654, 657.

#### Consortium.

The consortium to which a wife is entitled is not property, within the meaning of an act authorizing a married woman to maintain an action with reference to her individual property. *Hodge v. Wetzler*, 55 Atl. 49, 50, 69 N. J. Law. 490.

The reciprocal rights possessed by husband and wife to the society and affection of each other are regarded as property of the respective parties. In a broad sense of the word "property," it includes things not tangible or visible, and applies to whatever is exclusively one's own. *Jaynes v. Jaynes* (N. Y.) 39 Hun. 40; *Dietzman v. Mullin*, 57 S. W. 247, 248, 108 Ky. 610, 50 L. R. A. 808, 94

Am. St. Rep. 390; *Warren v. Warren*, 50 N. W. 842, 89 Mich. 123, 14 L. R. A. 545.

#### Contract and right of.

The right to acquire and possess property necessarily includes the right to contract. This right of contract inheres in property, and, in connection with its possession and use, forms its chief element of value. It is only by contract that its ownership can be acquired or transferred. *Dugger v. Mechanics' & Traders' Ins. Co.*, 32 S. W. 5, 6, 95 Tenn. 245; *State v. Schlitz Brewing Co.*, 59 S. W. 1033, 1040, 104 Tenn. 715, 78 Am. St. Rep. 941; *Harbison v. Knoxville Iron Co.*, 53 S. W. 955, 957, 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682.

Property does not consist merely of title and possession. It includes the right to make any legal use of it, and the right to pledge or mortgage it, or to sell and transfer it. The right to contract a debt or other personal obligation is included in the right to liberty, and one's payment of his debts, and therefore the basis of one's credit, the right to contract a debt, or to enter into a bond or other writing or obligation, is also a right of property. *People v. Common Council*, 38 N. W. 470, 471, 70 Mich. 534.

The word "property," as used in St. § 3915, declaring that any corporation, person, or association of persons who shall combine with others for the purpose of regulating or controlling or fixing the price for any merchandise, manufactured articles, or property of any kind, shall be guilty of criminal conspiracy, means property of the same general class or nature as that described previously by the words "merchandise and manufactured articles," and it does not include the right to contract. Hence a combination for the purpose of maintaining rates of insurance is not prohibited by such statute. *Ætna Ins. Co. v. Commonwealth*, 51 S. W. 624, 626, 106 Ky. 864, 45 L. R. A. 355.

The term "property" includes a contract with a corporation to deliver to it a quantity of scrap iron, though assigned by the corporation before the iron comes into its hands, within the meaning of Rev. St. 1881, § 5286, giving employes of a corporation doing business in the state liens for unpaid wages on all of the corporate property. *Aurora Nat. Bank v. Black*, 29 N. E. 396, 397, 129 Ind. 595.

A vested right of action is property in the same sense in which tangible things are property, and Pen. Code, § 640d (Laws 1901, p. 312, c. 128), providing that in cities of the first or second class any person offering for sale real property without written authority shall be guilty of a misdemeanor, is unconstitutional, as improperly abridging the rights and privileges of citizens of one portion of the state in respect to the making of

contracts. *Cody v. Dempsey*, 83 N. Y. Supp. 899, 900, 86 App. Div. 335.

One making a verbal contract with a minor that the latter should live with him, and be provided with board, clothing, and medical attendance, and should receive \$100 on becoming of age, has no property in such contract, as it is voidable by the infant, and therefore is not injured in his property, within the meaning of the civil damage act (Laws 1873, c. 646), giving employers who shall be injured in person, property, or means of support in consequence of the intoxication of any person a right of action against any persons who shall, by selling intoxicating liquors, have caused the intoxication of such person, where in the first year of his service the minor became intoxicated at a hotel owned by defendant, was frozen on his return home, and involved plaintiff in considerable expense for medical attendance and care. *Streever v. Birch*, 17 N. Y. Supp. 195, 196, 62 Hun, 298.

The word "property," as used in St. § 3915, declaring that any corporation, etc., which shall combine with others for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles, or property of any kind, etc., does not include the right to enter into a contract of insurance, nor to fix the terms upon which such a contract will be made. *Ætna Ins. Co. v. Commonwealth*, 51 S. W. 624, 626, 106 Ky. 864, 45 L. R. A. 355.

#### Corn and cotton.

The word "property," as used in Acts 1846, p. 146, rendering all property within the state subject to taxation, did not include corn and cotton, the produce of the preceding year, since, the slave which produced the corn and cotton having been previously taxed, to tax the corn and cotton would amount to a second tax on the slave. *State v. Jones*, 5 Tex. 383, 385.

#### Credits.

The proposition that a secured demand is property is too self-evident to require argument or authority. It is thus considered and treated by every writer upon political economy, by all law writers, by all courts, and by the whole commercial world. Credits are everywhere subjects of garnishment and execution, of purchase and sale. Solvent debts are property, within the meaning of Const. art. 10, § 1, which provides for the taxation of all property except such as may be exempt as therein specified. *State v. Carson City Sav. Bank*, 30 Pac. 703, 705, 17 Nev. 146. See, also, *Florer v. Sheridan*, 36 N. E. 365, 369, 137 Ind. 28, 23 L. R. A. 278; *Boyd v. City of Selma*, 11 South. 393, 394, 96 Ala. 144, 16 L. R. A. 729. Property includes credits, whether for land sold and unpaid for, or otherwise. *People v. Worthington*, 21 Ill.

171, 174, 74 Am. Dec. 86. Contra, holding that the word "property" is used in its ordinary and popular sense, but cannot be construed, however, to include credits or choses in action, even if secured by mortgage. *People v. Hibernia Savings & Loan Soc.*, 51 Cal. 243, 244, 21 Am. Rep. 704.

Credits are not "property," in the sense in which the latter word is employed in the constitutional provision that all property shall be taxed in proportion to its value. That credits are correctly designated as property, in a general sense, no one, of course, will deny, and that they fall within the true meaning of that word as employed in other portions of the Constitution is readily conceded; but, it does not follow, either logically or grammatically, that, because a word occurs in one section with a definite sense, therefore the same sense is to be adopted in every other section in which it occurs. The Constitution provides, in effect, that all the common wealth within the state shall be uniformly taxed. Mere credits are a false quantity, in ascertaining the sum of wealth which is subject to taxation as property, in so far as that sum is attempted to be increased by the addition of those credits. Property taxation based thereon is not only merely fanciful, but necessarily the unconstitutional imposition of an additional tax upon a portion of the property already once taxed; and to hold that credits constitute property would be to attribute a meaning to the word "property" which would not promote, but would utterly defeat, the uniformity of property taxation, which it was the principal purpose of that section to secure. *People v. Hibernia Savings & Loan Soc.*, 51 Cal. 243, 249, 21 Am. Rep. 704.

In legal parlance, and in the sense in which the term is used in the Constitution, relating to the listing of moneys and credits for taxation, credits are choses in action—things incorporeal—consisting in the right of one person to demand and recover from another a sum of money or other thing in possession. The value of a credit grows out of the right to have and receive property in possession either by a sale and transfer of the claim to another person in exchange for money or other things, or by requiring or enforcing payment from the debtor. Credits, therefore, though fictitious, nevertheless constitute property—substantial, convertible, and productive property. *Exchange Bank v. Hines*, 3 Ohio St. 1, 24.

The term "property," as used in Const. art. 12, § 2, declaring that all property subject to taxation shall be listed at its true value in money, includes promissory notes, bank accounts, and other credits. *McCurdy v. Prugh*, 55 N. E. 154, 156, 59 Ohio St. 465.

The word "property," as found in Rev. St. p. 69, providing under certain circumstan-

ces for an equitable division of the proceeds of property attached among various creditors, embraces money, debts, and choses in action, and hence the statute is applicable where the attachments are served on a garnishee. *Stahl v. Webster*, 11 Ill. (1 Peck) 511, 518.

The word "property," as used in the act of April 14, 1851, providing that the widow and children of a decedent may retain either realty or personal property belonging to the estate, to the value of a certain amount, etc., embraces money, bonds, and other evidence of indebtedness. *Appeal of Finney*, 4 Atl. 60, 61, 113 Pa. 11 (citing *Appeal of Larrison*, 36 Pa. [12 Casey] 130).

The word "property," as found in the attachment act, which provides that, where a defendant in a suit instituted by attachment has property in several counties, several writs may be issued to each county, includes credits and choses in action. *Cross v. Haldeman*, 15 Ark. 200, 202.

By the express provisions of Pen. Code, § 1718, subd. 9, the term "property" includes both real and personal, things in action, money, bank bills, and all articles of value. *People v. Barondessa*, 18 N. Y. Supp. 436, 444, 61 Hun, 571.

Under an express provision of Const. art. 13, § 2, "property" includes moneys, credits, bonds, stocks, franchises, and all matters and things, real, personal, and mixed, capable of private ownership. *Judge v. Spencer*, 48 Pac. 1097, 1098, 15 Utah, 242; *Cottle v. Spitzer*, 4 Pac. 435, 436, 65 Cal. 456, 52 Am. Rep. 305.

The word "property," in the embezzlement statute, includes money, goods, chattels, evidences of debt, and things in action. *State v. Orwig*, 24 Iowa, 102, 105.

Negotiable paper is not such property, money, or effects as the statute contemplates in describing what species of property may be made the subject of garnishment. This view seems to be based largely upon the provision of the statute that the property, money, or effects which may be reached by garnishment must be in the possession of, or due from, the person garnished to the defendant in the judgment or decree which forms the basis of the garnishment proceedings at the time the writ is served upon him, and that the maker of negotiable paper cannot be regarded as indebted to the original party before the maturity of the paper. *Hubbard v. Williams*, 1 Minn. 54, 55 (Gil. 37), 55 Am. Dec. 68.

#### Dead body.

There cannot be a right of property, either absolute or qualified, in a corpse; and the administrator of the deceased's estate has no legal control or authority over his

dead body, and the wife has no right or control over the body of her deceased husband after burial. *Blackstone* says that an heir has property in the monuments and escutcheons of his ancestors, but none in their bodies or ashes (2 Bl. Comm. 429); and *Bishop* declares that there can be no property in a person deceased, and consequently larceny cannot be committed of his body, but it can be of the clothes found upon the body, or of the shroud (*Bish. Cr. Law*, § 792, citing *East*, P. C. 652; *Hawkins & Hale's Pleas of the Crown*). And hence, where a murderer placed the dead body on a railway track to conceal the crime, the administrator of the deceased cannot maintain an action against the railway company for mutilating the body. *Griffith v. Charlotte, C. & A. R. Co.*, 23 S. C. 25, 39, 55 Am. Dec. 1.

There is no property, in any just sense, in the dead body of a human being; and therefore such a body is not an export, within the Constitution, providing that no state shall levy any duties on exports. *In re Wong Yung Qu* (U. S.) 2 Fed. 624.

#### Debts.

It is true, the general term "property" may often embrace mere debts and choses in action. Whether, in a particular statute, it is construed as having that broad meaning, or a more limited one, must be determined by the aid of the familiar rule relating to statutory construction. The word does not necessarily include debts within its meaning. Under Gen. St. 1878, tit. 10, c. 66, § 164, providing that, in an action for the recovery of money, upon the filing of an affidavit showing that a person named "has property, money, or effects in his hands or under his control belonging to the defendant in such action, a garnishee summons may be issued against such person," the word "property" does not include book accounts belonging to the defendant, and assigned under a general assignment for the benefit of creditors, and the garnishee summons upon such assignee is ineffectual as to such account. *Ide v. Harwood*, 14 N. W. 884, 885, 30 Minn. 191.

The word "property" in Code, § 297, authorizing a judge to order any property of the judgment debtor to be applied to the satisfaction of the debt, is limited to goods or specific money when these belong indisputably to the judgment debtor, and does not include an ordinary debt due to the judgment debtor. *West Side Bank v. Pugsley*, 47 N. Y. 368, 373.

The term "property" does not include debts, and therefore it may be doubted whether a power given to a municipal corporation to tax property authorizes it to tax debts. *Murray v. Charleston*, 96 U. S. 432-440, 24 L. Ed. 760.

Solvent debts are "property," within the meaning of that word as used in the Constitution, and are liable to taxation. *Savings & Loan Soc. v. Austin*, 46 Cal. 415.

Debts due to nonresident creditors are not property, within the taxation laws of the domicile of the debtor. *Ralley v. Board of Assessors*, 11 South. 93, 94, 44 La. Ann. 765.

The word "property" does not include a debt or duty, and hence, where a warrant commanded defendant to appear before a single justice, without a jury, to answer for the nonpayment of a debt, there was no controversy respecting property, within the fourteenth section of the Declaration of Rights. *Smith v. Campbell*, 10 N. C. 590, 597.

The term "property," as used in Sanb. & B. Ann. St. § 2639, providing for service of publication where defendant is a nonresident and has property, includes debts having a situs in the state. *Bragg v. Gaynor*, 55 N. W. 919, 923, 85 Wis. 468, 21 L. R. A. 161.

#### Deposita.

Where a nonresident at the time of his death kept an account, as trustee of an estate, in a bank in New York, in which account individual money of his own was also deposited, his estate is subject to the tax imposed by the transfer tax law of the state on the amount of his individual account. Where the right, whatever it may be, has a money value and can be owned and transferred, but cannot be enforced or converted into money against the will of the person owning the right without going into the state of New York, it is "property within the state" for the purpose of the transfer tax. *In re Houdayer's Estate*, 44 N. E. 718, 150 N. Y. 37, 34 L. R. A. 235, 55 Am. St. Rep. 642.

#### Dogs.

By the common law a dog is property, being a domesticated or tame animal, and as much the subject of property or ownership as horses, cattle, or sheep. *Chapman v. Decrow*, 45 Atl. 295, 298, 93 Me. 378, 74 Am. St. Rep. 357 (citing *Wright v. Ramscot*, 1 Saund. 84; *Athill v. Corbet*, Cro. Jac. 463; *State v. McDuffie*, 34 N. H. 523, 526, 69 Am. Dec. 516).

The term "property" includes dogs. *Washington City v. Meigs* (D. C.) 1 MacArthur, 53, 58, 29 Am. Rep. 578; *Jones v. Illinois Cent. R. Co.*, 23 South. 358, 75 Miss. 970; *Heisrodt v. Hackett*, 34 Mich. 283, 284, 22 Am. Rep. 529.

The natural inherent right of property does not include the ownership or custody of a vicious animal, such as a dog. It is a qualified or restricted right, qualified by the condition that the animal can be and is

safely confined and kept. *Strouse v. Leipf*, 14 South. 667, 668, 101 Ala. 433, 23 L. R. A. 622, 46 Am. St. Rep. 122.

A dog is "property," within the meaning of the constitutional provision that no person shall be deprived of property without due process of law. *Jenkins v. Ballantyne*, 30 Pac. 760, 8 Utah, 245, 16 L. R. A. 689.

Const. 1876, art. 8, § 1, provides that all property shall be taxed in proportion to its value. Held, that the word "property" as there used did not include dogs, so as to render invalid an act exempting to each family one dog, and imposing on all other dogs a tax of \$1 a year. *Ex parte Cooper*, 3 Tex. App. 489, 493, 30 Am. Rep. 152.

Dogs are "property," within the constitutional provision that all property shall be taxed according to its value. A dog is property notwithstanding the fact that he is not property of general use or has no market value. *Phillips v. Lewis*, 8 Tenn. Cas. 230, 231.

In Florida a dog is property, and taxable as other personal property. *Laws c. 4322*, § 16; *Acts 1895*, p. 17; *Florida Cent. & P. R. Co. v. Davis* (Fla.) 34 South. 218, 219.

Any article of property which the law subjects to taxation is prima facie an article of value, and, where the statute provides for a tax to be levied and assessed on the owners of dogs, such dogs are recognized as property in the law, and the malicious killing of a dog will subject the perpetrator to punishment under the statute providing that every person who shall maliciously injure any property of another shall be guilty of malicious trespass. *Kinsman v. State*, 77 Ind. 132, 134, 135.

Code, § 3042, declares that railroad companies shall be liable to the owner for any damage done to live stock or other property by the running of cars or other machinery on their road. Held, that a dog, though "property" in a qualified sense, so that the owner might maintain trespass by vi et armis for the wanton and malicious killing of the dog, was not "property" in the general sense in which that term is used in the statute, so as to entitle its owner to maintain case for its unintentional, though negligent, destruction. *Jemison v. Southwestern R. R.*, 75 Ga. 444, 445, 58 Am. Rep. 476.

Dogs are property by the common law, and, although it was not a crime to steal a dog, it was such an invasion of property as might amount to a civil injury and be redressed by a civil action. Why trespass would lie for stealing a dog when it was no crime to steal him is not plain to a mind unversed in that "paragraph of human reason" once, as before said, part of the common

law. *State v. Yates*, 10 Ohio Dec. 182, 185, 19 Wkly. Law Bul. 150; *Id.* (Ohio) 37 Alb. Law J. 232, 223, 10 Cr. Law Mag. 439.

A dog, though property so as to enable the owner to maintain trespass if taken from him, was not the subject of larceny at common law; but under the provisions of the statute declaring all personal property to be subject of larceny, an indictment for stealing a dog may be maintained. *People v. Campbell* (N. Y.) 4 Parker, Cr. R. 386, 393.

A criminal prosecution cannot be sustained for the destruction of dogs. By the common law the property in dogs and other inferior animals is not such as that a larceny can be committed by stealing them, though the possessor has a base property in them, and may maintain a civil action for injuries done to them. *Commonwealth v. MacIn* (Va.) 3 Leigh, 809, 810 (quoted and approved in *Davis v. Commonwealth* [Va.] 17 Grat. 617, 620).

In considering whether the killing of a dog was included under a statute imposing a penalty on any person "who shall willfully and maliciously, kill, maim, beat or wound any horse, cattle, sheep or swine, or shall willfully injure or destroy any other property of another," the court said: "Dogs are not mentioned in the statute, nor do they come within either class or description of the animals which are mentioned. They are not regarded by the law as being of the same intrinsic value as the animals enumerated in the statute, and cannot, we think, be brought within the prohibition under the general expression 'any other property' by intendment, nor, in point of fact, do we suppose that it was intended by the lawmakers to include them. Had it been, they would doubtless have been included among the animals expressly enumerated." *State v. Marshall*, 13 Tex. 55, 59.

It is settled in this state that dogs have value, and are the property of the owner as much as any other animal which one may have or keep. *Tenhopen v. Walker*, 55 N. W. 657, 658, 96 Mich. 239, 35 Am. St. Rep. 598 (citing *Heisrodt v. Hackett*, 34 Mich. 283, 22 Am. Rep. 529).

"A dog is an animal belonging, by the common law, to the first or third classes," viz., such as are *domitæ naturæ*, tame animals, and such as are of so base a nature as not to be the subject of larceny. "He is tame. He continues perpetually with his master, and will not stray from his house or person, unless through fraudulent enticement. He is a well-known domestic animal." *Bouv. Law Dict. tit. "Dog."* A dog, then, being a domestic animal, is the subject of absolute property, and, though not intrinsically for his flesh, yet intrinsically for his use, being of some, we might say of much, value, the

killing of him is an indictable offense under Rev. St. p. 971, § 71, providing that every person who shall maliciously destroy any property, etc., shall be fined. *State v. Sumner*, 2 Ind. 377, 378.

A dog is property, and has a money value, and therefore the owner of a dog may recover from one who willfully and wrongfully kills the dog. *Nehr v. State*, 53 N. W. 589, 590, 35 Neb. 638, 17 L. R. A. 771.

Dogs have been held to be property by the courts in the District of Columbia, Kansas, Texas, Connecticut, Tennessee, Michigan, Nebraska, and Utah, and perhaps in other states. A contrary ruling has been made in several of the other states. We think that Chancellor Kent correctly lays down the common-law rule that animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of qualified property. Blackstone declares that the property in a dog is base property, but that such property is sufficient to maintain a civil action for its loss. *Graham v. Smith*, 28 S. E. 225, 226, 100 Ga. 434, 40 L. R. A. 503, 62 Am. St. Rep. 323.

#### Draft.

Under Code, § 45, subds. 9, 10, providing that the word "property" includes personal and real property, and the words "personal property" include money, goods, chattels, evidences of debt, and things in action, a nonnegotiable draft drawn on an insurance company by its authorized adjuster in settlement of a claim is property within the meaning of Code, § 4073, punishing any person obtaining money, goods, or property by false pretenses, although the draft is never approved by the company or accepted. *State v. Patty*, 66 N. W. 727, 728, 97 Iowa, 373.

#### Easements of light, air, and access.

Easements of light and air, ingress and egress to and from buildings, are "property" within the meaning of the Constitution, requiring compensation to be made therefor before it can lawfully be taken from its owner for public use. *Thompson v. Manhattan Ry. Co.*, 29 N. E. 264, 265, 130 N. Y. 360; *Bohm v. Metropolitan El. Ry. Co.*, 29 N. E. 802, 805, 129 N. Y. 576, 14 L. R. A. 344.

Under Const. art. 1, § 18, providing that no private property shall be taken or damaged for public or private use without compensation first made, the word "property" includes not only tangible property, but the right to air, light, and access. *State v. Superior Court of King County*, 66 Pac. 385, 388, 26 Wash. 278.

The easement of light and air on the surface of a street is "property" within the meaning of the Constitution, providing that

private property shall not be taken without just compensation. *Story v. New York El. Ry. Co.*, 90 N. Y. 122, 146, 43 Am. Rep. 146.

The polluting of the air of one's dwelling with noisome smells, which renders the enjoyment of life and property uncomfortable, is the "taking of property" within the inhibition of the Constitution against the taking of private property without compensation, as the term embraces the free use, enjoyment, and disposal of all of one's acquisitions without control or direction. *Caro v. Metropolitan El. R. Co.*, 46 N. Y. Super. Ct. (14 Jones & S.) 138, 164, 168.

#### Construed ejusdem generis.

"Property," as used in an act fixing a lighting rate on the owners and occupiers of houses, buildings, and property other than land, means property of the same sort as houses and buildings, and does not include water pipes under the surface of the soil. *Regina v. Southwark & V. Water Co.*, 6 El. & Bl. 1008, 1018.

How. Ann. St. § 1446c, subd. 2, declares that if any horse or other animal, or any cart, carriage, or vehicle, or other property shall receive any injury or damage by reason of neglect by any township, village, city, or corporation to keep in repair any public highway, street, bridge, sidewalk, etc., such city or corporation shall be liable to pay the owner thereof just damages, etc. Held, that the word "property" as used in such statute was preceded by several words descriptive of particular kinds of property, and hence the word should be construed as limited to things of that character, and for this reason the term could not be extended to include the loss of services of a man's wife by reason of her injury from a defective sidewalk. *Roberts v. City of Detroit*, 60 N. W. 450, 451, 102 Mich. 64, 27 L. R. A. 572.

"Property or rights of property," as used in Rev. St. U. S. § 5057, providing that no suit shall be maintained between the assignee in bankruptcy and a person claiming an adverse interest touching any property or right of property transferable to or vested in such assignee unless brought within two years from the time when the cause of action accrued, means "property or rights of property of such kind and description as by the provisions of the bankrupt law would, if they belonged to the bankrupt, be transferred to or vested in the assignee." *Haven v. Place*, 11 N. W. 117, 118, 28 Minn. 551.

#### Equitable, legal, or other title.

By the term "property," as applied to land, all titles are embraced, legal or equitable, perfect or imperfect. *Harvey v. Barker* (Cal.) 58 Pac. 692, 696, 126 Cal. 262 (citing *Knight v. United Land Ass'n*, 142 U. S. 161,

12 Sup. Ct. 258, 271, 35 L. Ed. 974); *Estes Park Toll-Road Co. v. Edwards*, 32 Pac. 549, 551, 3 Colo. App. 74.

The term "property," as used in the statute by which Louisiana was acquired by the United States, and which stipulated that the inhabitants of the ceded territory should be protected in the enjoyment of their property, comprehends every species of title, inchoate or incomplete; those rights which existed in contract executory, as well as executed contracts. *Soulard v. United States*, 29 U. S. (4 Pet.) 511, 512, 7 L. Ed. 938; *Bryan v. Kennett*, 5 Sup. Ct. 407, 412, 113 U. S. 179, 28 L. Ed. 908; *Scranton v. Wheeler*, 21 Sup. Ct. 48, 59, 179 U. S. 141, 45 L. Ed. 126. This is the meaning of the term in the treaty ceding California to United States, which provides for the protection of the right of property of the inhabitants of the ceded territory. *Hornsby v. United States*, 77 U. S. (10 Wall.) 224, 242, 19 L. Ed. 900; *Teschmacher v. Thompson*, 18 Cal. 11, 21, 79 Am. Dec. 151; *Thompson v. Doaksum*, 10 Pac. 199, 201, 68 Cal. 593; *Leese v. Clark*, 20 Cal. 387.

A bona fide equitable interest in property of which the legal title is in another may be insured under the general name of "property," or by a description of the thing insured. *Locke v. North American Ins. Co.*, 13 Mass. 61, 66; *Tyler v. Aetna Fire Ins. Co.* (N. Y.) 12 Wend. 507-512.

Where a sheriff's deed conveyed all the right, title, and estate of L. in certain land, "being the same property conveyed by J.," the purchaser by sheriff's deed acquired title only to the interest conveyed by J., and not to interest held by the judgment debtor at the date of the levy and sale under a deed from *A. Parks v. Watson*, 29 Mo. 108, 111, 115.

The term "property" must be regarded as applicable only to possessions or rights founded in justice and good faith and based upon authority competent to their creation, and hence it is held that, under an article of the Treaty of Paris which stipulated for the protection of the people of Louisiana in the free enjoyment of their liberty and property, rights claimed under an invalid grant from a Spanish official not having authority to make such grant was not included within the term "property." *United States v. Reynes*, 50 U. S. (9 How.) 127, 151, 13 L. Ed. 74.

The word "property," as used in the Code, authorizing an attachment against a defendant who has assigned, disposed of, or secreted his property with intent to defraud his creditors, means any property in his possession and to which he claims title, though in fact his title is imperfect or clearly bad. *Treadwell v. Lawlor* (N. Y.) 15 How. Prac. 8, 9.



2 Gav. & H. St. p. 261, § 519, provided that after the recovery of a judgment the execution plaintiff might file an affidavit with the clerk of the county to the effect that defendant had property, describing it, which he refused to apply to the judgment; and it further provided that proceedings for an examination of defendant relative thereto might be had. Held, that the word "property," as applicable to lands, included every species of title, inchoate or complete. *Burt v. Hoettinger*, 28 Ind. 214, 218.

#### **Equitable lien.**

Under Code, § 3343, subd. 7, defining "property" to include money, chattels, things in action, and evidences of debt, an equitable lien on bonds is property. *Hovey v. Elliot*, 53 N. Y. Super. Ct. (21 Jones & S.) 331, 340.

#### **Estate.**

The word "property" is equivalent to "estate," in its operation to pass the interest in lands as well as the land itself, and hence a will will pass land by either of these words. *Foster v. Craige*, 22 N. C. 209, 211.

The word "estate" has a broader signification than the word "property." The former includes choses in action; the latter does not. *Pippin v. Ellison*, 34 N. C. 61, 62, 55 Am. Dec. 403.

#### **Estate of succession.**

The word "property," used in a will, has as broad a meaning as an "estate of succession," and is identical with those words. *Succession of Marks*, 35 La. Ann. 1054.

#### **Exemption under statute of limitation.**

A statute of limitation, when fully run upon a claim, whether the demand relate to real or personal property or a money demand on contract or sounding in tort, constitutes a vested property right within the meaning of the Constitution, and its possessor is entitled to the benefit of the constitutional guaranties for the protection of the title to property and property rights. *Eingartner v. Illinois Steel Co.*, 79 N. W. 433, 434, 103 Wis. 373, 74 Am. St. Rep. 871; *Board of Education of Normal School Dist. v. Blodgett*, 40 N. E. 1025, 1026, 155 Ill. 441, 81 L. R. A. 70, 46 Am. St. Rep. 348.

#### **Fee.**

The word "property," in a devise, when used in connection with other expressions showing that it refers to the testator's real estate, or where the devise is of all the testator's property, will give a fee to the devisee. *Carter v. Gray*, 43 Atl. 711, 58 N. J. Eq. 411.

The word "property," in a will, is sufficient to pass real estate. In a devise of "all

and every residue of my 'property,' goods, and chattels," the word "property" was not qualified by "goods and chattels" and restricted to personal estate, but would pass freehold. *Wall's Lessee v. Langlands*, 14 East, 370, 372.

The word "property," in a devise, "I will all my lands and property," conveyed all the estate and interest in the land which the testator possessed. *Fogg v. Clark*, 1 N. H. 163, 167.

The word "property," when used in a will disposing of testator's property, is sufficient to pass the fee in the testator's real estate, when such intention is manifest from the entire instrument. *Chamberlain v. Owings*, 30 Md. 447, 455.

The word "property," when used in connection with other expressions showing that it refers to a testator's real estate, or where the devise is of all the testator's property, passes a fee to the devisee. *Carter v. Gray*, 43 Atl. 711, 58 N. J. Eq. 411.

In a deed which, after the description of the property, proceeded, "being part of the 58 acres, late the property of W., which was decreed by an orphans' court of Y. county, unto M. [the grantor], one of the sons of said W., deceased," the use of the word "property" did not amount to a covenant by the grantor that W., his father, was seised of an indefeasible estate in fee simple, and that the said estate was vested in him, but amounted to no more than a recital and a continuation of the description of the land intended to be granted. *Whitehill v. Gotwalt* (Pa.) 3 Pen. & W. 313, 323 (citing *Cain's Lessee v. Henderson* [Pa.] 2 Bin. 108; *Gratz's Lessee v. Ewalt*, Id. 95).

In *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545, 551, it is said: "Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights, and the correlation of rights and obligations, necessary for the highest enjoyment of land by the entire community of proprietors." *City of Franklin v. Durgee*, 51 Atl. 911, 71 N. H. 186.

The term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or a mere right of possession. Several persons may have in the same land a property which is subject to taxation. *Topeka Commercial Security Co. v. McPherson* (Okla.) 52 Pac. 395, 399 (citing *State v. Moore*, 12 Cal. 56).

#### **Franchise.**

A franchise is property, and it cannot wantonly or of whim be taken away by legislative act and transferred to another. Wil-

Wilmington & R. R. Co. v. Downward (Del.) 14 Atl. 720, 721. See *Randolph v. Larned*, 27 N. J. Eq. (12 C. E. Green) 557, 560.

The term "property," in its broad sense, includes even a franchise; so the word "property," as used in the statute providing for the taxation of all property not specifically exempted, includes a franchise, and hence a tax on a turnpike is proper. *Frankfort, L. & N. Turnpike Road Co. v. Commonwealth*, 6 Ky. Law Rep. 391, 392.

The term "property" was held in *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* (Md.) 4 Gill & J. 1, 145, to include a corporate franchise to select and acquire land for the authorized purposes of the corporation. The court says it is an incorporeal hereditament, not a legal title to the land itself, not a mere capacity or faculty to acquire and hold land, such as every individual possesses, but in addition to such capacity it is a right or privilege—a portion of the eminent domain vested in the corporation—to acquire the legal title to land subjected by the grant to its will. *Baltimore & F. Turnpike Road v. Baltimore, C. & E. M. Pass. R. Co.*, 31 Atl. 854, 855, 81 Md. 247.

"Property" is a word of large import, and in its application to a railroad company, under a provision that its property shall be exempt from any public charge or tax whatever, includes all the real and personal property required by it for the successful prosecution of its business, and includes the franchise. Nothing is better settled than that the franchise of a private corporation, which in its application to a railroad is the privilege of running it and taking fare and freight, is property, and of the most valuable kind, as it cannot be taken for public use, even, without compensation. It is true, it is not the same sort of property as the rolling stock, roadbed, and depot grounds, but it is, equally with them, covered by the general term "the property of the company." *Wilmington & W. R. Co. v. Reid*, 80 U. S. (13 Wall.) 264, 267, 20 L. Ed. 568 (reversing 64 N. C. 226). See, also, *Worth v. Wilmington & W. R. Co.*, 89 N. C. 291, 301, 308, 45 Am. Rep. 679.

"Property," in its broadest and most comprehensive sense, includes all rights and interest in real and personal property, and in easements, franchises, and incorporeal hereditaments. That which may be taken for public uses is not exclusively tangible property. Wherever the right of eminent domain exists, whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of this power, and may be appropriated to public use when necessity demands. A franchise is nevertheless a right in the nature of "property," within the sense that that word is used in the eminent domain law, and no reason is perceived why

it could not be condemned for the use of the public. We know of no policy of the law that would forbid the taking of such property for public uses. *Metropolitan City Ry. Co. v. Chicago W. D. Ry. Co.*, 87 Ill. 317, 324.

The word "property," as used in provisions of the Maryland Bill of Rights relating to taxation, does not include the franchise of a corporation. *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 361, 379, 385, 24 Am. Rep. 511.

The word "property," as used in Const. art. 9, § 1, declaring that the Legislature shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall be paying a tax in proportion to the value of his, her, or its property or franchise, is used as a generic term in its broad and comprehensive sense, and comprehends all intangible property, of whatever description, including franchises, as well as physical or tangible property, such as real estate, or personal property of a character universally regarded as proper subjects of taxation. *State v. Savage*, 91 N. W. 716, 717, 65 Neb. 714.

The term "property," in its broad sense, includes even a franchise. An act declaring that when an ad valorem tax is ordered by a county court it shall be assessed upon "all the property" in the county not specifically exempted, and expressly providing for the assessment of "all property" of a turnpike road, includes the interest of the company in the turnpike road, and does not refer only to what little property it usually owns aside from it. *Frankfort, L. & V. Turnpike Co. v. Commonwealth*, 82 Ky. 386, 389.

The word "property," as used in the statute providing for the taxation at its true value "of all property" used for railroad and canal purposes, means and includes not only all tangible property, but the company's franchise as well, which constitutes the right by which it operates and uses its tangible property, and without which the same would be of little value. *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 48 N. J. Law (19 Vroom) 146.

A corporate franchise is a mere privilege or right of authority by the government, and is not "property" of any description, and consequently not subject to taxation under Const. art. 12, § 2, providing: "Laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stock, joint-stock companies or otherwise, and also all real and personal property according to its true value in money," etc. *Bank v. Hines*, 3 Ohio 1, 8. A franchise is valuable, and in that sense has sometimes been held to be property; but it is not property in the sense used in said section of the Constitution, and its taxation is not by that section limited

or restricted. *State v. Ferris*, 41 N. E. 579, 381, 53 Ohio St. 314, 30 L. R. A. 218.

A state tax on a corporate franchise of a corporation engaged in foreign commerce is not a tax on its property in violation of Const. U. S. art. 1, § 10, forbidding a state to tax imports. *People v. Roberts*, 52 N. E. 1102, 1104, 158 N. Y. 162.

A ferry franchise is as much property as a rent, or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property. *Carroll v. Campbell*, 17 S. W. 884, 885, 108 Mo. 550; *Billings v. Breinig*, 7 N. W. 722, 723, 45 Mich. 65; *Conway v. Taylor's Ex'r*, 66 U. S. (1 Black) 603, 17 L. Ed. 191.

The franchise of a turnpike company is property. *Turnpike Co. v. Parks*, 50 Ohio St. 568, 575, 576, 35 N. E. 304.

The franchises, property, and interests of a railroad corporation in a street is not "property" within the meaning of the statute, and liable to assessment for improvements on such street. *South Park Com'rs v. Chicago, B. & Q. R. Co.*, 107 Ill. 105, 108.

A franchise to construct a toll public road and collect tolls thereon is not "property" within the meaning of the bankruptcy act, and for that reason the franchise does not pass to the assignee in bankruptcy, the franchise being a personal trust, not assignable without the consent of the granting power. *People v. Duncan*, 41 Cal. 507, 511.

A ferry franchise is property. *Conway v. Taylor's Ex'r*, 66 U. S. (1 Black) 603, 17 L. Ed. 191.

Under the term "property," as used in the revenue law of 1898 (Acts 1898, p. 347, No. 170), denominating the property subject to taxation, charters and franchises are included. *Maestri v. Board of Assessors*, 34 South. 658, 662, 110 La. 517.

The franchise of a toll bridge is "property" within the meaning of the bankrupt law, and passes to the assignee in bankruptcy. *Stewart v. Hargrove*, 23 Ala. 429, 437.

### Freight.

In an action on a policy covering the cargo of a vessel, issued to the owner, it appeared that the insured was to take a cargo of lumber on board and transport it to Porto Rico, for which he was to have, in lieu of freight, three-fifths of the lumber. The court said: "We agree that 'freight' cannot be insured under the name of 'property,' but we think the contract by which the insured undertook to carry the cargo gave them an interest in that cargo different from freight and well coming within the term

'property.'" *Wiggin v. Mercantile Ins. Co.*, 24 Mass. (7 Pick.) 271, 273.

In an insurance policy on freight, profits, and cargo, warranted "American property," these words may well be applied to all the subjects insured, for all of them are, in the common language of commercial life, "property," and it would not be improper to hold that the warranty was that freight, profits, and cargo are "American property." *Bayard v. Massachusetts Fire & Marine Ins. Co.* (U. S.) 2 Fed. Cas. 1065, 1069.

### Funds in county treasury.

As used in the statute carving out of an old county two counties, and providing that all county records and other property belonging to the old county shall remain its property, the word "property" is used in its broad sense, and includes funds in the treasury of the old county. *Washington County v. Weld County*, 20 Pac. 278, 274, 12 Colo. 152.

### Good will.

The good will of the business is the expectation of continued public patronage. It is property, transferable like any other property. *Merchants' Ad-Sign Co. v. Sterling*, 57 Pac. 468, 469, 124 Cal. 429, 46 L. R. A. 142, 71 Am. St. Rep. 94.

The good will of a trade or business is a species of property. It possesses a market value, and may be disposed of and sold as other property. *Trentman v. Wahrenburg*, 65 N. E. 1057, 1060, 30 Ind. App. 304.

Good will, like a franchise, is a privilege which the courts will protect as a right of value. As such it is property, though intangible. *People v. Dederick*, 55 N. E. 927, 930, 161 N. Y. 195.

The good will of a business is property, transferable like any other property, and, although intangible, is deemed by the law to be a thing of value, and is adequate as a consideration for the promise of a purchaser, and may form the subject-matter of a contract of sale, in whole or in part. *Mapes v. Metcalf*, 88 N. W. 713, 716, 10 N. D. 601.

"Good will," as the term is used when speaking of the good will of a business, is not corporeal property, but it may adhere to or spring out of corporeal property or a tangible locality or establishment. It must rest on some principal or tangible thing, and hence it is held that it can never arise as an asset of a partnership where the parties only contribute, as capital, their professional skill and reputation, however intrinsically valuable these may be. *Sheldon v. Houghton* (U. S.) 21 Fed. Cas. 1239, 1241.

Good will is intangible property which, in the nature of things, can have no ex-

istence apart from the business of which it is a part. It cannot be sold by judicial decree or otherwise, unless it be in connection with the sale of the business on which it depends, and hence a mortgage of the machinery, type, presses, cases, furniture, paper, forms, and tools of a newspaper company, together with the "good will" of its business, cannot be foreclosed as to the good will after all the tangible property covered by the mortgage has been alienated, worn out, or destroyed, and the corporation has become consolidated with another newspaper corporation. *Metropolitan Nat. Bank v. St. Louis Dispatch Co.* (U. S.) 86 Fed. 722.

In discussing the question as to whether good will of a business was taxable as property, the court said: "Despite the almost universal recognition at the present day of good will as in the nature of property, the law on this subject is of recent growth. The cases greatly confound the thing itself with the means of transferring it, and with the rights an assignee acquires in order to effect that transfer. There is a kind of local good will that Lord Eldon characterized as nothing more than the probability that the old customers will resort to the old place." *Clutwell v. Lye*, 17 Ves. 835, 846. Good will of this character may inhere in real property and give to it additional value. As civilization became more complex, the realization was forced upon the courts that the right to carry on an established business, and to represent that it was the old business that was carried on, is often a thing of value, since men were willing to pay for the privilege, and contended for it at the forum; and therefore the courts have, by evolutionary processes, so adjusted themselves to conditions as to treat such privileges, even where not connected with real estate, as in the nature of assets. The trend of authority is that they will be regarded and protected, not only where they are made the subject of express contract in connection with the voluntary sale of the business, but in voluntary sales. Some of these cases seem to treat good will as property, while in other cases courts have attained the result by the exercise of control over the assignor. We regard it as clear, however, that good will is not in and of itself property, but that it is an incident that may be attached to, and in some cases be connected with, it. *Hart v. Smith*, 64 N. E. 661, 663, 159 Ind. 182, 58 L. R. A. 949, 95 Am. St. Rep. 280 (citing *Rawson v. Pratt*, 91 Ind. 9, 16; *Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 446, 13 Sup. Ct. 944, 37 L. Ed. 799).

The good will that attaches to the business of conducting a newspaper belonging to a copartnership is not "property," within the constitutional provision that a general

assembly shall provide by law for uniform and equal rate of assessment and taxation, and shall secure a just valuation for taxation of all property, both real and personal, or within Burns' Rev. St. 1901, § 8410, declaring that all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation. *Hart v. Smith*, 64 N. E. 661, 662, 159 Ind. 182, 58 L. R. A. 949, 95 Am. St. Rep. 280.

"Good will" has been defined as that good disposition which customers entertain towards the house of business identified by the particular name or firm, and which may induce them to continue giving their custom to it. The good will of a business is property, and may have a value independent of any particular locality or any specific tangible property. In fact, a corporation sued for such good will is sued for property actually received, within the meaning of the New York stock corporation law (Laws 1892, c. 688). *Washburn National Wall-Paper Co.* (U. S.) 81 Fed. 17, 20, 26 C. C. A. 312.

"The interest of an outgoing partner in good will may be valued and assigned with the rest of the effects to the remaining partner." *Lobeck v. Lee-Clarke-Andresen Hardware Co.*, 55 N. W. 650, 653, 87 Neb. 158, 23 L. R. A. 795.

#### Goods and chattels.

The word "property" is a general term, and implies the words "goods and chattels," so that it is held that an indictment for larceny of certain property, specifically alleged to be a parcel, sufficiently established that the property was personal, and was not defective for failure to allege that the forfeiture was of goods and chattels. *State v. Bayonne*, 36 La. Ann. 761, 762.

#### Gross receipts of railroad.

A tax on the gross receipts of railroad companies in lieu of all other taxes to be paid by them is not a direct tax on the property of such companies, within the meaning of Bill of Rights, art. 15, providing that "every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government according to his actual worth in real or personal property." It is neither levied upon the capital stock, nor on their property, in the sense in which the term "property" is used in the Constitution. Gross receipts, it is true, when received, may be considered as the property of such companies, just as a person's income may be considered his property, when paid to him. But it will hardly be contended that an income tax is a direct tax on property within the meaning of the Bill of Rights. Properly speaking, the tax is not imposed on the gross receipts; they are referred to, not as descriptive of the subject to be taxed, but

merely as furnishing the basis of ascertaining the amount of tax to be paid. It is not a tax on property, but a tax on the franchise of the railroad companies, measured by the extent of their business. *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 361, 379, 24 Am. Rep. 511.

Act March 24, 1875, c. 78, providing that railroads which should pay  $1\frac{1}{2}$  per cent. of their gross receipts into the treasury should be exempt from all other taxes, is in violation of the provision of the Constitution of 1870 providing that "all property shall be taxed." Such a tax is not a tax on property. *Memphis & C. R. Co. v. Gaines*, 3 Tenn. Ch. 604, 605.

#### Human life.

A statute making municipal corporations liable for the destruction of property by mobs is held not to include liability for taking life. By no possible intendment, says the court, could "property" then be made to include a human life. *Gianfortone v. City of New Orleans* (U. S.) 61 Fed. 64, 67, 24 L. R. A. 592.

Act April 24, 1857, provides that it shall be lawful for any one having a cause of action against an insurance company to bring suit in any county "where the property of the insured may be located." Prior to this act litigants were obliged to bring action where the insurance company was located, even at great inconvenience and expense, and it was to remedy this that the act was passed. Not clearly including in its terms life insurance and accident companies, it was supplemented by Act April 8, 1868, declaring that all its provisions should apply to "life and accident insurance companies." Held, that the latter act authorized suits to be brought against life and accident insurance companies in the county where the person insured resided. *Quinn v. Fidelity Ben. Ass'n*, 100 Pa. 382, 384.

#### Improvements.

Const. 1848, art. 9, § 5, provides that taxes shall be levied by valuation, so that every one shall pay in proportion to the value of his or her property; that all the property within the limits of a corporation shall be taxed for payment of debts; and that all taxes shall be uniform in respect to persons and property. Held, that the word "property" means both real and personal property, and hence an ordinance exempting improvements upon real estate from sewer tax was unconstitutional. *Primm v. City of Belleville*, 59 Ill. 142, 144.

#### Inheritance.

Const. art. 1, § 8, provides that no man shall be deprived of his "property" but by the law of the land. Act Tenn. April 1, 1885, declared that, where a lunatic died

intestate and possessed of personality derived from an intestate spouse, such property should pass to the next of kin of the person from whom it was derived. After the death, intestate, of a husband whose sole distributee was his wife, the latter was declared a lunatic at an inquisition which was held prior to the passing of the act of April 1, 1885. Held, that the latter act, depriving the widow of the right to transmit by inheritance her property derived from her deceased husband, deprived her of "property" within the meaning of the Constitution. *Strattan Claimants v. Morris Claimants*, 15 S. W. 87, 89, 89 Tenn. (5 Pickle) 497, 12 L. R. A. 70.

#### Insurable interest.

Property is that which is peculiar to any person, that which belongs exclusively to an individual, that to which a person has legal title, whether in possession or not; and therefore it is held that a wife's insurable interest in the life of her husband is property belonging to her. *Holmes v. Gilman*, 19 N. Y. Supp. 151, 153.

#### Insurance policy.

An insurance policy taken out by the insured on his own life for the benefit of his estate is property, a chose in action, just as certainly and effectually as a promissory note payable 10 years from date or upon the happening of a certain event. Creditors have a right to rely on it as one of his assets. *Ionia County Sav. Bank v. McLean*, 48 N. W. 159, 160, 84 Mich. 629.

#### Interest of master in cargo.

This word "property" is very comprehensive, and by an insurance on "property" on board a ship there was no doubt an intent to cover the interest of the master, whether it was to be considered as commissions, or as a specific portion of the cargo belonging exclusively to him. *Holbrook v. Brown*, 2 Mass. 280, 282.

#### Interest of abutting owner in street.

"Property," as understood in relation to the right of eminent domain, is the right of property in and dominion over the specific thing, and is not, as was once understood by some, only a corporeal thing, as a horse or a piece of land; and hence the word "property" denotes certain rights in things which pertain to persons, and which are created and sanctioned by law. The right of the owner of land abutting on a street to the use of the street is property. *Callen v. Columbus Edison Electric Light Co.*, 64 N. E. 141, 143, 66 Ohio St. 166, 58 L. R. A. 782.

The owner of land abutting on a highway has an interest in the highway of a special and particular nature, which may well be considered as a part of his property, for which he is entitled to compensation upon its

condemnation for public purposes. *Cullen v. New York, N. H. & H. R. Co.*, 33 Atl. 910, 912, 66 Conn. 211.

The owner of a lot abutting on a street is entitled to compensation for damage to real estate caused by the erection of poles and wires of an electric street railway company in front of his lot. *Jaynes v. Omaha St. Ry. Co.*, 74 N. W. 67, 74, 53 Neb. 631, 39 L. R. A. 751.

An abutting owner, by reason of his location, has an easement for the purposes of light, air, and access from the street, which rights are "property" within the meaning of the Constitution. *In re Seaside & B. Bridge El. R. Co.*, 31 N. Y. Supp. 630, 631, 83 Hun, 143.

The plaintiff, immediately previous to his bankruptcy in March, 1842, had a fee-simple title in a street subject to the public easement, which street then terminated in Lake Michigan, but more than 460 feet of accretion existed between the street and the lake shore. Held, that the interest of plaintiff, at the time of his decree in bankruptcy, in such street, was "property," within the meaning of Bankr. Act 1841, 5 Stat. 440. *Kinzie v. Winston* (U. S.) 14 Fed. Cas. 649, 651.

#### **Interest of vendee under contract of sale.**

It is a fact of public notoriety that in common parlance the person who is in possession of real property as owner, under a valid and subsisting contract for the purchase thereof, whether he has paid the whole of the purchase money and obtained the legal title or not, is called the "owner" thereof, and the property is usually called his by others. In equity it is in fact his, and the vendor has only a lien thereon for the security of his unpaid purchase money. A person who is in actual possession of property as the real owner thereof in equity has the right to insure the property as his own, in the absence of conditions in the policy requiring the true state of the legal title to be disclosed. *Ætna Fire Ins. Co. v. Tyler* (N. Y.) 16 Wend. 385, 396, 30 Am. Dec. 90.

The interest of a judgment debtor in real estate in his possession under a contract of purchase, the legal title of which is in his vendor, may be applied in satisfaction of the judgment in the mode prescribed by Rev. St. § 519, providing a remedy against a judgment debtor who has property subject to execution which he refuses to apply in satisfaction of the judgment. *Figg v. Snook*, 9 Ind. 202, 204.

#### **Intoxicating liquor.**

The term "property" includes intoxicating liquors, and therefore a statute destroying property in intoxicating liquors owned

and possessed when the act takes effect is in violation of the constitutional provision prohibiting the taking of property without due process of law. *Wynchamer v. People*, 13 N. Y. (3 Kern.) 378, 384.

A right of property in spirituous and malt liquors exists under the law in all the counties of this state, and this property is subject to a judgment against the owner in like manner and to the same extent as other property. *Fears v. State*, 29 S. E. 463, 465, 102 Ga. 274.

The statute law, as well as the common law, recognizes beer as property, and the brewing of beer as a lawful business, and protects this property as it does any other lawful product. *Kreiter v. Nichols*, 28 Mich. 496, 498.

#### **Invention and patent right.**

##### **See "Patent Right."**

A patent which vests the sale and exclusive right of making, using, and vending an invention in the person to whom it has been granted by the government, as against all persons not deriving title through him, is property capable of being assigned by him at his pleasure. *Ager v. Murray* (U. S.) 21 Am. Law Reg. (N. S.) 469. Under Act May 1, 1876 (P. L. 1889), which allows contributions to the capital of a limited partnership to be made in real or personal estate, mines, or other property, at a valuation to be approved by all the members, such contribution may be made by the transfer of patent rights. *Reh-fuss v. Moore*, 19 Atl. 756, 757, 134 Pa. 402, 7 L. R. A. 663.

A patent is, as has been said, a property in notion, and has no corporal tangible substance, and cannot be levied on and sold under execution issuing from the state courts, and whether it can be sold on an execution issuing from the federal courts is regarded as doubtful. Until its usefulness has been established, the value of a patent right is purely speculative. *Chisholm v. Forny*, 21 N. W. 664, 665, 65 Iowa, 333.

A patent is an incorporeal property right in an invention, created by statute. Property rights, whether corporeal or incorporeal, are governed by the same principles, and should receive equal protection. When a person wrongfully appropriates a patented invention, it is an invasion of a patented right of property, and the gains or profits derived from such piracy belong to the patentee. *Head v. Porter* (U. S.) 70 Fed. 498, 504.

"The patent for an invention is the evidence of the inventor's exclusive right to the use of the invention; it therefore may be said to create a property interest in that invention. Until the patent is issued, there is no property right in it; that is, no such right

as the inventor can enforce. Until then there is no power over its use, which is one of the elements of a right of property in anything capable of ownership." *Marsh v. Nichols, Shepard & Co.*, 9 Sup. Ct. 168, 170, 128 U. S. 605, 32 L. Ed. 538.

An invention secured by patent is property, and as much entitled to protection as any other property. *Cammeyer v. Newton*, 94 U. S. 225, 24 L. Ed. 72. The right of a patentee under letters patent granted by the United States for an injunction is exclusive of the government as well as all others, and the government cannot use the patent without a license or compensation to the owner. The patented products of the invention become tangible property, and fall within the common mass, while the conception of the mind embodied in the invention and secured by the patent becomes clothed with the attributes of incorporeal property. The tangible products of an invention are a species of property which are subject to taxation and to the payment of debts as other personal property. *Reeves v. Corning* (U. S.) 51 Fed. 774, 784.

The word "property," in Rev. St. § 1753, which authorizes the issuance of stock in payment for property estimated at its true money value, includes inventions for which applications for patents have been made. *Whitehill v. Jacobs*, 44 N. W. 630, 631, 75 Wis. 474.

Under an act allowing contributions to the capital of a limited partnership to be made in real or personal estate, mines, or other property, at a valuation to be approved by all of the members, such contribution may be made by the transfer of patent rights, these being property. *Reh fuss v. Moore*, 19 Atl. 756, 757, 134 Pa. 462, 7 L. R. A. 663.

"It is settled by abundant authority that the right acquired by the patentee by the use of a valid patent is property which is subject to the claims of a creditor, and may be reached by proper proceedings in equity and applied to the payment of his debts." *Vail v. Hammond*, 22 Atl. 954, 957, 60 Conn. 374, 25 Am. St. Rep. 330.

A patent right is regarded as personal property, and may be assigned. *Avery v. Wilson* (U. S.) 20 Fed. 856, 858.

A patent right is a subject of assignment, sale, or inheritance. *Reh fuss v. Moore*, 19 Atl. 756, 757, 134 Pa. 462, 7 L. R. A. 663, 26 Wkly. Notes Cas. 105, 107.

A patent right is an incorporeal kind of personal property, and in a certain sense analogous to property in a share of stock. The discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by securing a patent from

the government in a manner provided by law. This right the inventor may, under the law, assign before the patent is issued, and request that the patent be issued to the assignee. When a patent is issued, an exclusive right to the invention for the statutory period has been created and vested in the assignee. *Fruit Cleaning Co. v. Fresno Home Packing Co.* (U. S.) 94 Fed. 845, 849.

A patent right is a thing granted entirely by federal legislation. It is a personal favor of monopoly granted to a particular person by the government, and cannot be sold under a common execution, since it is neither "personal property capable of manual delivery," within Code Civ. Proc. § 542, subd. 3, nor debts and credit notes capable of manual delivery, which can be attached by leaving notice with a third person owing such debt or having such credits in his possession. *Peterson v. Sheriff of City and County of San Francisco*, 46 Pac. 1060, 115 Cal. 211.

A patent right is not tangible property. It is an incorporeal right. The patent secures to the patentee the exclusive right in the discovery. The right of property in the physical substance which is the fruit of the discovery is altogether distinct from the right in the discovery itself, and it is only the right to the invention or discovery, the incorporeal right, which a state cannot interfere with. *Commonwealth v. Petty*, 29 S. W. 291, 292, 96 Ky. 452, 29 L. R. A. 786.

An invention, a painting, a book, is the property of its creator. He may keep it for his own exclusive use or enjoyment if he sees fit. The public has no greater right to it, however useful it may be, than it would have to any part of his personal property. But if he once publishes it, his property right in it is gone, and any one may make use of it. *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 49 N. E. 872, 873, 155 N. Y. 241, 41 L. R. A. 846, 63 Am. St. Rep. 666.

The word "property," in Act May, 1876, providing that it shall be lawful to make contributions to the capital of a limited partnership in real or personal estate or other property, includes a patent right. *Reh fuss v. Moore*, 19 Atl. 756, 757, 134 Pa. 462, 7 L. R. A. 663, 26 Wkly. Notes Cas. 105, 107.

#### Judgment in tort.

The term "property" does not include a right of action in tort, but does include a judgment in tort, and therefore the assignment of a judgment in tort does not operate to assign the right of action, and, if the judgment be reversed, the right of action still remains in the assignor. *Gibson v. Gibson*, 43 Wis. 23, 33, 28 Am. Rep. 527.

#### Knowledge.

It is not exactly accurate to say that the mere abstract knowledge acquired in the

**study of a special employment is of itself property.** It is the right to apply that knowledge to the accomplishment of a particular result which constitutes property. For instance, if a witness had been required to answer a question put to him with a view of prescribing a remedy for the relief of the plaintiff in the suit in which he was called, then it might be said, if he was not offered any compensation, that he was deprived of a property right. But where a physician is asked a hypothetical question, and is called upon to give his opinion upon the facts stated in the hypothetical question, while he is testifying as a witness in court, he is not thereby required to practice his healing art. He is merely making a statement for the purpose of enabling the court and the jury to understand correctly a case which is before the court. There is no infringement here of a property right. *Dixon v. People*, 48 N. E. 108, 110, 168 Ill. 179, 89 L. R. A. 116.

#### Labor.

The word "property," as used in the provision of the federal Constitution that no one shall be deprived of property without due process of law, includes labor. Property is everything which has an exchangeable value. *In re Tiburcio Parrott* (U. S.) 1 Fed. 481, 506; *State v. City of Topeka*, 12 Pac. 310, 315, 36 Kan. 76, 59 Am. Rep. 529; *Slaughter-House Cases*, 83 U. S. (16 Wall.) 36, 127, 21 L. Ed. 394; *In re Marshall* (U. S.) 102 Fed. 323, 324; *Low v. Rees Printing Co.*, 59 N. W. 362, 366, 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670; *Ritchie v. People*, 40 N. E. 454, 462, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315.

Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage, and, as an incident to the right of acquiring property, the liberty to enter into contracts by which labor may be employed in such way as to the laborer may seem most beneficial, and of others to employ such labor, is necessarily included in a constitutional guaranty of protection of life, liberty, and property. *Low v. Rees Printing Co.*, 59 N. W. 362, 366, 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670.

Labor is property. The laborer has the same right to sell his labor and to contract with reference thereto as any other property owner. The right of property involves, as one of its essential attributes, the right not only to contract, but also to terminate contracts. *Gillespie v. People*, 58 N. E. 1007, 1009, 188 Ill. 176, 52 L. R. A. 283, 80 Am. St. Rep. 176.

Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the

foundation of most other forms of property. *In re Marshall* (U. S.) 102 Fed. 323, 324 (citing *Slaughter-House Cases*, 83 U. S. [16 Wall.] 36, 127, 21 L. Ed. 394); *In re Parrott* (U. S.) 1 Fed. 481, 506; *State v. Cadigan*, 50 Atl. 1079, 1081, 73 Vt. 245, 57 L. R. A. 666, 87 Am. St. Rep. 714.

"Property," within the meaning of Const. art. 1, cl. 1, declaring that all men have the right to enjoy life and liberty and to acquire possession and protect property, includes the right to labor and transact business. *State v. Cadigan*, 50 Atl. 1079, 1081, 73 Vt. 245, 57 L. R. A. 666, 87 Am. St. Rep. 714.

#### Land.

In a strict legal sense land is not property, but the subject of property. The term "property," though in common parlance frequently applied to a tract of land or a chattel, in its legal signification means only the rights of the owner in relation to it. Property is the right of any person to possess, use, and dispose of a thing. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference takes pro tanto the owner's property. The right of indefinite user or of using indefinitely is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. Use is the real side of property. *State ex rel. Star Pub. Co. v. Associated Press Co.*, 60 S. W. 91, 101, 159 Mo. 410, 51 L. R. A. 151, 81 Am. St. Rep. 368.

It is true the word "property" may sometimes include land, but in a will disposing of "all my earthly property," where there was no direction to sell the land, the word "property" was not intended to include land, where there were no words of inheritance or perpetuity applicable to the land. *Brown v. Dysinger* (Pa.) 1 Rawle, 408, 415.

"Property," as used in New Haven city charter, requiring the making of just compensation to persons whose property is taken for streets, should be construed to mean land; and hence the landowner, and not a mortgagee thereof, is entitled to compensation for land so taken. *Whiting v. City of New Haven*, 45 Conn. 303, 306.

As used in the various state Constitutions regarding the exercise of the right of eminent domain, land is not property in a strict legal sense, but the subject of property. *Staton v. Norfolk & C. R. Co.*, 16 S. E. 181, 184, 111 N. C. 278, 17 L. R. A. 838.

Where a railroad company accepted certain bonds issued by the state, which were to be a first lien on the road and property of the company, the word "property" included all the lands of the company, so as to



create a valid lien on them. *Willson v. Boyce*, 92 U. S. 320, 325, 23 L. Ed. 608.

The phrase "all my property, goods, chattels, and species whatsoever," in a will, would, by the restriction of the latter word, be confined to personalty, but for the words "except such articles hereinafter bequeathed," followed by devises of lands as well as personalty to several persons, which explains these lands to be part of the excepted articles, and implies they would, but for this expression, fall under the comprehensive term "property." *Blackmore's Heirs v. Paine*, 6 Tenn. (5 Hayw.) 105, 106.

#### **Leasehold.**

Where a corporation, desiring for its manufactory certain premises, took an assignment of the lease from the tenant, the taking of his leasehold interest was a purchase of "property," within Laws 1853, c. 333, providing that the trustees of a company might purchase "mines, manufactories, and other property necessary for their business." *Close v. Noye*, 41 N. E. 570, 571, 147 N. Y. 597.

On a general assignment by a lessee of his property, the lease is deemed property or not, at the election of the assignee, until he enters under it, or by some act or omission to act determines his right to elect. *Carter v. Hammett* (N. Y.) 12 Barb. 253, 263.

A leasehold interest in premises for a definite term is "property," within the meaning of that word as it is employed in Const. art. 1, § 3, par. 1, providing against the taking or damaging of private property for public purposes without just and adequate compensation being first paid; and the holder of a lease has such an interest in the premises as will enable him to maintain an action for damages resulting to his leasehold estate, sustained in consequence of the construction of a duly authorized public improvement, whether such damage results from the negligence of the municipal authorities or otherwise. *Pause v. City of Atlanta*, 26 S. E. 489, 490, 98 Ga. 92, 58 Am. St. Rep. 290.

#### **License.**

A license is in no sense property. It is a mere temporary permit to do what otherwise would be illegal, issued in the exercise of the police power. *Lantz v. Hights Town*, 46 N. J. Law, 107; *Voight v. Board of Excise Com'rs of City of Newark*, 36 Atl. 686, 687, 59 N. J. Law, 358, 37 L. R. A. 292.

A license to occupy a stall in a city market is property, and passes to an assignee in bankruptcy. *In re Emrich* (U. S.) 101 Fed. 231.

A liquor license issued by the authorities of a city under the police laws of the state, transferable subject to the approval

of such authorities, which is ordinarily granted, and which for that purpose has a recognized value, conditioned upon the acceptance of the transferee by the authorities, is property. *Fisher v. Cushman* (U. S.) 103 Fed. 860, 864, 43 C. C. A. 381, 51 L. R. A. 292; *Lyman v. Malcom Brewing Co.*, 54 N. E. 577, 578, 160 N. Y. 96. Contra, see *Koehler v. Olsen*, 22 N. Y. Supp. 677, 678, 68 Hun, 63. Though such a license is not in itself property, regarded merely as an evidence of authority to do business under a police regulation, yet under the circumstances it represents a substantial investment of the bankrupt's capital, which would otherwise be subject to the claims of his creditors, and, so long as such capital is in such form that it can be converted into money by merely executing an assignment, it constitutes "property," within the meaning and intent of the bankruptcy statute. *Fisher v. Cushman* (U. S.) 103 Fed. 860, 864, 43 C. C. A. 381, 51 L. R. A. 292. See, also, *In re May*, 5 Am. Bankr. R. 1, 4.

#### **Lien.**

A lien is a personal right, and cannot be transferred to another. A common-law lien is not property subject to sale or assignment, for it is neither the property nor is it the debt, but the right to retain the property as security for the debt. *Glascock v. Lemp*, 59 N. E. 342, 343, 26 Ind. App. 175.

#### **Mining claim.**

Mining claims are "property," in the just sense of the term. *McFeters v. Pierson*, 24 Pac. 1076, 1077, 15 Colo. 201, 22 Am. St. Rep. 388.

Mining claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific Coast states. They are "property" in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code of law, and recognized by the states and the federal government. The claim may be sold, transferred, and inherited without infringing the title of the United States, and there is nothing in principle or in any interest which the United States has in the land to prevent such claims from being subjected to a lien for taxes. *Forbes v. Gracey*, 94 U. S. 762, 764, 24 L. Ed. 313.

The locator of a mining claim has a possessory title, which is "property" in the highest sense of the term. It may be sold, mortgaged, and inherited, and is the subject of dower. *Black v. Elkhorn Min. Co.* (U. S.) 49 Fed. 549, 551. See, also, *McKeon v. Bisbee*, 9 Cal. 137, 142, 70 Am. Dec. 642.

A mining claim perfected under the law is "property" in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. *Belk v.*

Meagher, 104 U. S. 279, 283, 26 L. Ed. 735; Sullivan v. Iron Silver Min. Co., 12 Sup. Ct. 555, 556, 3 Sup. Ct. 339, 27 L. Ed. 1028; Suesenbach v. First Nat. Bank, 41 N. W. 662, 666, 5 Dak. 477; Waller v. Huges (Ariz.) 11 Pac. 122, 123, 124.

Improvements on a mining claim are property for the purpose of taxation. Such improvements are not the property of the United States, and the act providing for their taxation does not violate Organic Act, § 56, providing that "no tax shall be imposed on the property of the United States." While the title to the land is in the United States, the homestead settler or entryman should be regarded as the absolute owner of the improvements, which he may sell and remove at pleasure, as such improvements are not the property of the federal government. Crocker v. Donovan, 30 Pac. 374, 377, 1 Okl. 165.

The words "real estate" or "real property," as used in the civil practice act, shall be deemed to include mining claims. Comp. Laws Nev. 1900, § 3687.

#### Money.

"Property" is a generic term, and includes money. Commonwealth v. Morrison, 9 Ky. (2 A. K. Marsh.) 75, 90.

The general term "property" has two meanings, one legal and the other popular. Its legal meaning is equivalent to estate, and may include everything a man is worth. Its popular meaning would exclude choses in action and cash on hand; but where a will stated, in the residuary clause, that testator left all the rest of his property, such as horses, cattle, hogs, sheep, geese, beds, crops, and other articles too tedious to mention, etc., the word "property" included money on hand at the testator's death. Stuckey v. Stuckey (S. C.) 1 Hill, Eq. 308, 309.

The word "property" has been frequently held to embrace money and securities. Fry v. Shipley, 29 S. W. 6, 8, 94 Tenn. (10 Pickle) 252.

As used in Code Cr. Proc. art. 219, providing that "the offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it," the word "property" includes money, and one who has embezzled money and taken it into any county in the state may be prosecuted therefor in such county. Brown v. State, 4 S. W. 588, 589, 23 Tex. App. 214.

"Property" means money, within Comp. Laws, § 579, enacting that if any person feloniously steal the property of another in any other state, and bring the same into Michigan, he shall be guilty of larceny. Peo-

ple v. Williams, 24 Mich. 156, 162, 9 Am. Rep. 119.

Within the meaning of the statute providing that "any married woman may become seised or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name and as of her own property," the terms employed embrace every species of property, and include money, which is property, and she can take and hold money to her separate use. Mitchell v. Mitchell, 35 Miss. 108, 114.

The word "property," as used in Rev. St. 1881, § 16, providing that, after the issuing of execution upon an affidavit that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, the court may order him to appear and answer concerning the same, and that proceedings may thereafter be had for an application of the property in satisfaction of the judgment, etc., should be given a meaning broad enough to include money. Baker v. State, 2 N. E. 711, 716, 109 Ind. 47.

The word "property," as used in Bankr. Act July 1, 1898, § 3, providing that an act of bankruptcy shall consist in a person's having transferred, while insolvent, any portion of his property to one or more creditors, includes payment of money by a debtor to his creditor. Chism v. Citizens' Bank of Clarke-dale, 27 South. 637, 77 Miss. 599.

Money is property, and the payment of money works a transfer of property from debtor to creditor within Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], prohibiting transfers of property with a view of preference. In re Ft. Wayne Electric Corp. (U. S.) 96 Fed. 803, 804; In re Fixen (U. S.) 102 Fed. 295, 296, 42 C. C. A. 354, 50 L. R. A. 605; Landry v. Andrews, 48 Atl. 1036, 1037, 22 R. I. 597.

Where testator provided "that all property, money, and effects, willed by me to my wife, that may be left at her decease, shall be equally divided," etc., the word "property," being associated with money and effects, had, taken in connection with other provisions of the will, a restricted import, and did not embrace the amount devised. Brawley v. Collins, 88 N. C. 605, 607.

The clause in the charter of a railroad company requiring them to transport merchandise and property is held not to oblige them to become common carriers of money. In this connection the court observes that "property" is a word of very enlarged meaning, comprehending ordinarily everything which is valuable and is subject to disposition and protection of the law, but that in the case under consideration it was clear that at the time the charter was granted it was not the incumbent as a general thing on com-

mon carriers of merchandise and property to transport money. It might well be concluded that it was the intention of the Legislature to include coin under the head of "merchandise and property." *Kuter v. Michigan Cent. R. Co.* (U. S.) 14 Fed. Cas. 884, 885.

In construing a will the court said: "Now, it is not only true that money is property, but where the testator has said 'all the property,' and then given intensity to the expression by saying 'whether household furniture or any other kind,' he indicates that whatever kind of property it was which she [a legatee] had, or by whatever name it be called, it shall be refunded, and be had and be held by her to her own use." *Brown v. Brown*, 41 N. Y. 507, 514.

A clause in the charter of a railroad company requiring it to transport property does not oblige it to become a common carrier of money, since, while the word "property" is one comprehending everything of value, it must have meant, in the charter, such property as is usually carried by railroads. *Kuter v. Michigan Cent. R. Co.* (U. S.) 14 Fed. Cas. 884, 885.

The Supreme Court of the United States, in *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, in declaring that, within the meaning of Bankr. Act, § 67e, money is property, uses this language: "We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that, in a statute which is concerned with the obligation of debtors and the prevention of preferences of creditors, the readier and most potent instrumentality to give a preference should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories. It may be composed of a precious metal, and hence valuable of itself, and gaining little or no addition of value from the attributes which give it its ready exchangeability and currency; and its other forms are immediately convertible into the same precious metal, and even without such conversion have, at times, even greater commercial efficacy than it." And to the same effect are *Worden v. Columbus Electric Co.* (U. S.) 96 Fed. 803, and *In re Conbalm* (U. S.) 97 Fed. 923. These authorities conclusively show that money is "property," within the meaning of a bankrupt act, and that the payment of a debt in money is a "transfer of property," as the latter phrase is used in such act. *Sherman v. Luckhardt*, 70 S. W. 388, 389, 96 Mo. App. 320.

By the express provision of Code Cr. Proc. art. 732, money is property; and hence an indictment charging one with a theft of \$20 current money was sufficient. *Bryant v. State*, 16 Tex. App. 144, 145.

The word "property" in the provision of the testamentary act of Maryland of 1798 authorizing the court to order the property remaining in the hands of an administrator to be delivered up to his surety in case the administrator fails to give counter security to such surety when required to do so, includes money. In *re McKnight's Estate*, 1 App. D. C. 28, 34.

#### Mortgage lien.

The term "property," as defined by Comp. Laws 1879, c. 104, § 1, subd. 1, includes both personal and real property; and where property includes lands, tenements, hereditaments, or right thereto or interest therein, equitable as well as legal, a mortgage on such property is a lien on it. And although the mortgagee has no rights of possession or title to the land, he certainly has an interest in it, and under the statutory definition a mortgagee has property in the land mortgaged, so that he may interplead in any case in which it is sought to be taken. *Bodwell v. Heaton*, 18 Pac. 901, 902, 40 Kan. 36.

The term "property," in every sense of its common use, applies just as well to a mortgage as to a promissory note or a certificate of deposit. A testator held to have used the term "property," in a will, only in reference to mortgaged premises. *Stebbins v. Stebbins*, 86 Mich. 474, 481, 49 N. W. 294, 295.

#### Municipal bonds.

"Property," within the meaning of Laws 1875, c. 19, in reference to the embezzlement of property, includes negotiable bonds of a municipal corporation, complete in form and capable of becoming effective instruments in the hands of a bona fide holder, although they have not been issued. *Bork v. People*, 91 N. Y. 5, 12.

#### As necessary property of railroad.

The word "property," as used in the charter of a railway company limiting the taxing power of the state on the railway proposed to be constructed, and its appurtenances, and all property therewith connected, cannot be construed to embrace real estate other than that whose continuous use is necessary for the operation of the railroad—that is, land lying on each side of its track, and that covered by its depots and shops, and other places necessary to the full exercise of its franchises. Lands off the road, and bought originally to procure cross-ties from the timber thereon, was therefore liable to taxation under the general tax laws. *Wright v. Southwestern R. Co.*, 64 Ga. 783, 798.

The word "property," as used in Act April 25, 1844, and Act April 22, 1846, ex-

empting certain property of railroad corporations from taxation, is only such property belonging to the corporations, appurtenant and indispensable and fitting for use, that can be claimed to be exempt from taxation. It is not enough that it is a convenient possession, or that it affords facilities in carrying on the business of the company. It would no doubt be convenient to own extensive warehouses, coalyards, boardyards, and extensive machine shops at many points and places; but these erections and conveniences form no part of the road, and they are not exempt from taxation, within the meaning of the word "property" as used in the statute. *Railroad v. Berks County*, 6 Pa. (6 Barr) 70, 75.

The word "property," as found in P. L. 1888, p. 269, entitled "An act for the taxation of railroad and canal property," meant property in the possession of a railroad company as of right, if suitable and proper to the purposes of its franchise and the use of it irrespective of its ownership. In *re Erie R. Co.*, 48 Atl. 601, 602, 65 N. J. Law, 608.

#### Personal property.

The term "property," in the statutes defining embezzlement, is defined in Pen. Code, art. 789, as including any and every article commonly known and designated as "personal property" and all writings of every description that may possess any ascertainable value. *Taylor v. State*, 16 S. W. 302, 29 Tex. App. 466.

The word "property," as used in Act Jan. 11, 1867, authorizing mining companies to mortgage their property for loans, was insufficient to authorize a mortgage of chattels; and it was not intended by the term "property" to cover any other cases than those which the law made capable of being mortgaged by such corporation. *Appeal of Robert*, 60 Pa. (10 P. F. Smith) 400, 402.

The word "property," as used in St. 1862, c. 198, § 1, which provides that any property employed by a married woman in doing business on her separate account shall not be allowed to be claimed by her as against the creditors of her husband, but may be taken on an attachment or execution against him unless she files a certificate in the office of the town or city clerk, stating the name of her husband, place and nature of business, applies only to personal property which at common law would have become her husband's absolute property, and does not affect her real estate, in which the husband never would have taken more than a life interest. *Bancroft v. Curtis*, 108 Mass. 47, 50.

The word "property," as used in Code, § 291, providing that the defendant may be arrested in an action for the recovery of damages where the action is for injuring or

wrongfully taking, detaining, or converting property, should be construed to mean personal property. *Bridgers v. Taylor*, 8 S. E. 893, 894, 102 N. C. 86, 3 L. R. A. 376.

The word "property," in a garnishment affidavit in justice court, that the garnishee had property, credits, moneys, and effects, was construed to be a sufficient statement that the garnishee had personal property. *Russell v. Ralph*, 10 N. W. 518, 519, 53 Wis. 328.

An instrument reciting that a person named can upon "this, my order, receive from Mr. K. \$63.00 in lime," dated and signed, is a promissory note for "property," within an act relating to bonds and notes, and authorizing the assignment thereof. *Draher v. Schreiber*, 15 Mo. 602, 603.

#### Possession.

Bare possession of anything of value of which exclusive possession may possibly and lawfully be had is property. *Burch v. McDaniel*, 3 Pac. 586, 587, 2 Wash. T. 58.

In defining "larceny" as being the wrongful taking possession of the goods of another with intent to deprive the owner of his property in them, Mr. Roscoe, in his *Criminal Evidence* (page 621), says that property is the right to the possession, coupled with an ability to exercise that right. *State v. Slingerland*, 7 Pac. 280, 282, 19 Nev. 135; *State v. Moore*, 14 S. W. 182, 183, 101 Mo. 316.

#### Possibility.

"A bare possibility or mere expectation of acquiring property does not constitute property or a title to property, nor can it be transferred or levied upon. While the right of enjoyment may be uncertain and contingent, it is necessary that an interest or title of some kind be vested in the bankrupt in order that it may pass by operation of law to the trustee. It is the title of the bankrupt, as of the date he was adjudged a bankrupt, which is vested by operation of law in a trustee, and this title, so far as pertains to this case, must be to property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." In *re Wetmore* (U. S.) 108 Fed. 520, 523, 47 C. C. A. 477.

#### Power to grant franchise.

The power to authorize the laying down of gas pipes is in no true sense of the word a part of the city "property" to which the corporate authorities of the city are to resort for purposes of revenue; and whether, therefore, the permission to lay down gas pipes is given by the joint consent of the mayor and common council, or by the two boards alone, there is no squandering or illegal disposition of private property of the city which

will justify a suit by the taxpayers of the city to annul a charter obtained by such means. *Smith v. Metropolitan Gaslight Co.* (N. Y.) 12 How. Prac. 187, 190.

#### **Promissory note.**

A promissory note is property. The fact that the maker may be irresponsible does not change the rule that one buying a note buys property. *Crampton v. Newton's Estate* (Mich.) 93 N. W. 250, 251.

Notes, bills, etc., representing the money loaned at interest by a corporation, is "property," within the meaning of that term as used in a constitutional provision relative to taxation. *City of New Orleans v. Mechanics' & Traders' Ins. Co.*, 30 La. Ann. 876, 877, 31 Am. Rep. 232.

Rev. St. §§ 1781, 1782 [U. S. Comp. St. 1901, p. 1212], make it a criminal offense for any member of Congress to receive, or agree to receive, any money, property, or other valuable consideration for procuring, or aiding to procure, any contract from the government, etc. Section 1781 makes it an offense for any person to give, or agree to give, any money, property, or other valuable consideration for the procuring, or aiding to procure, such contract by a member of Congress. The words "property" and "valuable consideration," as used in such provisions, do not include the delivery to a member of Congress of a nonnegotiable note made by a government contractor, promising to pay a certain sum as the proceeds of the contract were received, such notes being executed pursuant to an agreement to pay such member for his services in procuring a contract. *United States v. Driggs* (U. S.) 125 Fed. 520, 522.

#### **Public lands.**

The term "property" includes the possession of and a claim to public land of the United States. *People v. Black Diamond Coal Min. Co.*, 37 Cal. 54.

#### **Public office.**

A public office is not "property," within the meaning of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. *State v. Crumbaugh*, 63 S. W. 925, 927, 26 Tex. Civ. App. 521; *Cameron v. Parker*, 38 Pac. 14, 19, 2 Okl. 277; *Donahue v. Will County*, 100 Ill. 94, 103; *Attorney General v. Jochim*, 58 N. W. 611, 613, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606; *Moore v. Strickling*, 33 S. E. 274, 276, 46 W. Va. 515, 50 L. R. A. 279. It is a mere public agency, revocable according to the will and appointment of the people. *Moore v. Strickling*, 33 S. E. 274, 276, 46 W. Va. 515, 50 L. R. A. 279; *Conner v. City of New York*, 5 N. Y. (1 Seld.) 285, 296.

Public offices are not the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. They are only the subjects of property as far as they can be so in safety to the general interest involved in the discharge of their duties. This principle demands that different rights of property should be recognized in different offices. It is one of the ordinary rights of property to alien and dispose of it at pleasure; but that is inadmissible in public offices, because the public require a responsible person to answer for defaults. Besides, the power of alienation is not the test of property. Property in reference to a thing means whatever a person can possess and enjoy by right; and, in reference to the person, he who has that right to the exclusion of others is said to have the property. That an office is the subject of property, thus explained, is well understood by every one, as well as distinctly stated in the lawbooks from the earliest times. *Hoke v. Henderson*, 15 N. C. 1, 17, 25 Am. Dec. 677.

"It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public, benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned any office or had any title to it." *Donahue v. Will County*, 100 Ill. 94, 103.

The term "property" does not include the unearned emolument of a public office, and therefore, unless in violation of the Constitution or statute, the salary of a public officer may be reduced during his term. *Wilson v. City of New York*, 65 N. Y. Supp. 328, 329, 81 Misc. Rep. 693.

An office of profit is property, and hence, when the lawful owner is deprived of it, his right to have it restored by the courts is as clear as his right to recover any other property; and in a direct proceeding to recover an office, if it becomes necessary for plaintiff to trace his right thereto through a popular election provided by law, he may do so, and resort to the best evidence to show the votes cast at the election, since to deny him such right would be to destroy his right. *State v. Owens*, 63 Tex. 261, 262, 267.

"Property," within the meaning of the fourteenth amendment to the federal Constitution, prohibiting the taking of property without due process of law, does not include an office created by the Legislature, and therefore its abolition by the Legislature is not in violation of the amendment. *Hawkins v. Roberts*, 27 South. 327, 332, 122 Ala. 130.

**Public records.**

Public records and documents are such as are placed on the public files for the use or information of the public, to which the public has the access, and of which the public has the right usually, on payment of fees, to demand copies. They are not property in any ordinary sense. In *re Comin-gore* (U. S.) 96 Fed. 552, 557.

**Railroad bonds.**

"Property," as used in Rev. St. c. 80, § 9, authorizing judgment in garnishment proceedings if the garnishee has property belonging to defendant, construed to include railroad bonds. *Banning v. Sibley*, 8 Minn. 389, 404 (Gil. 282, 293).

Const. 1879, art. 13, § 1, reading: "All property in the state shall be taxed. \* \* \* The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership"—held to include bonds of a railroad corporation. *Mackey v. City and County of San Francisco*, 113 Cal. 392, 397, 45 Pac. 696, 697.

**Real property.**

The term "property," at common law, included real property. *Fretwell v. McLe-more*, 52 Ala. 124, 145.

While the word "property," in its general signification, is comprehensive enough to include both real and personal property, it does not necessarily refer to both in every case. A will read: "All the rest of my property, after paying all the legatees and my lawful debts, I give together with my farm, to my son J." The farm was the only real estate testator had, and, if the executor had collected the outstanding debts as directed in the will, the personality would have sufficed to pay the legacies. Held, that the legacies were not a charge on the farm. *Purdy v. Purdy*, 57 N. Y. Supp. 166, 167, 36 App. Div. 535.

The word "property" is by judicial construction deemed sufficient to embrace both real and personal estate; but, being a general expression, its meaning, when used in a will, may be restricted to that description of property to which the testator intended it to apply. The devise of that "portion of my property remaining" etc., contained in the will under consideration, is certainly sufficient to pass the real estate of the testatrix, unless restrained by the context, or unless the provisions of the will itself show that she meant to use the word as merely applying to personal property. The modern doctrine is that, to confine the use of the word "property" and such expressions to personal estate, there must be a clear indica-

tion in the will of an intention so to confine them; and the fact that there has been no preceding devise of real estate, or that the words used have been applied in the previous part of the will to dispose of personal estate, or are accompanied by words descriptive of personal estate merely, will not be sufficient to restrict them invariably to personal property, but to warrant such a restriction some other indication of intention is necessary. *Wheeler's Heirs v. Dunlap*, 52 Ky. (3 B. Mon.) 291, 293 (citing *Jarm. Wills*, 670, and the cases cited).

Act 1875 (Laws 1875, c. 49) authorizes actions by the people to recover "money, funds, credits, and property" held by public corporations, boards, officers, or agents for public purposes, which have been wrongfully converted or disposed of. Held, that the word "property," being associated with and preceded by the words "money," "funds," and "credits," which were words of specific description of property, the word "property," following, must be construed as referring to property of the same general character, and hence the act did not authorize a recovery of real property under such circumstances. *People v. New York v. M. B. Ry. Co.*, 84 N. Y. 565, 569.

A devise of all of his property by a testator is equivalent to a disposition of "all I am worth in the world," "whatever else I have in the world," "all my substance," which have been construed not only to pass land, but to pass the fee simple. It is stronger than "worldly effects," which will carry real estate, if such appears from the whole will to be the intention of the testator. "Property" in a will includes real estate, unless it appears from the will that testator used the term in a restrained sense, and intended to confine it to personal estate. *Rossetter v. Simmons* (Pa.) 6 Serg. & R. 452, 456.

The term "property" embraces both real and personal estate; and under it, when used in a general residuary clause in a will, the real estate of the testator not attempted to be specifically disposed of will pass. *Morris v. Henderson*, 37 Miss. 492, 505.

It is not unusual for an unlettered person to use the word "property" to denote all that he has, real as well as personal estate. In a will it is sufficient to pass real estate, unless there is something to show that it is used in a more confined sense. *Morgan v. Morgan*, 6 Barn. & C. 512, 518.

The word "property," as used in a will devising testator's property, is to be considered as including real estate. "The word 'property' includes real estate." *Laing v. Barbour*, 119 Mass. 523, 525.

Where a testator devised his "forge property, \* \* \* including the land belonging to the forge," nothing passed but the real

estate. *Gries v. Coleman* (Pa.) 1 Woodw. Dec. 413-415.

A policy on a building occupied as a brewery, covering also a steam boiler in connection, vats, tubs, etc., contained in the building, provided that in case of any "sale, alienation, transfer, conveyance, or change of title in the property insured," the insurance should be void. Held, that such provision related to the real estate alone, and did not operate as a prohibition of the sale of articles of personal property covered by the mortgage. *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 59, 4 Am. Rep. 532.

The word "property," as used in an act relating to municipal liens, means the real estate subject to the lien, and against which the claim is filed as a lien. *P. & L. Dig. Laws Pa. 1897*, vol. 4, col. 1269, § 55.

#### Right of action.

There is no doubt that a right in action, where it comes into existence under common-law principles and is not given by statute as a mere penalty or without equitable basis, is as much property as any tangible possession, and as much within the rules of constitutional protection. *Dunlap v. Toledo, A. A. & G. T. Ry. Co.*, 15 N. W. 555, 556, 50 Mich. 470, 474.

The term "property" includes a cause of action, and therefore a taking without due process of law is a violation of the constitutional prohibition of taking of property without due process. *Seaman v. Clarke*, 69 N. Y. Supp. 1002, 1004, 60 App. Div. 416.

A right of action is as much property as is a corporeal possession, and, in the case of a minor, is protected by the law in the same way and under the same securities. *Power v. Harlow*, 57 Mich. 107, 111, 23 N. W. 606, 607; *Battishill v. Humphreys*, 31 N. W. 894, 900, 64 Mich. 494.

The word "property," as used in Pub. St. c. 166, §§ 1, 2, as amended by Pub. Laws c. 399, p. 131, giving to married women the exclusive management of their property, includes the right to release a cause of action for personal injuries sustained by her since her marriage, through the negligence of another, though such woman's husband may have been required to join in bringing an action therefor. *Cooney v. Lincoln*, 87 Atl. 1031, 1032, 20 R. I. 183.

The word "property," as used in Laws 1860, c. 90, § 1, declaring that a married woman may sue and be sued in all matters relating to her separate property as if she were sole, authorized an action against her alone for damages done by straying cattle from her own premises onto the adjoining lands, notwithstanding the fact that her husband and children resided with her on the land, and that both the land and the cattle

were used for the support of the family. *Rowe v. Smith*, 45 N. Y. 230, 233.

Under Pub. St. c. 201, providing for a distribution of insolvents' estates, and that all of the debtor's property shall pass under the assignment, an assignee of an insolvent acquires the right of the insolvent to sue for a usurious payment given by Pub. St. c. 203, § 3, to the debtor. *Pearson v. Gooch*, 45 Atl. 406, 408, 69 N. H. 571.

The term "property," as used in the Constitution, providing that private property may be taken for public use by paying a just compensation therefor, includes a right of action for injuries to land purposed to be taken for public use, so that it can be included in the assessment which the commissioner made of the value of the land. *Morris Canal & Banking Co. v. Townsend* (N. Y.) 24 Barb. 658, 665.

Code, § 292, requires the judgment debtor, if execution be returned unsatisfied, to appear and answer concerning his property, and if the execution is only issued, and it appears that he has property which he unjustly refuses to apply towards satisfaction of the judgment, he must also answer as to the same. By section 298 the judge may appoint a receiver of the property of the judgment debtor, and by section 244 a receiver may be appointed on return of an execution unsatisfied, where the judgment debtor refuses to apply his property in satisfaction of the debt thereof. Held, that a right of action founded on a contract, and in which nothing can be recovered except profits actually made, or which would have been made except for the fault of the party who is accountable, is "property," within the statute. *Ten Broeck v. Sloo* (N. Y.) 13 How. Prac. 28, 30.

The word "property," as used in Pen. Code, § 519, providing for the punishment of any person sending or delivering to some person a letter or other writing expressing or implying a threat to expose a secret affecting the person threatened, with intent to extort any money or other property from another, should be construed to include the right to take and prosecute an appeal, so that a threat made for the purpose of inducing an appellant to dismiss an appeal is a threat made with intent to extort property. *People v. Cadman*, 57 Cal. 562, 563.

The term "property" does not include a right of action in tort. *Gibson v. Gibson*, 43 Wis. 23, 33, 28 Am. Rep. 527.

The term "property," which is a most comprehensive word, covers choses in action. *Smith v. New York Consol. Stage Co.* (N. Y.) 28 How. Prac. 277, 279, 280.

The word "property," as used in a will devising all of testator's property to his wife,

and directing that it should be sold after her death, does not include choses in action, as the term "property," in its legal sense, is confined to goods, which embrace things inanimate, as furniture, etc., and to chattels, which embrace living things, as horses, etc. *Pippin v. Ellison*, 34 N. C. 61, 62, 55 Am. Dec. 403; *Vaughan v. Town of Murfreesboro*, 2 S. E. 676, 677, 96 N. C. 317, 60 Am. Rep. 413.

A chose in action is property, within the meaning of Code, § 218, subd. 3, providing for service by publication where defendant is a nonresident, but has property in the state. *Winfree v. Bagley*, 9 S. E. 198, 102 N. C. 515.

Under a statutory provision (Rev. St. c. 61, § 2) providing that a woman having property is not deprived of any part of it by her marriage, it is held that the word "property" includes choses in action as well as in possession, and covers money due as well as money possessed. *Carlton v. Carlton*, 72 Me. 115, 116, 39 Am. Rep. 307.

The term "property," as used in a will whereby a testator gave his wife all the property which belonged to her marriage portion, of what kind or nature soever, included choses in action. *McLemore v. Blocker* (S. C.) 1 Harp. Eq. 272, 274.

The word "property" is a word of large signification, in its broadest sense including every character of possession and action. Used in such a sense, the word is large enough to include a claim against an Indian tribe. But in a will in which testator devises all of his property in common to his wife and daughter, the word "property" is limited to things capable of being used in common, and therefore does not include choses in action. *Appeal of Jameson*, 1 Mich. (Man.) 99-102.

The right of the insured to payment of the amount of a policy after loss is held to be property, but to be in the nature of a chose in action, intangible, incapable of manual delivery or actual physical possession, and therefore not within the meaning of Code Iowa, § 1923, which provides that no sale or mortgage of personal property is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is acknowledged and filed for record with the recorder of the county where the holder of the property resides. *Aultman v. McConnell* (U. S.) 34 Fed. 724, 726.

Under Civ. Code, art. 2400, subjecting nonresident married persons to the same provisions of law as regulate the community of acquets and gains between citizens of the state, so far as relates to all property acquired in the state, it is unnecessary to give any technical meaning to the word "proper-

ty." The object of the Legislature to subject nonresidents who acquire rights within the state to the same rules as those which govern resident citizens is manifest, and leaves no doubt but that the word "property" includes not only lands and chattels, real and personal, but also all choses in action. *Meyerson v. Alter* (U. S.) 11 Fed. 688, 689.

The term "property," as used in the statute declaring that all property of the wife, held by her previous to the marriage, or which she may become entitled to after marriage, in any manner, is the separate estate of the wife, includes every right which the wife may have in and to things real or personal—things in possession or in action. *Sloan v. Frothingham*, 72 Ala. 589, 603.

Under Code, §§ 462-464, defining property as including both real and personal property, and personal property as including money, goods, chattels, things in action, and evidences of debt, a right of action to recover damages, which will be the subject of computation only, is property, within Code, § 292, requiring a judgment debtor, if execution is returned unsatisfied, to appear and answer concerning his property. *Ten Broeck v. Sloo* (N. Y.) 2 Abb. Prac. 234, 235.

Under the insolvent act, providing that the assignment shall vest in the assignee all of the property of the debtor, real and personal, it is held that money collected from the government for damages by an incupated cruiser under the United States act of June 5, 1882, was property, within the meaning of the act; the court observing that when the sovereign power has established a claim against itself, or against a fund in its hands, and has provided a tribunal and all necessary machinery for its establishment and collection, such a claim is property. *Goreley v. Butler*, 16 N. E. 734, 736, 147 Mass. 8.

The word "property," within the meaning of a statute relative to the jurisdiction in administration of estates, includes not only land and tangible personal property, but a chose in action. A thing which is the subject of legal ownership is property, whether that thing is in possession of the owner or in possession of another, and the owner has only a bare right to reduce the thing to possession by means of an action. *Appeal of Beach*, 55 Atl. 596, 598, 76 Conn. 118.

The word "property," as used in Const. art. 11, § 13, providing that all property shall be taxed in proportion to its value, does not include choses in action, even when secured by mortgage. *Lick v. Austin*, 43 Cal. 590, 595.

The word "property," as used in Const. art. 9, providing that all property in the state shall be taxed in proportion to its value is not limited to tangible visible property



merely, but is used in its common and popular sense, as including choses in action. *People v. Eddy*, 43 Cal. 331, 336, 13 Am. Rep. 143.

The right of a borrower to recover the excessive interest upon a usurious loan vests in the assignee upon the execution of an assignment in bankruptcy by the borrower. *Wheelock v. Lee*, 64 N. Y. 242.

#### **Right of way.**

Beyond a doubt, an easement is, in a sense, property. And there are, perhaps, cases where the appropriation of a mere easement—such, for instance, as a railroad right of way—might be held to be a taking of property. *Hurt v. City of Atlanta*, 28 S. E. 65, 68, 100 Ga. 274.

"Property" is defined as being the right to possess, use, enjoy, and dispose of a thing. The thing mentioned does not always have a tangible or physical existence. It may be an easement, or anything else that can become the subject of private ownership. The proprietor of an irrigating ditch, whether upon his own premises or those of another, has a private ownership both in the ditch and the right of way therefor. *Tripp v. Overocker*, 1 Pac. 695, 697, 7 Colo. 72.

Property extends to easements and other incorporeal hereditaments which, though without tangible or physical existence, may become the subject of private ownership. Where a municipal corporation built a culvert across a public road, and erected guard rails to protect the approach thereto, which obstructed and destroyed the use of a private right of way across the land adjoining the road, there was a taking of property without compensation, giving the owner a right of action for damages. *De Lauder v. Baltimore County Com'rs*, 50 Atl. 427, 428, 94 Md. 1.

It is held that the right of a railway company to the uninterrupted use of its tracks is property, for the condemnation of which by another company it is entitled to damages, although the crossing by the other company involved no expense to the first-mentioned company, and did not decrease the value of the land, other than as it interfered with the use of the tracks thereon. *Chicago & W. I. R. Co. v. Englewood Connecting Ry. Co.*, 4 N. E. 246, 249, 115 Ill. 375, 56 Am. Rep. 173.

A railroad right of way is property, within the meaning of the statute authorizing the cost of local improvements to be assessed on contiguous property. *Rich v. City of Chicago*, 38 N. E. 255, 260, 152 Ill. 18; *South Park Com'rs v. Chicago, B. & Q. R. Co.*, 107 Ill. 105, 108; *Chicago & A. R. Co. v. City of Joliet*, 39 N. E. 1077, 1078, 153 Ill. 649.

The laying out of public streets across the right of way of a railroad constitutes a taking of property. *Southern Kansas Ry. Co. v. Oklahoma City*, 69 Pac. 1050, 12 Okl. 82; *Illinois Cent. R. Co. v. City of Chicago*, 41 N. E. 45, 47, 156 Ill. 98; *Illinois Cent. R. Co. v. Town of Mattoon Highway Com'rs*, 43 N. E. 1100, 1101, 161 Ill. 247; *Old Colony R. Corp. v. Inhabitants of Plymouth County*, 80 Mass. (14 Gray) 155, 161.

A right of way for a tollroad held under a grant of Congress constitutes property. *Estes Park Tollroad Co. v. Edwards*, 32 Pac. 549, 551, 3 Colo. App. 74.

The term "property," in the constitutional provision that private property shall not be taken for public use, except for compensation, does not include a right of way, which is only an easement, and not an interest in land. *Snyder v. Warford*, 11 Mo. 513, 516, 49 Am. Dec. 94. See, also, *City of Knoxville v. Africa*, 77 Fed. 501, 507, 23 C. C. A. 252.

#### **Right to acquire property.**

The Court of Appeals, in *Bertholf v. O'Reilly*, 74 N. Y. 523, 30 Am. Rep. 323, in commenting on the clause in the Bill of Rights providing that no person shall be deprived of life, liberty, or property without due process of law, means "the right to acquire property and enjoy it in any way consistent with the equal rights of others, and the just exactions and demands of the state." *Wilson v. Commercial Tel. Co.*, 3 N. Y. Supp. 633, 638.

The right of property preserved by the federal Constitution is the right not only to possess and enjoy property, but to acquire it in any lawful mode, or by following any lawful pursuit, which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. *Low v. Rees Printing Co.*, 59 N. W. 362, 366, 41 Neb. 127, 24 L. R. A. 702, 43 Am. St. Rep. 670.

#### **Right to attend public school.**

The provision of the fourteenth amendment of the federal Constitution that no state shall deprive any person of life, liberty, or property without due process of law has no reference to the privilege accorded by the law of the state of attending public schools maintained at the expense of the state; and no person can be said to have been deprived of either life, liberty, or property because denied the right to attend as a pupil at school, however obviously insufficient and untenable be the ground upon which the exclusion is put. *Ward v. Flood*, 48 Cal. 36, 50, 17 Am. Rep. 405.

#### **Right to use river for navigation, etc.**

The mere privilege of using the water of a river for navigation, fishing, etc., is

not property, for, even if we concede a right to use the water, it is not property, within the meaning of Const. art. 1, § 6, providing that private property shall not be taken for public use without just compensation. It must be something that is tangible, fixed, certain, and continuous. It must be absolute, and not subservient to the supreme power, the sovereign will. Property as used in the Constitution, means things real or personal. It does not mean privileges or advantages which a citizen enjoys by virtue of his citizenship. The owner of land adjoining a navigable river, in which the tide ebbs and flows, has no private right or property in the shore between high and low water mark, and is therefore not entitled to compensation from a railroad constructing, in pursuance of a legislative grant, a road along the shore between high and low water mark, so as to cut off all communication between such land and the river, otherwise than across such road. *Gould v. Hudson River R. Co.*, 6 N. Y. (2 Seld.) 522, 535.

#### Right to work.

The word "property" is defined by the California Penal Code to include both real and personal property; but it is held that under Pen. Code, § 7, providing that the words "personal property" shall include money, goods, chattels, things in action, and evidences of debt, an employé's right to work is not property, so that a complaint charging a foreman with extorting money from an employé by a threat to discharge him did not charge the crime of extortion, defined by Pen. Code, § 911, declaring that fear such as will constitute extortion may be induced by a threat to do an unlawful injury to the person or property of the individual threatened. *In re McCabe*, 73 Pac. 1106, 29 Mont. 28.

#### Riparian right.

The Supreme Court, discussing riparian rights as property, say in *Yates v. Milwaukee*, 77 U. S. (10 Wall.) 497, 504, 19 L. Ed. 984: "This riparian right is property, and is valuable; and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary, that it be taken for the public good on due compensation. Clearly, it is a property right in the civil as well as in the common law." *Hollingsworth v. Parish of Tensas* (U. S.) 17 Fed. 109, 113; *Hanford v. St. Paul & D. R. Co.*, 42 N. W. 596, 44 N. W. 1144, 1145, 43 Minn. 104, 7 L. R. A. 722.

Property includes the water flowing in a natural water course upon or between a man's lands. *Lux v. Haggin* (Cal.) 4 Pac. 919, 927.

#### Salary of officer.

The salary of an office is property, the right to which depends on the right to the office, and the former cannot be constitutionally taken away until the latter is destroyed. *Greene v. Knox*, 67 N. E. 910, 911, 175 N. Y. 432.

#### Salary of teacher.

A teacher's salary is property, so that he has a right, under the Constitution, to use his salary for his own benefit, or for the benefit of the others, as he sees fit. And a law deducting part of his salary for the purpose of creating a pension fund thereby deprives him of his right of property. *Hibbard v. State*, 64 N. E. 109, 114, 65 Ohio St. 574, 58 L. R. A. 654.

#### Seat in stock exchange.

A seat in a stock exchange is property, and liable for its owner's debts, and is not to be regarded as a mere personal privilege or license to buy and sell at the meetings of the board. *Habenicht v. Lissak*, 20 Pac. 874, 875, 78 Cal. 351, 5 L. R. A. 713, 12 Am. St. Rep. 63 (citing *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264; *Londheim v. White* [N. Y.] 67 How. Prac. 467; *Grocers' Bank v. Murphy* [N. Y.] 60 How. Prac. 426; *In re Ketchum* [U. S.] 1 Fed. 840, 842); *People v. Feitner*, 67 N. Y. Supp. 893, 894, 56 App. Div. 280; *Austen v. Brigham*, 67 N. Y. Supp. 891, 892; *Powell v. Waldron*, 89 N. Y. 328, 330, 42 Am. Rep. 301; *In re Glendinning's Estate*, 74 N. Y. Supp. 190, 191, 68 App. Div. 125. Contra, see *Pancoast v. Gowen*, 93 Pa. 66, 71; *Thompson v. Adams*, 93 Pa. 55.

A seat in the New York Stock Exchange is property. It is a matter of common knowledge that these seats are of large pecuniary value, and for many years have been freely sold and transferred for large sums of money, with the sanction of the exchange. *In Powell v. Waldron*, 89 N. Y. 330, 42 Am. Rep. 301, Judge Finch, in considering the characteristics of membership in the Cotton Exchange, says: "We think that the right of a judgment debtor in the seat of the cotton exchange was property. That it had value is proved and is conceded, and that it could be transferred to certain class of purchasers under prescribed rules and conditions is also established. Although of a character somewhat peculiar, its use restricted, its range of purchasers narrow, and its ownership clogged with conditions, it is nevertheless a valuable right, capable of transfer, and correctly decided to be property." Such a seat is property, within the meaning of the tax laws. *Austen v. Brigham*, 67 N. Y. Supp. 891, 892; *People v. Feitner*, 67 N. Y. Supp. 893, 894, 56 App. Div. 280; *In re Glendinning's Estate*, 74 N. Y. Supp. 190, 191, 68 App. Div. 125. See, also, *In re Ketchum* (U. S.) 1 Fed. 840, 842; *Grocers' Bank v. Murphy*

(N. Y.) 60 How. Prac. 426, 427; *Londhelm v. White* (N. Y.) 67 How. Prac. 467; *Hyde v. Woods*, 94 U. S. 523, 524, 24 L. Ed. 264; *Habenicht v. Lissak*, 20 Pac. 874, 875, 877, 78 Cal. 351, 5 L. R. A. 713, 12 Am. St. Rep. 63.

A seat in a stock exchange is property, and liable for the owner's debts, notwithstanding provisions in the by-laws of the exchange that the property is held in trust for the members, and that no member under any circumstance shall be deemed to have or claim or possess any individual right, title, or interest in the property or assets of the association until finally dissolved. *Habenicht v. Lissak*, 20 Pac. 874, 875, 78 Cal. 351, 5 L. R. A. 713, 12 Am. St. Rep. 63.

A certificate of membership in the board of trade of the City of Chicago is not property in any such sense as to render it liable to be subjected to the payment of debts of the holder by legal proceedings. *Barclay v. Smith*, 107 Ill. 349, 352, 47 Am. Rep. 437.

The word "property," as used in Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565, 566 [U. S. Comp. St. 1901, p. 3451], declaring that the bankrupt's trustee, on his appointment and qualification, shall be vested with the bankrupt's title to property which prior to the filing of the petition the bankrupt could by any means have transferred, includes a membership in the Philadelphia Stock Exchange, where at the time of the filing of the petition in bankruptcy the bankrupt had no unsettled accounts with the members of the exchange, and article 11, § 4, of the rules of the exchange, provided that any member wishing to sell his membership should have the right to do so, provided he had no unsettled contracts with any member of the stock exchange. In re Page (U. S.) 107 Fed. 89, 93, 46 C. C. A. 160, 59 L. R. A. 94 (affirming 102 Fed. 746).

Membership in the San Francisco Stock and Exchange Board is property which passes upon the bankruptcy of the member to his assignee. *Hyde v. Woods*, 94 U. S. 523, 524, 24 L. Ed. 264.

A seat in a stock exchange is property, where it has a vendible value of several thousand dollars, within the meaning of the bankrupt act. *Page v. Edmunds*, 23 Sup. Ct. 200, 202, 187 U. S. 596, 47 L. Ed. 318.

A seat in a board of brokers is not property, in the eye of the law. It is a mere creation of the board, and to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it. *Thompson v. Adams*, 93 Pa. 55.

A seat in a board of brokers is not property subject to execution. It is a mere personal privilege—perhaps more accurately a license—to buy and sell at the meetings of

the board. *Pancoast v. Gowen*, 93 Pa. 66, 71.

#### Services of wife.

The services of a wife are not property, within the meaning of 3 How. St. § 1446c, providing that if any horse or other animal, or any cart, carriage, or vehicle, or other property, is injured by reason of a defective sidewalk, the corporation shall be liable to pay the owner thereof just damages, so as to authorize a husband to sue a city for loss of the services of his wife from injuries caused by a defective sidewalk. While this statute uses the word "property," it is preceded by several words descriptive of particular kinds of property, and the provision is thereby limited to things of a like kind. In the language of Chief Justice Shaw: "Therefore, though the word 'property' is used, it follows words designating goods and chattels, and could not extend to mere rights." *Roberts v. City of Detroit*, 60 N. W. 450, 451, 102 Mich. 64, 27 L. R. A. 572 (cited in *Harwood v. City of Lowell*, 58 Mass. [4 Cush.] 310).

#### Shares of stock.

Property includes shares of stock, and hence they are subject to embezzlement, under the statute making fraudulent appropriation of property by one to whom it has been intrusted embezzlement. *People v. Williams*, 60 Cal. 1, 2.

Where a corporation was authorized in its articles of incorporation to "purchase, hold, sell, or exchange any real estate or other property," the word "property" was used as meaning real estate, money, goods, chattels, evidences of debt, etc., and hence the corporation might purchase its own stock. *Iowa Lumber Co. v. Foster*, 49 Iowa, 25, 28, 31 Am. Rep. 140.

Stock in a railroad company is embraced in the term "property," directed by a will to be sold. *Adams v. Jones*, 59 N. C. 221, 223.

The word "property," in Borough Act April 3, 1851, relating to taxation for borough purposes, refers to property subject to manual occupation, and does not include stock in a corporation. *Mifflintown v. Jacobs*, 69 Pa. (18 P. F. Smith) 151, 153.

The stock of a corporation is its property, and hence it would be assessing the same property twice to assess to each of the stockholders the shares held by him, and also to assess the corporation on all its property. *People v. Badlam*, 57 Cal. 594, 601.

Though shares of stock are converted by means of the wrongful use of the certificate, the owner, in suing, may count upon the conversion of either. The shares are the property converted, but the certificate itself is also property, standing, as it does, as the representative of the shares; and, as its

conversion may take the shares from the owners, it would be property upon its conversion, as upon the conversion of money or any chattel. *Daggett v. Davis*, 53 Mich. 35, 37, 18 N. W. 548, 549, 51 Am. Rep. 91.

The term "property," as used in Comp. St. c. 77, § 38, providing that "the property named in this section shall be assessed and taxed, except so much thereof as may be in this chapter exempted: (1) All real and personal property in this state; (2) all moneys, credits, bonds, or stocks, and other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property in transitu to or from this state, used, held, owned, or controlled by persons residing within this state; (3) the shares of capital stock of banks and banking companies doing business in this state; (4) the capital stock of companies and associations incorporated under the laws of this state"—covers the earned premiums of insurance companies, in the hands of local agents. *Phenix Ins. Co. v. Omaha*, 36 N. W. 522, 525, 23 Neb. 312.

A provision in the charter of a railroad company denying to municipal corporations the power to tax their stock, but giving them power to tax "any property, real or personal," of the company, is, in effect, a denial of power to tax the shares of stock in the hands of stockholders. *Central R. & Banking Co. v. Wright*, 17 Sup. Ct. 80, 81, 164 U. S. 327, 41 L. Ed. 454.

#### Slaves.

"Property," real or personal, takes its designation and character from the laws of the states. It is not the object of the federal government to regulate property. The federal government was organized by conferring on it certain delegated powers, and by imposing certain restrictions on the states. Among these restrictions, it is provided that no state shall impair the obligation of a contract, nor liberate a person who is held to labor in another state, from which he escaped. In this form the Constitution protects contracts and the right of the master, but it originates neither. The traffic in slaves does not come under the constitutional power to regulate commerce among the several states. In this view, the Constitution does not consider slaves as merchandise. The Constitution nowhere speaks of slaves as property. *Jones v. Van Zandt* (U. S.) 13 Fed. Cas. 1040, 1042.

Slaves are a species of property, to which, in the estimation of the public, there is always some value attached. *Parr v. Gibbons*, 27 Miss. (5 Cushm.) 375, 377.

#### Subscription list to newspaper.

The term "property" includes the subscription list of a newspaper which has a

large monetary value. *Holden's Adm'r's v. McMakin* (Pa.) 1 Pars. Eq. Cas. 270, 298. See, however, *McFarland v. Stewart* (Pa.) 2 Watts, 111, 26 Am. Dec. 109.

#### Surplus railroad earnings in receiver's hands.

The surplus earnings of a railroad in the hands of a receiver are not the property of the railroad company, and are not included in a general description of its property. The possession of the money is in the court, and the equitable title to it is in the creditors of the railroad company. Hence, where a railroad and other property of a railroad company, which had for several years been in the hands of a receiver, was sold by a decree of the court which directed a sale of the road franchises, of the company, right of way, depots, rolling stock, tools, and all other property of the company, real, personal and mixed, surplus earnings of the railroad in the hands of the receiver in the form of money did not pass to the purchaser. *Strang v. Montgomery & E. R. Co.* (U. S.) 23 Fed. Cas. 218, 219.

#### Testator's property.

Within the inheritance tax law, taxing transfers of property where the aggregate amount of personal property exceeds the sum of \$10,000, the word "property" refers to the property of the testator, passed or transferred, and not that portion of it received by the individual. In *re Corbett's Estate*, 64 N. E. 209, 210, 171 N. Y. 516; In *re Hoffman's Estate*, 88 N. E. 311, 312, 143 N. Y. 327.

The word "property," in Tax Law, § 221, in reference to the taxation of property or any beneficial interest passing by certain transfers to or for the use of any brother or sister of the decedent, and providing that such transfer of property shall not be taxed unless it is personal property of the value of \$10,000 or more, does not refer to the property of a decedent passing, but to the property only which passes by any such transfer to or for the use of such brother or sister. Here there is no ambiguity. There is no need of a statutory definition, because the word is defined definitely by its connection and environment. In *re Corbett's Estate*, 65 N. Y. Supp. 782, 783, 32 Misc. Rep. 120.

The authority given in the inheritance tax law for the collection of the tax by a sale of the property, while it mentions the property as that of the decedent, must be held to mean not the property of the testator indiscriminately, for then property given to one exempt from tax might be seized in satisfaction. It must rather be held to be the property of the decedent passing to each beneficiary. Upon the refusal of the life tenant, therefore, to pay the tax, the prop-

erty subject to sale is her interest in the trust fund, or what passes or is transferred to her by the will. Likewise, it is what passes to the remainderman, which is subject to sale. In neither case is it the actual property owned by the testator at his death. *In re Hoyt*, 76 N. Y. Supp. 504, 507, 37 Misc. Rep. 720.

The term "property" signifies the interest or right which one has in lands or chattels, and is as indicative of the intention to pass the whole right of a testator as the word "estate," and more so than the word "effects," and many other words which have been allowed by the courts to be evidence of that intent. *Foster v. Stewart*, 18 Pa. (6 Harris) 23, 24; *Stoever v. Stoever* (Pa.) 9 Serg. & R. 434, 445.

#### **Trade-Mark.**

A trade-mark is a species of property, which may be sold or transmitted by death, with the business in which it has been used. *Baldwin v. Von Micheroux*, 25 N. Y. Supp. 857, 859, 5 Misc. Rep. 386.

There is no abstract right in a trade-mark. It is property only when appropriated and used to indicate the origin or ownership of an article or goods, and its value consists in the confidence of the public, secured through its instrumentality. *Avery v. Melke*, 4 Ky. Law Rep. 759, 764, 81 Ky. 73.

#### **Trust property.**

The word "property," in its ordinary legal signification, is nomen generalissimum, and extends to every species of valuable right and interest; and hence it is held that personal property held in trust, as an accumulating fund for a seminary of learning within the state, is exempt from taxation under Pub. St. c. 11, § 5, cl. 3, which makes the personal property of a benevolent, literary, charitable, or scientific institution exempt from taxation. *Williston Seminary v. County Com'rs*, 18 N. E. 210, 211, 147 Mass. 427.

#### **United States bonds.**

The word "property," as used in the transfer act (Laws 1892, c. 399), imposing a tax on the transfer of property by will, is defined by the act as embracing all property over which the state has any jurisdiction for the purpose of taxation, and does not include United States bonds, though physically present within the state. *In re Whiting's Estate*, 44 N. E. 715, 716, 150 N. Y. 27, 34 L. R. A. 232, 55 Am. St. Rep. 640; *In re Sherman's Estate*, 46 N. E. 1032, 1033, 153 N. Y. 1.

#### **Vested remainder.**

A vested remainder is property, under the ordinary, as well as any legal, sense of

the term. It may be bought and sold with the same freedom as present estates in land. It may be devised by will, and, in default thereof, will pass to the remainderman's heirs. All the essential incidents of property attach to it, and it is unquestionably property, within the meaning of the Constitution, prohibiting the condemnation of property without compensation. *Thompson v. Manhattan Ry. Co.*, 6 N. Y. Supp. 929, 15 Daly, 438.

#### **Water.**

Water, when reduced to possession, is property, and it may be bought and sold, and have a market value; but it must be in actual possession, subject to control and management. Running water in natural streams is not property, and never was. The construction of a dam across an outlet of a lake or a river or a creek for the purpose of securing power with which to operate mills or factories is not a reducing of the water to possession, or to control or management, in such a sense as to change its legal character and make it property. If it did, the owner at times might find it difficult to control, especially in case of freshets or floods. He might have trouble in preventing it from being precipitated upon the lands of his neighbors below, and find it unpleasant to respond to them for the damages caused by his property. *City of Syracuse v. Stacey*, 62 N. E. 354, 355, 169 N. Y. 231.

#### **PROPERTY ATTACHED.**

Code, §§ 240, 241, provide that an attachment may be discharged if defendant furnish a bond in double the amount claimed. Held, that the words "property attached" are plain, and the remedy is confined to the discharge of an attachment on all of the property that has been seized, and the defendant may not withdraw such property as he chooses, and leave other property subject to the attachment. *Royal Ins. Co. v. Noble* (N. Y.) 5 Abb. Prac. (N. S.) 54, 58.

#### **PROPERTY HOLDER.**

The phrase "property holder," as used in a city charter providing that the city council shall not grant the privilege for the opening of a barroom, except on the written consent of a majority of the bona fide householders or property holders within 300 feet of the place proposed for its establishment, is not synonymous with the word "householders," but applies to the owner of the property, while a householder may be a tenant by the month or year. Therefore either one or the other may consent to the establishment of a barroom. *Shepherd v. City of New Orleans*, 25 South. 542, 544, 51 La. Ann. 847.

**PROPERTY NOT CAPABLE OF MANUAL DELIVERY.**

The term "property not capable of manual delivery," in Code Civ. Proc. § 542, providing that property not capable of manual delivery may be attached in a certain manner, includes growing crops. *Raventas v. Green*, 57 Cal. 254, 255.

**PROPERTY OF ANOTHER.**

See "Of."

**PROPERTY OF THE PARTIES.**

The expression "property of the parties," as used in Code, § 2007, providing that in granting a divorce the court shall also make such disposition of the "property of the parties" as shall appear just and equitable, is comprehensive, and refers to an equitable division of the property rights of the parties which the court is authorized to make. It does not mean joint property alone. It refers to the separate as well as the joint property of husband and wife. *Webster v. Webster*, 26 Pac. 864, 2 Wash. St. 417.

**PROPERTY OF UNITED STATES.**

Rev. St. § 3618 [U. S. Comp. St. 1901, p. 2414], requiring the proceeds of any sale of property of the United States to be conveyed into the treasury, cannot be construed to include lumber made at a sawmill on an Indian reservation, for the Indians of that reservation; for it is in fact the property of the Indians thereon, and not that of the United States. *United States v. Sinnott* (U. S.) 26 Fed. 84, 85.

**PROPERTY RATIONE SOLI.**

"Property *ratione soli*" is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil. Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the crown by virtue of its prerogative, one man had of killing and taking animals *feræ naturæ* on the land of another; and in like manner the game, when killed or taken by virtue of the privilege, becomes the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil. And Lord Coke says (4 Inst. 304) "that, seeing the wild beasts do belong to the purveyor *ratione soli*, so long as they remain in his grounds he may kill them; for the property *ratione soli* is in him." See, also, 4 Bac. Abr. (Bouv. Ed.) 435. It is said in 2 Bl. Comm. 419, that

if a man starts game on the private grounds of another, and kills it there, the property belongs to him in whose ground it was killed, because it was started there, and the property arises *ratione soli*. *Payne v. Sheets*, 55 Atl. 656, 657, 75 Vt. 335.

**PROPERTY RIGHTS.**

A deed to B. and her minor heirs, with a provision that in case of the death of either of the heirs without issue the property right shall revert back to the surviving heirs, gives B. a life estate, with remainder to her minor "children," or to those living at the time of her death, and the issue, if any, of those dead; the words "property right" evidently meaning the right which a child would have in the property at its death, subject to the prior estate of the mother. *Seymour v. Bowles*, 50 N. E. 122, 124, 172 Ill. 521.

In a charter to a water company a provision that the companies which might thereafter be chartered were not to interfere with the property rights or the rights of obtaining water pertaining to the company, the words "property rights" referred to rights in respect to tangible property, and the proviso thus forbade any interference by any new company with the plant of the company. But where, at the time another charter is granted, the company had not obtained a certain franchise, such franchise did not come within the term "property rights." *Bienville Water Supply Co. v. City of Mobile*, 22 Sup. Ct. 820, 822, 186 U. S. 212, 46 L. Ed. 1132.

A perfected railroad franchise, when followed by construction and operation, is a property right. *Blume v. Interurban St. Ry. Co.*, 83 N. Y. Supp. 939, 991, 41 Misc. Rep. 171.

The privilege of contracting is both a liberty and a property right. *Mathews v. People*, 67 N. E. 28, 32, 202 Ill. 389, 63 L. R. A. 73, 95 Am. St. Rep. 241.

The right to hold public office, such as sheriff, is just as sacred in the eyes of the law to the incumbent as the right to hold the property he has earned. It is a property right, and one of which he cannot be divested of except by strict conformity to the statute. *People v. Therrien*, 45 N. W. 78, 80, 80 Mich. 196.

**PROPERTY TAX.**

Capital stock tax as, see "Capital Stock Tax."

Franchise tax distinguished, see "Franchise Tax."

Succession tax as, see "Succession Tax."

"In one sense all taxes may be said to be taxes upon property, since they are to be collected in money, and money is property.

Indirectly it is property that is reached by every species of taxation. Hence I have heard it maintained that the merchants' license tax is a tax upon property; seeing that the Legislature, in fixing the amount of the taxes, have thought proper to regulate it by the amount and value of merchandise purchased or disposed of between certain intervals. And in this sense a tax per caput may be also called a tax upon property, for the man's property, not his head, can only be taken to pay it. But this is not the sense in which a property tax is understood when it is referred to in the Constitution or legislative enactments." *Garett v. City of St. Louis*, 25 Mo. 505, 510, 69 Am. Dec. 475.

A law (Collateral Inheritance Tax Law; Laws 1887, c. 713, § 1) providing that all property which shall pass by will from any person who may die seised or possessed of the same shall be subject to a tax, to be paid at the death of the decedent, for the use of the state, does not impose a property tax, but a tax on the right of succession under a will, or devolution in case of intestacy. In *re Swift's Estate*, 32 N. E. 1096, 137 N. Y. 77, 18 L. R. A. 709.

Acts 1894, c. 113, requiring traders in the city of Baltimore to take out separate licenses to carry on business in disconnected buildings, does not violate the bill of rights (article 15), providing that every person ought to contribute his proportion of taxes according to his actual worth in property, as a license tax is not a property tax, but a tax for the good government and benefit of the community. *Rohr v. Gray*, 30 Atl. 632, 633, 80 Md. 274.

The imposition of a duty on goods sold at public outcry by licensed auctioneers, and which duty must be paid by the vendor of the goods, is not a tax on property, within the meaning of the constitutional amendment of 1874 limiting taxation. *Wintz v. Girardey*, 31 La. Ann. 381, 388.

#### PROPERTY TAX PAYER.

Acts 1899, p. 258, § 1, prohibiting the issuing of county bonds unless a majority of the qualified voters of the county who are property tax payers have voted for the same, means one against whom a property tax has been or could be assessed for the year in which the voting occurred, and not merely one who owned property at the time of it. *Hendrick v. Culberson*, 56 S. W. 616, 23 Tex. Civ. App. 409.

#### PROPERTY WITHIN THE STATE.

The bonds of a state, owned by a foreign insurance company, but kept in the state in accordance with the act of the Legislature requiring such companies to deposit

bonds therein as security for their liabilities, are a portion of the capital of the company, and are property within the state, within the meaning of the revenue act, providing that all property within the state should be subject to taxation. *People v. Home Ins. Co.*, 29 Cal. 533, 534, 540.

The expression "property in this state," as used in Gen. St. p. 380, § 7, providing that any creditor having a claim of \$100 or more against a nonresident debtor owning property in this state may institute proceedings for the settlement of the same, etc., includes the distributive share of a nonresident in an estate in process of settlement within the state. *Appeal of Ward*, 52 Conn. 565, 567.

Rev. St. 1874, c. 39, § 1, regulating the descent and distribution of property in this state, does not include notes and bonds belonging to one whose domicile is in Missouri which at the time of the owner's death are temporarily in possession of a person in Illinois for safe-keeping. *Cooper v. Beers*, 33 N. E. 61, 143 Ill. 25.

"Property within the state," in Code, art. 81, § 2, providing for the taxation of all other property of every kind within the state, was construed to include the average weekly shipment of dealers in cattle, who were accustomed to receive shipments of cattle one day in each week, which they sold to local buyers or exported as the case might be, on the following day. *Myers v. Baltimore County Com'rs*, 35 Atl. 144, 83 Md. 385, 34 L. R. A. 309, 55 Am. St. Rep. 349.

The phrase "property within the state," as used in the transfer act (Laws 1892, c. 399), imposing a tax when the transfer is by will or intestate laws of the property within the state, does not include bonds of a local corporation, kept at the residence of a nonresident owner, while stock of such local corporation, kept at the residence of a nonresident owner, is property within the state. In *re Bronson's Estate*, 44 N. E. 707, 150 N. Y. 1, 34 L. R. A. 238, 55 Am. St. Rep. 632.

The term "property within the jurisdiction of the commonwealth," as used in St. 1891, c. 425, § 1, imposing a collateral inheritance tax on property within the jurisdiction of the commonwealth, includes stocks and bonds of foreign corporations, and bonds secured by a mortgage on realty in a sister state, owned by a descendant domiciled within the state. *Frothingham v. Shaw*, 55 N. E. 623, 624, 175 Mass. 59, 78 Am. St. Rep. 475.

The term "property within the state," taxable under the transfer tax law, does not include mortgage bonds securing real estate in New York, which are kept by a nonresident at her residence in a foreign state, and hence they are not subject to the transfer tax on her death. In *re Preston's Estate*, 75 N. Y. Supp. 251, 252, 37 Misc. Rep. 236.

Notes secured by mortgages of land in another state, owned by a resident of the state, are property that will pass by a will, within Laws 1885, c. 483, as amended by Laws 1891, c. 215, defining property subject to a legacy tax. In re Corning's Estate, 23 N. Y. Supp. 285, 3 Misc. Rep. 160.

## PROPIEDADES.

The term "propiedades," in Mexican law, means property of all kinds—real, personal, and mixed. *United States v. Santistevan*, 1 N. M. 583, 592.

## PROPORTION.

See "In Proportion to"; "Relative Proportions."

In like proportion, see "Like."

The term "proportion" is synonymous with "pro rata." *Hager v. McDonald* (U. S.) 65 Fed. 200, 202 (citing Black, Law Dict. tit. "Pro Rata," p. 944).

"Proportion," as used in Laws 1868, c. 105, § 4, requiring the Governor, in his certificate of work done on a ship canal, to "determine the proportion of said lands the company has become entitled to in consideration of said work," and the commissioners of school lands to convey by patent to the company "said proportion of said lands, respectively, as selected by the company," means proportion in value, and not in quantity. *State v. Commissioners of School and University Lands*, 34 Wis. 162.

"Proportion" as used in the revised charter of St. Louis, requiring a land commissioner's jury to assess property adjoining condemned land in proportion that such property may be respectively benefited by the proposed improvement, should be construed to mean that no assessment shall exceed the actual benefits. *Tyler v. City of St. Louis*, 56 Mo. 60.

In a contract by abutting property owners for the paving of a street, in which each property owner contracts to pay "in proportion to his ownership and interest in the property abutting and proximate to the street," the phrase quoted is equivalent to the phrase "each party thereto to pay only such part of the total cost as his front footage bears to total frontage"; and hence the interlineation of the last phrase is not a material alteration, sufficient to avoid the contract. *Young v. Borzone*, 66 Pac. 135, 140, 26 Wash. 4.

## PROPORTIONAL.

The word "proportional," in a constitutional provision requiring taxes to be pro-

portional, does not mean that it is sufficient that it is levied upon one entire class of citizens, but it should be upon all classes. *State v. United States & O. Exp. Co.*, 60 N. H. 219, 220.

## PROPORTIONATE MEASUREMENT.

"Proportionate measurement" is expressly defined by the rules of the General Land Office relating to surface to be a measurement having the same ratio to that recorded in the original field notes as the length of the chain used in the new measurement has to the length of the chain used in the original survey; assuming that the original measurement was correctly made. *Caylor v. Luzadder*, 36 N. E. 909, 910, 137 Ind. 319, 45 Am. St. Rep. 183.

## PROPOSAL.

"Proposal" may mean an offer, as of marriage; an introduction, as to a measure in a legislative assembly; and it may also mean an expression of intention or design; and a statement in a letter that "I propose to settle" is the same as "I intend or mean to settle." *Taylor v. Miller*, 18 S. E. 504, 505, 113 N. C. 340.

## PROPOSE.

To "propose" is defined to be "to offer, as a plan or scheme; to put or hold before one's mind, as a design or determination; to form, as a purpose;" and necessarily does not mean an accomplished fact. So that, a contract agreeing to pay a certain sum of money for an advertisement, the amount to be deducted from merchandise to be sold for a proposed new hotel, does not require the completion of the hotel before the merchandise should be furnished. *Hand v. Shaw*, 50 N. Y. Supp. 117, 120, 27 App. Div. 107.

"Propose" means to form or declare a purpose or intention, and a statement in a letter that "I propose to settle both of your claims before the first of next month" is a promise to settle, sufficient to prevent the bar of the statute of limitations. *Taylor v. Miller*, 18 S. E. 504, 505, 113 N. C. 340.

## PROPOSITION.

A proposition does not become a contract until the maker or his agent is notified of its acceptance. *Perry v. Dwelling House Ins. Co.*, 33 Atl. 731, 733, 67 N. H. 291, 68 Am. St. Rep. 668 (citing *Beckwith v. Cheever*, 21 N. H. [1 Fost.] 41; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65, 70; *Dickinson v. Dodds*, 2 Ch. Div. 463).

A proposition does not become twofold by annexing to it some condition of qualifi-



cation. The condition is not of itself a proposition, but only a part of one. *Hubbard v. Woodsum*, 32 Atl. 802, 804, 87 Me. 88.

## PROPRIETARY.

Proprietary medicine, *see*, also, "Patent Medicines."

Proprietary medicines as distilled spirits, *see* "Distilled Spirits."

"Proprietary," as defined by the Imperial Dictionary, means belonging to; ownership; as proprietary rights. By Webster, as belonging or pertaining to a proprietor; "proprietor" being defined as one who has the legal right or exclusive title to anything, whether in possession or not; an owner. And by Worcester, as relating to a certain owner or proprietor. Thus, where a medicinal preparation is sold by persons owning all there was of the good will and business reputation appurtenant to the article resulting, its name and their recommendation of it was a proprietary medicine. *Ferguson v. Arthur*, 6 Sup. Ct. 861, 863, 117 U. S. 482, 29 L. Ed. 979.

"Proprietary articles," as used in the customs act of 1883, providing for certain duty on proprietary articles, does not include the liquor cordial known as "Benedictine." *In re Gourd* (U. S.) 49 Fed. 728, 729.

Within the meaning of the customs law which reads, "Proprietary preparations, to wit, all cosmetics, pills, bitters, powders, etc., or compositions recommended to the public as proprietary articles or prepared according to some private formula as remedies or specifics for any disease," bitters prepared under the direction of a sworn chemist, protected by trade-mark, and recommended for use as a tonic, the chief medical ingredient being pepsin prepared from the stomachs of animals, and especially beneficial in cases of dyspepsia and all stomach difficulties arising from indigestion, not sold alone as a drink or beverage, but sometimes mixed with wine or spirits, are proprietary preparations, and subject to duty as such. *Grommes v. Seeberger* (U. S.) 41 Fed. 32, 33.

## PROPRIETOR.

*See* "Literary Proprietor"; "Riparian Proprietor."

The term "proprietor" has a well-defined meaning, and, according to lexicographers, means "one who has the legal right or exclusive title to anything, whether in possession or not; an owner; as the proprietor of a farm or mill." *Webst. Dict.* And Worcester defines the term "proprietor" as meaning a possessor in his own right; an owner; a proprietor. *Koppel v. Downing*, 11 App. D. C. 93, 103.

A proprietor is defined to be an owner; a person who has the legal right or exclusive title to anything, whether in possession or not. *Latham v. Roach*, 72 Ill. 179, 181. The court will presume that, in order to have become proprietors of town site land under Act Cong. May 23, 1844, the parties had done all that the act contemplated to acquire such occupation as would entitle them to claim the land in preference to another person. *Davis v. Murphy*, 3 Minn. 119, 125 (2 Gil. 69, 73).

A proprietor is one who has the legal right or exclusive title to a thing. In most instances the word is the synonym of "owner." *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, 579, 15 L. R. A. 263.

The word "proprietor," as used in Act July 8, 1870, § 86, c. 230, 16 Stat. 212, Rev. St. § 4952 [U. S. Comp. St. 1901, p. 3406], authorizing a citizen or resident of this country, if he be proprietor of any book, map, print, chromo, etc., to obtain a copyright therefor, should be construed in the limited and restricted sense of a person who by purchase or otherwise has lawfully acquired the exclusive rights of some native or resident author or artist, and in no other manner. It means the lawful owner and representative, whether by assignment, employment, death, or other lawful succession, of the exclusive rights of some native or resident author or artist only. *Yuengling v. Schile* (U. S.) 12 Fed. 97, 105.

Within the meaning of a statute providing that, upon the sale of any lands for taxes then due, if such sale should prove invalid, the purchaser shall be entitled to receive from the proprietor of such land the amount of taxes, interest, etc., by the word "proprietor" is clearly meant the owner or person under legal obligation to pay taxes on the land, and on account of whose failure to pay them the sale occurs. Against such proprietor the statute gives the purchaser a personal right, and, of course, a personal remedy. *Hunt v. Curry*, 37 Ark. 100, 105.

By the term "proprietor," in a statute relative to copyrights of paintings, etc., is intended the person who not only obtains the right to physical possession of the painting, but the common-law right of publication, or preventing publication, which belongs to the author. So it is held that a sale by an author of his painting, reserving the right of reproduction, does not destroy his right of copyright, or make the purchaser of the painting a proprietor thereof. *Werckmeister v. Springer Lithographing Co.* (U. S.) 63 Fed. 808, 811.

1 Rev. St. [7th Ed.] p. 573, § 67, providing that no grant of land under water shall be made to any person other than the proprietors of adjacent lands, does not include one

who without right enters on and fills up land under navigable water, thereby raising it above the water, since by such act he acquires no title to such land. *People v. Commissioners of Land Office*, 32 N. E. 139, 135 N. Y. 447.

The word "proprietor," as applied to realty, does not necessarily import that the party is the occupier of such premises. *Russell v. Shenton*, 3 Q. B. 449.

Every person, including married women and cestuis que trust, for whose use, benefit, or enjoyment any building or improvement shall be made, is embraced within the words "owner or proprietor," as used in the article of the Code relating to liens. *Civ. Code Ala.* 1896, § 2751.

Every person for whose immediate use, enjoyment, or benefit any building, erection, or improvements shall be made shall be included by the words "owner or proprietor thereof," as used in the statute relating to mechanics' and builders' liens, not excepting such as may be minors over the age of 18 years and married women. *Rev. St. Wyo.* 1899, § 2907.

Every person, including all cestuis que trusts, for whose immediate use, enjoyment, or benefit any building, erection, or other improvement shall be made, shall be included in the words "owners or proprietors thereof," under the act relating to mechanics' liens, not excepting such as may be minors over the age of 18 years, or married women. *Ann. St. Ind. T.* 1899, § 2886.

The word "proprietors," as used in the chapter regulating community land grants, means the members of the colony, community, or town to which said grant was originally made, or their successors, including all persons residing within the exterior boundaries of such grant, and who shall have been in occupation and adverse possession of any part or portion of such grant for a period of not less than two years prior to the passage of this act, and all persons who shall have improved any portion of such grant and paid taxes on the same for two years prior to the passage of this act. *Comp. Laws N. M.* § 2181.

#### Lessee.

Where a railroad corporation operates and controls the railroad of another corporation under a lease, or contract equivalent to a lease, the lessee corporation becomes the proprietor of the leased railroad, under *Gen. St. c. 144, § 1*, defining proprietors of a railroad to include the corporation into whose hands a road has passed, the assignees or trustees to whom any road has been mortgaged, and any persons to whom it may have been conveyed. *Pierce v. Concord R. R.*, 51 N. H. 590, 591.

The owners of a private railroad, who, with the consent of another railroad company, run their rolling stock over the tracks of the company, were, while in such occupation of the tracks, proprietors of the railroad, within the meaning of that term as used in *Gen. St. c. 148, § 7*, requiring the proprietors of railroads to guard crossings at the requirement of town authorities. *Hall v. Brown*, 54 N. H. 495.

A railroad using and occupying tracks under a statutory easement is not a proprietor, within the meaning of that word in *Gen. Laws, c. 159, § 1*, requiring the proprietor of any railroad to secure the crossings by a bridge or gate on being required to do so by a vote of the town. *Eastern R. in New Hampshire v. Portsmouth*, 62 N. H. 344.

The word "proprietors," as used in *Pub. St. c. 91, § 27*, prohibiting fishing in portions of ponds where fish are lawfully cultivated, without permission of the proprietors, includes lessees as well as owners. *Commonwealth v. Skatt*, 38 N. E. 499, 500, 162 *Mass.* 219.

The word "proprietor," as used in 2 *Balinger's Ann. Codes & St. § 5433*, authorizing an injunction to restrain the malicious erection of any structure intended to spite or annoy an adjoining proprietor, means the person occupying the premises, either as tenant or owner. *Winsor v. German Savings & Loan Soc.*, 72 *Pac.* 66, 67, 31 *Wash.* 365.

Where the applicant for insurance against fire on a cotton mill and machinery had answered to previous questions that the buildings and machinery, with certain specified exceptions, belonged to one person (himself), and that certain machinery not to be insured in the policy belonged to one A. H., and that the works were not operated by the proprietors, but were rented, and in reply to the question, "Are they [the works] immediately superintended by one of the proprietors?" answered, "Yes," the answer is sufficiently verified by the fact that the works were superintended by the tenant, A. H.—in common parlance, a "proprietor," as distinguished from his employes—and who actually owned a part of the machinery run in the works, whether the meaning intended to be conveyed or actually conveyed by the answer, under the circumstances, be considered. *Wilson v. Hampden Fire Ins. Co.*, 4 *R. I.* 159, 162.

#### Printer.

The use of the word "proprietor" in an affidavit of the publication of a summons which purports to be made by one who styles himself the proprietor is a sufficient compliance with the statute requiring such affidavit to be made by the printer. *Quivey v. Porter*, 37 *Cal.* 458, 464; *Sharp v. Daugney*, 33

Cal. 505, 513; *Woodward v. Brown*, 51 Pac. 2, 7, 119 Cal. 283, 63 Am. Rep. 108.

**Receiver.**

A proprietor is one who has the legal right or exclusive title to anything. In many instances, if not usually, the word is the synonym of the word "owner." It conveys the idea of property in the thing in right of the person who is said to be the proprietor, and excludes that of a mere possessor in the right of another, though the possession may be coupled with the duty or obligation to take care of or even to use the thing in that other's right. And the term as used in Rev. St. art. 2899, giving a right of action against the proprietor of a railroad for death of any person caused by negligence, does not include a receiver of a railroad, though the word "proprietor" is often used to express a right to property in a thing less than an absolute or exclusive right; but when this occurs it will ordinarily appear from the context, and in all such cases the person holds for himself, and in his own right. The ordinary meaning of the word "proprietor" is such that no person can hold that relation to property unless he has a personal interest in or right to it. *Turner v. Cross*, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262, 263; *Houston & T. C. Ry. Co. v. Roberts* (Tex.) 19 S. W. 512; *Yoakum v. Selph*, 19 S. W. 145, 83 Tex. 607; *Bonner v. Thomas* (Tex.) 20 S. W. 722; *Allen v. Dillingham* (U. S.) 60 Fed. 176, 184, 8 C. C. A. 534.

**PROPRIETY.**

"Propriety," as used in the colony ordinance known as the "Ordinance of 1641," declaring that in all creeks, coves, and other places by or on salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have propriety to the low-water mark, is nearly, if not precisely, equivalent to "property." It imports, not an easement—no incorporeal right, license, or privilege—but a jus in re, and real or proprietary title to, and interest in, the soil itself, in contradistinction to a usufruct, or an uncertain and precarious interest. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 70.

The term "propriety and justness of the amount of damage," as used in Laws 1901, p. 181, § 1, allowing an appeal from a drainage assessment which shall bring before the Supreme Court the propriety and justness of the amount of damage, must mean that the court may review the propriety of the award, as well as the justness of the amount. *State v. Superior Court of King Co.*, 71 Pac. 601, 31 Wash. 32.

**PROPRIOS.**

The "propios," in the Spanish law, were productive lands, the usufruct of which had

been set apart to the several municipalities for the purpose of defraying the charges of their respective governments. *Sheldon v. Milmo*, 36 S. W. 413, 415, 90 Tex. 1 (citing *Escrache*, Dict.). See, also, *Hart v. Burnett*, 15 Cal. 530, 554.

**PROPTER AFFECTUM.**

See "Challenge Propter Affectum."

**PROSECUTE**

See "Duly Prosecuted."

"To prosecute a suit is, according to the common acceptance of language, to continue a demand which has been made by the institution of process in a court of justice." *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 408, 5 L. Ed. 257.

The word "prosecuted," as used in a fire insurance policy providing that all claims thereon should be barred unless prosecuted within one year from the day of loss, is synonymous with "bringing suit or action," and does not mean presentation of the loss and demand of payment. *Merchants' Mut. Ins. Co. v. Lacroix*, 35 Tex. 249, 262.

The word "prosecuted," as used in the nonimprisonment act, which provides that the debtor shall give notice of assignment to the plaintiffs by whom he shall be prosecuted, means sued. *Hall v. Kellogg* (N. Y.) 13 Barb. 603, 619.

The meaning of the word "prosecute," as used in Rev. St. U. S. § 5106, providing that no creditor whose claim is provable shall be allowed to prosecute to final judgment in a suit against a bankrupt until the question of discharge shall have been determined, is to proceed judicially, and refers equally to suits brought before the bankruptcy proceedings and those instituted while it is pending. *Brooks v. Bates*, 4 Pac. 1069, 1072, 7 Colo. 576.

The word "prosecuted," employed in the Code of Civil Procedure, where it declares that every action shall be prosecuted in the name of the real party in interest, is used in the sense of "commenced," and does not prevent a party from assigning his interest in the subject-matter after it has been duly commenced, or require that the assignee shall make himself a party thereto, or dismiss the same, and commence another action in his own name. *Hickox v. Elliott* (U. S.) 22 Fed. 13, 19.

To prosecute an action or suit is to follow up or to carry on such action or suit. An action on a sheriff's bond is directed by law to be prosecuted—that is, to be followed up or carried on—within nine years from its date, if the sureties are to be thereby af-

fects. *Inhabitants of Knowlton Tp. v. Read*, 11 N. J. Law (6 Halst.) 320, 321.

The word "prosecute," as used in a bond that defendant in the court below should prosecute a certiorari in the appellate court, means that the suit or proceeding shall be prosecuted or followed up to the conclusion, and is not complied with by return of the writ to the court above, for that is but one of the series of acts which go to make up the prosecution of the writ. *Marryott v. Young*, 33 N. J. Law (4 Vroom) 336, 337.

#### As prosecute with effect.

The word "prosecute," in a bond requiring a party to prosecute an action, means to prosecute it with effect, which means with success. *Berghoff v. Heckwolf*, 26 Mo. 511, 513.

#### PROSECUTE TO CONCLUSION.

St. 1891-92, p. 252, providing that any citizen of the United States entitled to commence any suit or action in any court of the United States may commence and prosecute to conclusion, without giving security, on filing an affidavit that he is unable to pay costs, means that the party may prosecute an appeal from an adverse judgment. *Fuller v. Montague* (U. S.) 53 Fed. 206, 207.

#### PROSECUTE TO CONVICTION.

Mill. & V. Code, § 5526, provides that any civil officer who shall arrest and prosecute to conviction any person guilty of carrying a bowie knife shall be entitled to \$50. Certain policemen arrested a defendant in the first instance for the specific offense charged, and furnished the evidence by their own testimony, by which he was indicted, and, by standing ready to testify against him on trial, induced him to plead guilty. Held, that the defendant had been "arrested and prosecuted to conviction," within the meaning of the statute, in as full a sense as though the state had established its case by the fullest proof. *Porterfield v. State*, 21 S. W. 519, 520, 92 Tenn. (8 Pickle) 289.

#### PROSECUTE TO OR WITH EFFECT.

An attachment bond conditioned that plaintiff shall prosecute a suit with effect at the court to which it is returnable means to prosecute with diligence, according to law. *Kahn v. Herman*, 3 Ga. (3 Kelly) 266, 272.

"Effect," as used in a statute requiring that an appeal bond shall be conditioned that the appellant shall prosecute his appeal to effect, does not mean that he shall prosecute his appeal to a successful issue in his favor, but that he will prosecute the same

with due diligence to a final issue, whether successful or not. *Kasson v. Brocker's Estate*, 1 N. W. 418, 424, 47 Wis. 79.

Where plaintiff on appeal gave a bond to prosecute the appeal with effect, and entered his appeal and prosecuted it until he became nonsuited, it was prosecuting the appeal with effect, and it was immaterial whether the judgment against him was recovered on nonsuit or by verdict of a jury. In either case there was no breach on his part of a condition of the bond, whether construed literally or according to its spirit or obvious intent. *Hobart v. Hilliard*, 28 Mass. (11 Pick.) 143.

Gen. St. c. 53, providing that on an appeal the appellant shall execute a bond conditioned that he shall prosecute his appeal with effect, and pay all damages and costs which may be awarded against him on such appeal, means merely that he will prosecute the appeal with due diligence to a final judgment, and not to a successful issue in his favor. *Riley v. Mitchell*, 35 N. W. 472, 38 Minn. 9.

The language of the condition of a civil appeal bond that appellant shall prosecute the appeal with effect is satisfied by due entry of the appeal in the appellate court. *State v. McCarty*, 4 R. I. 82, 86.

#### As with success.

A condition of a replevin bond that the plaintiff shall prosecute said action with effect means to prosecute the action with success, or to a successful termination. *Boom v. St. Paul Foundry Mfg. Co.*, 22 N. W. 538, 539, 33 Minn. 253; *Perreau v. Bevan*, 5 Barn. & C. 284; *Jackson v. Hanson*, 8 Mees. & W. 476, 487; *Morgan v. Griffith*, 7 Mod. 380, 381; *Tummons v. Ogle*, 37 Eng. Law & Eq. 15; *Berghoff v. Heckwolf*, 26 Mo. 511, 513; *Trent v. Rhomberg*, 18 S. W. 510, 512, 66 Tex. 249.

An appeal bond which provides that appellant shall prosecute his appeal to effect means to prosecute to a successful termination. *Doe v. Daniels* (Ind.) 6 Blackf. 8, 10; *Legate v. Marr* (Ind.) 8 Blackf. 404, 405; *Karthauss v. Owings* (Md.) 6 Har. & J. 134, 138.

The term "prosecuting with effect" means with success, and extends to one continued prosecution, from the commencement until the termination of the suit. Thus, where to debt on bond the defendant pleaded that he had prosecuted the suit with effect in the county court, but that a writ of error had been brought in the court above, where the judgment had been reversed, and the plaintiff replied that the judgment in the court above also was that the plaintiff in the court below should abate, and that there should be a return irrepleviable, upon demur-

rer to this replication the court held that the words "to prosecute with effect" in the court below were not confined to the prosecution in that court only, but extended also to the prosecution of the writ of error, as that was part of the suit commenced below. *Chapman v. Butcher*, Carthow, 248, 519, 1 Show. 400; *Gwillim v. Holbrook*, 1 Bos. & P. 410. So, where the plaint is removed into a Supreme Court, the condition of the bond is not satisfied by having prosecuted with effect in the county court, but the plaintiff must follow it into the court above. *Gibbs v. Bartlett* (Pa.) 2 Watts & S. 29, 33 (citing *Vaughn v. Norris* [Ca. temp. Hard.] 139; *Turnor v. Turner*, 2 Brod. & B. 107, 112; 7 Com. Dig. 269).

In a recognizance providing that the obligor shall prosecute his suit with effect, the condition is not performed where the party submits to a nonsuit. *Covenhoven v. Seamen* (N. Y.) 1 Johns. Cas. 23; *Turnor v. Turner*, 2 Brod. & B. 107, 109.

Plaintiff in replevin "prosecutes with effect," within the meaning of the replevin bond, where he takes steps to try his right, but is interrupted by his death. *Morris v. Matthews*, 2 Adol. & E. (N. S.) 293, 299.

A clause in a bond conditioned for prosecuting a writ of error with effect means that, if plaintiffs in error fail to reverse the judgment, they will pay whatever the judgment appealed from adjudged that they should pay. *Smith v. Caldwell*, 70 S. W. 926, 927, 96 Mo. App. 632.

### PROSECUTE TO SUCCESS.

The expression "prosecute to success," used in an oil lease providing that the lessee should commence drilling a test well within 90 days from June 27, 1885, and "prosecute said drilling with due diligence to success or abandonment, and, should oil or gas not be pumped or excavated before" a certain date, the lease should be void, construed to mean that there must be a product obtained from the well capable of division between the parties in the proportions mentioned in the lease, and that, if this was not done, the drilling was not prosecuted to success. *Kennedy v. Crawford*, 21 Atl. 19, 20, 138 Pa. 561.

### PROSECUTING ATTORNEY.

A natural and technical import of the words or title "prosecuting attorney" are identical with "attorney at law," and suggests to every person alike the idea of an attorney at law set apart to conduct the public business, whether of a civil or criminal nature, and perhaps primarily of a criminal character, in the courts of law. *People v. May*, 3 Mich. 598, 605.

A prosecuting attorney is a public officer acting in a quasi judicial capacity. It is

his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. *Holder v. State*, 25 S. W. 279, 281, 58 Ark. 473.

The term "prosecuting attorney" signifies the same as "district attorney." *Cobbe's Ann. St. Neb. 1903*, § 2379.

### PROSECUTING WITNESS.

Under the act of 1869 providing that one-half of the penalty to be recovered against a railroad company for an omission to ring the bell or sound the whistle on the approach of a train to a crossing of a public highway shall go to the prosecuting witness, it is not essential, to entitle the person in whose name the suit is brought to recover, that he should actually have testified in the case; and therefore, where there were no witnesses examined in such a case, but the case was tried on an agreed state of facts, the person in whose name the suit was brought will be regarded as the prosecutor, and, being competent to testify, was the prosecuting witness, within the meaning of the act, and therefore entitled to maintain the suit, and to his share of the penalty recovered. *Illinois Cent. R. Co. v. Herr*, 54 Ill. 356.

### PROSECUTION.

See "Criminal Prosecution"; "Full Prosecution"; "Malicious Prosecution"; "Stage of Prosecution."

#### Civil action.

The word "prosecution," when applied to legal proceedings, means to begin a civil action. *Hirschbach v. Ketchum*, 39 N. Y. Supp. 291, 293, 5 App. Div. 324.

The word "prosecution," in the statute of limitations, providing that every action for malicious prosecution shall be commenced within two years after the cause of action accrues, means cases where a party has been maliciously prosecuted and imprisoned without cause, as well in civil as in criminal proceedings. *Burnap v. Marsh*, 13 Ill. (3 Peck) 535, 540.

In common parlance the word "prosecution" is frequently applied to civil actions for tort, and therefore the use of the word in a contract in consideration of a forbearance to prosecute, relating to a transaction which constitutes both a crime and a tort, may be construed to mean not to prosecute the civil suit. *Mall v. Willett*, 11 N. W. 661, 664, 57 Iowa, 705.

Rev. Laws, § 713, provides that a court of chancery may, when necessary, require of

either party sufficient security for costs of prosecution. Held, that a chancellor has authority to require a defendant to furnish security for costs whenever the defense consists of an affirmative claim in avoidance of the other's demand, inasmuch as the word "prosecution" must be taken as applying to a defense. *Badger v. Taft*, 58 Vt. 585, 3 Atl. 535.

As applied to proceedings on the civil side of a court, the word "prosecution" includes the institution of a suit, and is not confined to the mere pursuit of the remedy after proceedings have been instituted. When a town enacts a by-law providing for a law committee consisting of the principal town officers, and authorizing them to elect a town solicitor "to prosecute the litigation to which the town is a party," and, if need be, employ special counsel, an action brought by an attorney on behalf of the town on the order of such committee is the action of the town. *Inhabitants of Clinton v. Heagney*, 55 N. E. 894, 895, 175 Mass. 134.

#### Same—Carrying on suit already begun.

A suit may be prosecuted after it has been begun, but the bringing of a suit is its initiation. The one phrase applies to the further conduct of a suit, and the other to the beginning of a new suit. *Buecker v. Carr*, 47 Atl. 34, 36, 60 N. J. Eq. 300.

A prosecution is not an action or a suit. It is the following up or carrying out of an action or suit already commenced until the remedy be attained. *State v. McDonald*, 2 N. J. Law (1 Penning.) 355, 360.

#### Criminal proceeding.

Criminal action synonymous, see "Criminal Action."

The word "prosecution" usually denotes a criminal proceeding. *United States v. Reisinger*, 9 Sup. Ct. 99, 101, 128 U. S. 398, 32 L. Ed. 480; *United States v. Mathews* (U. S.) 23 Fed. 74.

The well-understood signification of "prosecution" is a criminal proceeding at the suit of the government. *Tennessee v. Davis*, 100 U. S. 257, 25 L. Ed. 648; *Travelers' Ins. Co. v. Myers*, 52 N. E. 831, 832, 59 Ohio St. 332; *City of Sparta v. Lewis*, 23 S. W. 183, 91 Tenn. 370; *Ex parte Fagg*, 44 S. W. 294, 297, 38 Tex. Cr. R. 573, 40 L. R. A. 212; *City of Davenport v. Bird*, 34 Iowa, 524, 527; *Ives v. Jefferson County Sup'rs*, 128 Wis. 166, 168; *Moutray v. People*, 44 N. E. 496, 497, 162 Ill. 194.

Prosecution is the institution or commencement of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, or by indictment or infor-

mation. A prosecution exists until terminated in the final judgment of the court, to wit, the sentence. *Territory v. Nelson*, 2 Wyo. 346, 352.

Though the term "prosecution" may, according to the etymological signification, be applied as well to private action as to suits at the instance of the commonwealth, yet, whenever it is used as a denomination of the suit, it is applied to the latter only, according to the invariable acceptance of the term both by the learned and the unlearned. *Commonwealth v. Clarke*, 8 Ky. (1 A. K. Marsh.) 323.

A prosecution is the means adopted to bring a supposed offender to justice and punishment by due course of law. *Schulte v. Keokuk County*, 37 N. W. 376, 377, 74 Iowa, 292 (citing *Bouv. Law Dict.*); *Sigsbee v. State*, 30 South. 816, 817, 43 Fla. 524. It is also defined to be the institution or commencement and continuance of a criminal suit—a process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on the behalf of the state or government. Under these definitions, the number of offenses charged in a single information or indictment is immaterial, as proceedings under an information or indictment constitute but a single prosecution, and the statute allows but one fee to one prosecution. *Schulte v. Keokuk County*, 37 N. W. 376, 377, 74 Iowa, 292.

"Prosecution" is defined in Cr. Code 1895, art. 26, to be the whole or any part of the procedure which the law provides for bringing offenders to justice. *Ex parte Fagg*, 44 S. W. 294, 297, 38 Tex. Cr. R. 573, 40 L. R. A. 212.

The word "prosecutions," in Const. art. 5, § 26, providing that all prosecutions shall be carried on in the name and by the authority of the people of the state of Illinois, is not used in its broadest sense, as signifying all proceedings in courts of justice or elsewhere for the protection or enforcement of a right or the punishment of a wrong, whether of a public or private character, but means prosecutions of a public or criminal character. *Donnelly v. People*, 11 Ill. (1 Peck) 552, 553, 52 Am. Dec. 459.

The word "prosecution," as used in the statute providing that the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment, means the manner of bringing a supposed offender to justice and punishment by due course of law. An amendment of a criminal statute, therefore, does not deprive the state of the right to prosecute for offenses against the section as originally enacted, though the indictment is not found until after the adop-

tion of the amendment. *Sigsbee v. State*, 30 South. 816, 817, 43 Fla. 524.

The word "prosecution," as used in Const. art. 12, § 2, has been construed to mean a prosecution instituted by some officer whose duty it is to prosecute criminals. *City of Pilot Grove v. McCormick*, 56 Mo. App. 530, 533.

A "criminal action," as used in the Penal Code, means the whole or any part of the procedure which the law provides for bringing offenders to justice; and the terms "prosecution," "criminal prosecution," "accusation," and "criminal accusation" are used in the same sense. Pen. Code Tex. 1895, art. 28.

#### **Same—Complaint or indictment.**

The word "prosecution," as used in Rev. Code, § 7614, declaring that, in prosecutions under the chapter relating to violations of the liquor law by indictment or otherwise, it shall not be necessary to state the kind or quantity of liquor sold or kept for sale, etc., means a proceeding instituted and carried on by due course of law before a competent tribunal for the purpose of determining the guilt or innocence of the person charged. The making of a complaint for the purpose of procuring a warrant of arrest on preliminary examination is, in a sense, a prosecution. But as used in the statute, the word "prosecution" does not mean the making of a complaint, merely, but means a criminal action. *State v. Rozum*, 80 N. W. 477, 479, 8 N. D. 548.

The word "prosecution," in Act March 31, 1860, § 77 (P. L. 450), providing that "all indictments and prosecutions for all misdemeanors—perjury excepted—shall be brought or exhibited with two years next after such misdemeanor shall have been committed," is used as synonymous with "indictment." An indictment is a prosecution, though, standing by itself, "prosecution" has a larger significance. The first proviso speaks of the person "against whom the indictment shall be brought and exhibited," as "subject and liable to prosecution as aforesaid." "Prosecution as aforesaid" can only refer to indictment. So, also, the language of the second proviso is, "Indictments may be commenced and prosecuted," which words show that, where the terms "indictments" and "prosecutions" are used in other parts of the section, they can only be construed as words of synonymous import. *Commonwealth v. Hass*, 57 Pa. (6 P. F. Smith) 443, 445.

The term "prosecution," in a statute limiting criminal causes, means the finding of an indictment, but it is not necessary that a warrant be issued thereon in order to constitute a commencement of the prosecution. *Gardner v. State*, 68 N. E. 163, 165, 161 Ind. 262.

#### **Same—Trial.**

The word "prosecution," in Code, § 1092, providing that the court, in a prosecution against several, may direct any defendant to be discharged, that he may be a witness for the state, means trial, and so allows one indicted with the prisoner, but not on trial with him, to be a witness while still under indictment. *Edwards v. State*, 26 Pac. 258, 2 Wash. St. 291.

#### **Disbarment proceedings.**

The word "prosecutions," within the meaning of Const. art. 633, providing that all prosecutions shall be carried on in the name and by the authority of the people of the state of Illinois, and conclude "against the peace and dignity of the state," embraces prosecutions of a criminal character only, and has no application to a summary proceeding, either under the statute or at common law, to strike an attorney from the roll, or to suspend him from practice. *Moutray v. People*, 44 N. E. 496, 497, 162 Ill. 194.

#### **Proceedings for penalties.**

The word "prosecutions," as used in Rev. St. c. 133, § 77, providing that, when any prosecution instituted in the name of the state for breaking any law in this state shall fail, the fees shall be paid out of the county treasury, means criminal cases, and does not apply to actions for penalties or forfeitures, though such actions are in the name of the state, and for a violation of some law. *Ives v. Jefferson County Sup'rs*, 18 Wis. 166, 168.

#### **Prosecutions under municipal ordinances.**

The term "prosecutions," in Const. art. 5, § 8, which provides that all prosecutions shall be conducted in the name and by the authority of the state of Iowa, is limited to those instituted for violations of the laws of the state and those tribunals provided for by the Constitution, and does not apply to prosecutions for infractions of city ordinances. *City of Davenport v. Bird*, 34 Iowa, 524, 527.

The word "prosecution," as used in a constitutional provision that all prosecutions shall be carried on in the name of and by the authority of the commonwealth, embraces only such transgressions as were at common law indictable offenses, punishable by imprisonment or other infamous mode; and a prosecution in the municipal court in the name of the city for the violation of an ordinance is not a prosecution, within the meaning of the Constitution. *City of Louisville v. Wehmhoff* (Ky.) 76 S. W. 876, 879.

A proceeding by a municipal corporation to enforce such fines and penalties as are ordinarily and by usage enforced by them is not criminal in its nature, whatever may be the form of the procedure. Such proceedings are only quasi criminal, and are not

prosecutions. *Ex parte Fagg*, 44 S. W. 294, 297, 38 Tex. Cr. R. 573, 40 L. R. A. 212 (citing Dill. Mun. Corp. § 432; *City of Sparta v. Lewis*, 23 S. W. 182, 183, 91 Tenn. [7 Pickle] 370).

#### **Quo warranto.**

Where the question in *Donnelly v. People*, 11 Ill. (1 Peck) 550, 52 Am. Dec. 459, was whether the constitutional provision that all prosecutions should be carried on in the name and by the authority of the people of the state embraced the case of an information in the nature of a quo warranto against an individual for usurping a public office, the court held the proceeding to be a substitute for the ancient writ of quo warranto, "but none the less a criminal prosecution as well to punish the usurper for the usurpation of the franchise as to oust him from its enjoyment;" and that the same certainty was required in such information as was required in indictments. To the same effect are *People v. Mississippi & A. R. Co.*, 13 Ill. (3 Peck) 66; *Hay v. People*, 59 Ill. 94. In *People v. Ridgley*, 29 Ill. 66, it was said that such an information was understood to be a criminal proceeding, and in *Smith v. People*, 44 Ill. 23, an information for usurpation in office was incidentally described as one in the nature of a criminal information. *State of Illinois v. Illinois Cent. R. Co.* (U. S.) 33 Fed. 721, 726.

#### **PROSECUTOR.**

See "Private Prosecutor."

A prosecutor is one who instigates a prosecution by making the affidavit upon which a defendant is arrested. *State v. Cohn*, 9 Nev. 179, 191.

A prosecutor is one who prefers an accusation against a party whom he suspects to be guilty. The party who appears in response to a subpoena is not a prosecutor, but only a witness. *State v. Millain*, 3 Nev. 409, 425.

A prosecutor, within a statute giving half of the penalty recovered to the state, and the other to the prosecutor, to be recovered by action, is any one who may see fit to bring the action—in other words, a common informer. The first act found in our statute books imposing a penalty for usury is in *Leam. & Spic.* 532, whereby one-third is given to the informer. This was passed in 1694. By another act, passed in 1738, the language is that "one moiety of the penalty shall go to him or them that will prosecute the same." In our present act the words are "one moiety to the prosecutor." As the offense, the penalty, and the appropriation in these several statutes are in principle the same, I cannot believe that the learned reviser used the word "prosecutor" in a dif-

ferent sense from that of "informer," or "person who will sue for the same." *Phillips v. Bevens*, 23 N. J. Law (3 Zab.) 373.

The words "the prosecutor," as used in Act Nov. 13, 1792, requiring that the name of the prosecutor, and the town or county in which he shall reside, shall be written at the foot of every bill of indictment for any trespass or misdemeanor, were not equivalent to saying "a prosecutor," but meant the person who voluntarily goes before the grand jury with his complaint; and the indictment was not demurrable because the name of a prosecutor was omitted. *United States v. Sanford* (U. S.) 27 Fed. Cas. 952, 953.

A person summoned by the grand jury to give evidence on an indictment for trespass is not a prosecutor, within the meaning of a statute providing that the name of a prosecutor shall be written at the foot of every bill of indictment for any trespass or misdemeanor before it be presented to the grand jury, and that such prosecutor shall be subject to costs in case the prosecution is not effectual, or the indictor is in any manner acquitted. *Commonwealth v. Hutcheson*, 4 Ky. (1 Bibb) 355.

#### **PROSPECT.**

A prospect differs from a mine only in the fact that ore has been taken from the latter in large quantities. It is more a matter of speculation than is a mine from which ore has been taken, but the future of each is equally uncertain. *Montana R. Co. v. Warren*, 12 Pac. 641, 644, 6 Mont. 275.

#### **PROSPECTED.**

In an action for the sale of mines, where the defense was fraudulent representations, in that an experienced miner had thoroughly prospected said claims, and knew what he was talking about, it was contended that the word "prospected," as applied to placer mines, signifies that holes have been sunk to the bed rock, and a test made of the earth in each, and the average ascertained. The court held that, if such were the significations of the word, it should have been explained, to make it intelligible, since "to prospect" signifies to explore for unworked deposits or ore, as a mining region; to do experimental work upon, as a new mining claim, for the purpose of ascertaining its probable value. *Martin v. Eagle Development Co.*, 69 Pac. 216, 219, 41 Or. 448.

#### **PROSPECTING.**

When used with reference to the annual labor to be expended on a mining claim, prospecting is not used in the sense of exploration and discovery, which is necessary before a valid location can be made, but



rather in the sense of development and demonstration, that the value of the ledge may be determined, as distinguished from the ascertainment of its existence. *Bishop v. Baisley*, 41 Pac. 936, 941, 28 Or. 119.

A prospecting contract is said to partake of the character of a qualified partnership, although Mr. Lindley regards the term "partnership" to be a misnomer, as applied to such a contract, and describes it, in its usual scope, to be simply a common venture, wherein one party, called the "outfitter," furnishes the supplies, and the other, called the "prospector," performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement. *Hartney v. Gosling*, 68 Pac. 1118, 1123, 10 Wyo. 346.

## PROSTITUTE.

Chinese prostitute as laborer, see "Chinese Laborer."

An allegation in an indictment that a female was enticed away with the intent of rendering her a prostitute is equivalent to an allegation that it was done for the purpose of prostitution. *Nichols v. State*, 26 N. E. 839, 127 Ind. 406.

A woman may be a prostitute, and carry on the business of such, if she so holds herself out to the world. She may, on the street, or in other public or private places, so conduct herself as to make it clear that she is a prostitute, and that such is her occupation. And an instruction stating that it must be shown the defendant had illicit sexual intercourse with various persons, to constitute her a prostitute, was erroneous; the question being for the jury. *State v. Rice*, 9 N. W. 343, 56 Iowa, 431.

A prostitute is a female given to indiscriminate lewdness; a strumpet. As a verb, its definition is to offer freely to a lewd use, or to indiscriminate lewdness. As an adjective, it means openly devoted to lewdness; sold to wickedness or infamous practices. A female may live in a state of illicit carnal intercourse with a man for years without becoming a prostitute. *Carpenter v. People* (N. Y.) 8 Barb. 603, 611; *State v. Stoyell*, 54 Me. 24, 27, 89 Am. Dec. 716.

Wherever the word "prostitute" is used in the criminal laws of the state, it must be held to be used as defined in Rev. St. 1881, § 2003, enacting that any female who frequents or lives in houses of ill fame, or associates with women of bad character for chastity, either in public, or at a house which men of bad character frequent or visit, or who commits fornication for hire, shall be deemed a prostitute. Therefore a single act of illicit sexual intercourse did not make a woman a

prostitute. *Fahnestock v. State*, 1 N. E. 372, 376, 102 Ind. 156.

### As imputing adultery.

A prostitute is a female given to promiscuous sexual intercourse with men for gain. Adultery may be committed by one act of illicit intercourse, but the female to whom the word "prostitute" can be applied has only gained that character by a long continuance in the vice of lewdness. It necessarily denotes one who, if married, has committed numerous adulteries. To say of a married woman that she is a prostitute is necessarily to impute to her the guilt of adultery. *Davis v. Sladden*, 21 Pac. 140, 142, 17 Or. 259.

### Concubinage distinguished.

See "Concubinage."

### As vagabonds.

"Prostitutes," as used in Pen. Code, art. 339, defining a disorderly house as one kept for the purpose of public prostitution, or as a common resort for prostitutes and vagabonds, does not necessarily mean and include vagabonds, so that a house kept as a common resort for prostitutes, unless they be common prostitutes, is not a disorderly house. *Springer v. State*, 16 Tex. App. 591, 593.

## PROSTITUTING.

An allegation that a female was enticed away for the purpose of prostituting her does not mean the same, or is not of the same effect, as the phrase "for the purpose of prostitution," and an indictment alleging the former is insufficient under a statute penalizing the latter. *Miller v. State*, 23 N. E. 94, 95, 121 Ind. 294.

## PROSTITUTION.

See "Public Prostitution."

The words "concubinage" and "prostitution" have no common-law meaning, and, in a statute relating to enticing away females for such purposes, were intended to cover all cases of lewd intercourse. *People v. Cummons*, 23 N. W. 215, 56 Mich. 544.

"Prostitution" is defined by Webster as the act or practice of prostituting or offering the body to an indiscriminate intercourse with men; common lewdness of a female. In the legal authorities the term is defined as the common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire. *State v. Gibson*, 19 S. W. 980, 981, 111 Mo. 92 (quoting 2 Bouv. Law Dict.); *Bunfill v. People*, 39 N. E. 565, 566, 154 Ill. 640.

Prostitution does not alone consist in sexual commerce for gain. If a woman sub-

mits to indiscriminate sexual intercourse, which she invites or solicits by word or act or any device, she is a prostitute. Her avocation may be known from the manner in which she plies it, and from pecuniary charges and compensation gained in any other manner. *State v. Clark*, 43 N. W. 273, 78 Iowa, 492 (citing *State v. Rice*, 56 Iowa, 431, 9 N. W. Rep. 343).

In its most general sense prostitution is the setting one's self to sale or of devoting to infamous purposes what is in one's power. In its more restricted sense, it is the practice of a female offering her body to an indiscriminate intercourse with men. *State v. Stoyell*, 54 Me. 24, 27, 89 Am. Dec. 716; *Haygood v. State*, 13 South. 325, 98 Ala. 61; *State v. Goodwin*, 6 Pac. 899, 901, 33 Kan. 538; *Fahnestock v. State*, 1 N. E. 372, 374, 102 Ind. 156; *Osborn v. State*, 52 Ind. 526, 528; *Miller v. State*, 23 N. E. 94, 95, 121 Ind. 294; *State v. Brow*, 15 Atl. 216, 217, 64 N. H. 577; *Carpenter v. People* (N. Y.) 8 Barb. 603, 610; *State v. Toombs*, 45 N. W. 300, 301, 79 Iowa, 741; *State v. Ruhl*, 8 Iowa (8 Clarke) 447, 453; *Commonwealth v. Cook*, 53 Mass. (12 Metc.) 93, 97; *People v. Demoussset*, 12 Pac. 788, 789, 71 Cal. 611.

The word "prostitution" means common, indiscriminate, illicit intercourse, and not sexual intercourse confined exclusively to one man. *Osborn v. State*, 52 Ind. 526, 528; *Fahnestock v. State*, 1 N. E. 372, 374, 102 Ind. 156; *People v. Demoussset*, 12 Pac. 788, 789, 71 Cal. 611; *Commonwealth v. Cook*, 53 Mass. (12 Metc.) 93, 98; *State v. Brow*, 15 Atl. 216, 217, 64 N. H. 577; *State v. Ruhl*, 8 Iowa (8 Clarke) 447, 453; *United States v. Smith* (U. S.) 35 Fed. 490, 493, 494; *State v. Stoyell*, 54 Me. 24, 27, 89 Am. Dec. 716.

The procuring a female to leave her father's house for the purpose of illicit intercourse with the individual who enticed her to accompany him is not sufficient to constitute the offense of enticing a person for the purpose of prostitution. *Commonwealth v. Cook*, 53 Mass. (12 Metc.) 93, 97; *State v. Brow*, 12 Atl. 216, 217, 64 N. H. 577.

## PROTECT—PROTECTION.

"Protected," as used in a deposition in an action for the loss of cotton carried by boat, that all the cotton under the boiler deck was protected from the water and from sparks, is a synonym of "covered." *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387, 398, 28 Am. Rep. 729.

While the word "protect" often means to cover, shield, or defend from injury, harm, or danger of any kind, the word in Sanb. & B. Ann. St. § 3314, as amended, which provides that every person who, as principal contractor, architect, etc., furnishes any ma-

terials in or about the erection, construction, protection, or removal of any machinery erected or constructed so as to be or become a part of the freehold, shall have a lien on such material, imports something used or furnished for the machinery which not only preserves it from injury, but becomes a part of the machinery itself, and therefore one furnishing lubricating oil is not entitled to a lien. *Standard Oil Co. v. Lane*, 44 N. W. 644, 645, 75 Wis. 636, 7 L. R. A. 191.

The term "protection purposes," in an indorsement by a general agent on an open marine policy by which a risk was made to cover certain goods, and by which the agent indorsing the policy was required to report the indorsement to the home office for entry on the office records and for protection purposes, was construed not to mean that the company might receive or refuse the application upon arrival, as it was not the intention or understanding between the parties at the time of taking out the policy, or when the insurance was effected. *Arkansas Ins. Co. v. Bostwick & Ryan*, 27 Ark. 539, 544.

### Of bankrupt.

"Protection," as used in the fourth section of the bankruptcy act of 1867, giving the registers jurisdiction to grant protection to the bankrupt, meant protection from being arrested in cases where he is not liable to arrest and from which he is exempted by the twenty-sixth section. In *re Glaser* (U. S.) 10 Fed. Cas. 464, 465.

### Of bill or debt.

To "protect a bill" for the seller means, in any reasonable business construction, to be answerable for its payment—not merely that a note should be given by the debtor for it, or that such note or its renewal should be paid, but that the bill should be paid. The notes not being the thing guarantied, but only evidence, or in a certain sense security for, the thing guarantied, i. e., the debt, a change of notes, either by renewal or extension by the same makers, whether the new corporation or the trade paper, so called, cannot of itself, as a purely legal consequence, discharge the guarantors. *Robbins v. Robinson*, 35 Atl. 337, 338, 176 Pa. 341.

In an agreement consolidating certain railroad companies, in which it is provided that the bonds and debts of the former company shall be protected by the consolidated company, the words "shall be protected" "have the same meaning which they ordinarily have in promises of men of business to protect drafts or other debts not made or contracted by themselves; that is to say, a personal obligation to see that they are paid at maturity." *Wabash, St. L. & P. Ry. Co. v. Ham*, 5 Sup. Ct. 1081, 1085, 114 U. S. 587, 29 L. Ed. 235.

**Of customer.**

An agreement by a manufacturer and seller of lead to "protect and guaranty" a customer until the agent of the former should arrive "means that the manufacturer will supply the article to his customer as low as the most favorable market price at the time of delivery." *Beymer & Bauman Lead Co. v. Haynes*, 16 Atl. 326, 81 Me. 27.

**From infringement.**

An agreement made on the sale of a heater, to "protect the sale from infringement on other heaters," should be construed to mean that the sale and use of such heater would infringe no patent. *Croninger v. Paige*, 4 N. W. 106, 48 Wis. 229.

An agreement by a principal that he would "protect" his agent from all infringements and infringement suits on account of the latter's sales of the patented article means, obviously, that if anybody sues the agent or makes a claim against him on the ground that the patent contained in the article infringes upon another patent, or if anybody else undertakes to sell articles within the agent's territory that infringe upon the principal's patents, then the latter will protect the agent against such suit or claim, and will vindicate its patent. *Wiggin v. Consolidated Adjustable Shoe Co.*, 37 N. E. 752, 753, 161 Mass. 597.

**PROTECTORY.**

A protectory for boys is an institution for the education and care of destitute or homeless boys, especially those in danger of becoming vicious. *Duggan v. Slocum* (U. S.) 83 Fed. 244, 246.

**PROTEST.**

Webster says, "A protest is a solemn declaration of opinion." Undoubtedly the framers of the Constitution, in providing that any member of either house may dissent from and protest against any act, proceeding, or resolution which he may deem injurious to any person or the public, and have the nature of the dissent entered on the journal, intended just that and nothing more. A paper which is not confined to a discussion of the action objected to, but contains reflections on the house, is not a "protest," within such provision. *Auditor General v. Board of Sup'rs of Menominee*, 51 N. W. 483, 491, 89 Mich. 552.

The word "protest," as used in Burns' Rev. St. 1894, § 6248, providing that, on protest of any member of an election board, any ballot bearing a distinguishing mark or mutilation shall be preserved, and such ballot may be submitted in evidence in any contest of election, includes a ballot rejected by

consent of the entire election board. *Tombaugh v. Grogg*, 59 N. E. 1060, 1063, 156 Ind. 355.

A protest is a declaration on oath, by the master, of the circumstances attending the loss of his vessel, intended to show that the loss occurred by the perils of the sea, and concluding with the protestation against any liability of the owner to the freighters. Its use and design seem to be merely to authenticate the fact of the loss to the insurer and all concerned, and to repel any inference unfavorable to the owner from a neglect to record, at the earliest time, a statement of the fact and causes of the loss. Though some of the crew may join in the declaration, the protest is the act of the master. *Cudworth v. South Carolina Ins. Co.* (S. C.) 4 Rich. Law, 416, 419, 55 Am. Dec. 692.

**As exception to ruling.**

The words "protest" and "exception" are not equivalent terms in law, and where the record shows that, on refusal of the court to grant further time for argument, defendant earnestly protested, the word "protested" will not be construed so as to show an exception reserved. The word, as here used, means nothing more than an expression of dissent to the act of the court on the ground of impropriety or illegality. *Robinson v. State*, 53 N. E. 223, 224, 152 Ind. 304.

**PROTEST (In Commercial Law).**

See "Notice of Protest"; "Waiver of Protest"; "Without Protest."

"Protest is a solemn declaration of the holder against any loss to be sustained by the nonacceptance or nonpayment of a bill." *Ocoee Bank v. Hughes*, 42 Tenn. (2 Coldw.) 52, 54 (citing Story, Bills, § 276).

In a strict and technical sense the term "protest," when used with reference to commercial paper, means only the formal declaration drawn up and signed by a notary, yet in the popular sense, and as used among men of business, it includes all steps necessary to charge an indorser; and this is in accordance with the general principle which makes any act of a public officer, which presupposes the existence of other acts to make it legally operative, presumptive proof of the latter. *Townsend's Adm'r v. Lorain Bank of Elyria*, 2 Ohio St. 345, 353; *Ocoee Bank v. Hughes*, 42 Tenn. (2 Coldw.) 52, 54; *Sprague v. Fletcher*, 8 Or. 367, 370, 34 Am. Rep. 587.

The word "protest" is applied to the form of instrument made by a notary public, alleging the due presentment and dishonor of a bill, and declaring that such notary does protest the same for nonpayment or non-acceptance, as the case may be. Notice to an indorser of a promissory note that the

note "has been protested for nonpayment, and that the holders look to him for payment of the same," is not a sufficient notice of dishonor, as the notice must contain words directly or by necessary construction showing that the note has been presented for payment, and payment refused. *Platt v. Drake* (Mich.) 1 Doug. 296, 298.

In its original technical sense, protesting a bill was proof to a notary that due steps had been taken by the law to protect the payee against loss by reason of nonacceptance or nonpayment by the drawee. In its popular sense it includes all the steps necessary to fix the liability of the drawer or indorser. *Wards v. Sparks*, 14 S. W. 898, 53 Ark. 522.

A protest of a note or draft is made for the purpose of fixing the liability of the indorser or drawer by a seasonable notice that due demand has been made on the promisor or acceptor. *Greenfield Bank v. Crafts*, 84 Mass. (2 Allen) 268, 273.

A protest is a declaration in writing, made by a public officer under his oath of office, that the bill or note to which it relates was, on the day it became due, presented for payment, and that payment was refused; and a notice of such protest is not merely a notice that this declaration was made, but that the facts so declared had really occurred. *Cook v. Litchfield*, 10 N. Y. Leg. Obs. 330, 338.

Strictly speaking, the term "protest" applies only to foreign bills, but the custom to treat inland bills and notes in the same manner as foreign bills has become so well-nigh universal that in common parlance the term means the taking such steps as are required to charge the indorser on a note. *Anville Nat. Bank v. Kettering*, 106 Pa. 531, 534, 51 Am. Rep. 536; *Brewster v. Arnold*, 1 Wis. 264; *Coddington v. Davis*, 1 N. Y. (1 Comst.) 186, 189; *Ayrault v. Pacific Bank*, 29 N. Y. Super. Ct. (6 Rob.) 337, 350; *Wood River Bank v. First Nat. Bank of Omaha*, 55 N. W. 239, 36 Neb. 744; *Williams v. Parks*, 89 N. W. 395, 396, 63 Neb. 747, 56 L. R. A. 759; *City Sav. Bank v. Hopson*, 5 Atl. 601, 602, 53 Conn. 453. Such was its meaning in an instruction sent with a note by one bank to another for the purpose of collection—to protest it. *Williams v. Parks*, 89 N. W. 395, 396, 63 Neb. 747, 56 L. R. A. 759; *First Nat. Bank of Manning v. German Bank of Carroll County*, 78 N. W. 195, 197, 107 Iowa, 543, 44 L. R. A. 133, 70 Am. St. Rep. 216.

The placing of a waiver of notice and protest over the name of an indorser in blank on a promissory note converts his contingency into an absolute liability, and is a material alteration invalidating the indorsement. *Davis v. Eppler*, 16 Pac. 793, 794, 38 Kan. 629.

The time and place of presentation for acceptance or payment, or demand and refusal, and the reason assigned, if any, are facts that in general should appear in a protest, as being essential to its validity, of which facts it is the appropriate and exclusive evidence. The proof as contained in the protest of a foreign bill cannot be supplied allunde, and superseded by another mode of proof, such as witnesses or otherwise. *Ocoee Bank v. Hughes*, 42 Tenn. (2 Coldw.) 52, 54.

The words "protest for nonpayment" have come to have a technical meaning, and include not only the idea that the bill is past due, but that payment of it has been demanded, and, not being paid, it is dishonored. They mean the process necessary to dishonor the bill, to wit, demand, refusal of payment, and the drawing up of a formal protest. *McFarland v. Pico*, 8 Cal. 626, 637.

The word "protest," as employed relative to commercial paper, in its popular sense includes all the steps necessary to fix the indorser, to wit, demand of payment, refusal, and notice. *Price v. McClave*, 13 N. Y. Super. Ct. (6 Duer) 544, 548.

An acknowledgment of receipt of notice of protest written on a note by indorsers has the legal effect of releasing the indorsee from any obligation to make demand or give notice, as the word "protest" as so used includes all acts necessary to hold indorsers. *City Sav. Bank v. Hopson*, 5 Atl. 601, 602, 53 Conn. 453.

A protest is a constituent part of a bill of exchange, indispensably necessary to be made to entitle the holder to recover the amount from the other parties to the bill, and is by law made evidence of presentment and dishonor. *McFarland v. Pico*, 8 Cal. 626, 637.

A protest does not raise any new debt or create any further responsibility on the parties to a bill or note, but only serves to give formal notice that a bill or note is not accepted or paid. This protest, by the common law, is necessary on every foreign bill of exchange, but not on an inland bill. *Payne v. Winn* (S. C.) 2 Bay, 374, 375.

#### **As a certificate.**

See "Certificate."

#### **As demand and notice.**

Where the indorser of a promissory note in a suit against him on the note, in reply to a written interrogatory, admitted that he knew that the note had not been protested, the question whether he used the word "protested" in its technical meaning, or in the popular sense as including demand and notice, was for the jury. *Brannon v. Hursell*, 112 Mass. 63, 70.

A protest is simply a demand of payment in proper form and at a proper time, and, in case of nonpayment, due and reasonable notice to the indorsers by the bank or any of its clerks or servants, or other suitable person. This is the usual and popular meaning of "protest" as used even among merchants, and the sole meaning as used by noncommercial and unlearned men. *Ayrault v. Pacific Bank*, 47 N. Y. 570, 575, 7 Am. Rep. 489.

All the authorities agree that the words "I waive protest" or "Waive protest" or any similar forms importing that the protest is waived, are, when applied to a foreign bill, regarded as expressly waiving presentment and notice. In waiving protest the party is considered not only as dispensing with a formality, but as dispensing with the necessity of the steps which must precede, and of which it is merely the formal, though necessary, proof which the law requires. When, however, waiver of protest is applied to an inland bill or promissory note, the authorities are not so clear as to what is intended by such an indorsement, as a protest of such instrument is not necessary to charge the drawer and indorser; but *Comp. St.* 1879, c. 14, § 18, provides that a protest shall be evidence of a demand and a refusal to pay, and chapter 71, § 6, gives authority to indorse, to demand acceptance or payment of foreign and inland bills of exchange, and protest the same. We are therefore of the opinion that, where protest is waived upon any bill or note, it imports that all the steps to be ordinarily taken are dispensed with, and so, in waiving protest, the party dispenses with the necessity of the steps which precede it, and accordingly dispenses with any demand being made. *Baker v. Scott*, 29 Kan. 136, 44 Am. Rep. 628.

The word "protest," in an acknowledgment of receipt of notice of protest, written on a note by the indorsers, has the legal effect of releasing the indorsee from any obligation to make demand or give notice. *City Sav. Bank v. Hopson*, 5 Atl. 601, 602, 53 Conn. 453.

The words "protest waived" are equivalent to an express waiver of demand and notice of nonpayment. A waiver of protest, without more, is sufficient to dispense with demand and notice. Its very purpose is to supersede the ordinary steps and save trouble and expense. *First Nat. Bank v. Hartman*, 1 Atl. 271, 272, 110 Pa. 196; *Coddington v. Davis*, 1 N. Y. (1 Comst.) 186, 189.

Using the word "protest" in its strict sense, it is unnecessary in the case of a promissory note. In that sense, to protest a note is a useless act. All that is required to charge the indorser is due demand, nonpayment, and due notice. Notice being expressly waived, nonpayment is conceded, and unless the parties are held to have used the

word "protest" as referring to an act not necessary to be done or waived, it can refer only to the demand. "Protest" includes, in a popular sense, all the steps taken to fix the liability of the drawer or indorser; and, where there is nothing else in the waiver to limit the meaning, the word must be taken as used in that sense, whether applied to foreign or domestic bills or to promissory notes. *Wolford v. Andrews*, 13 N. W. 167, 29 Minn. 250, 43 Am. Rep. 201.

The term "protest" includes the giving of notice. *First Nat. Bank v. German Bank*, 78 N. W. 195, 197, 107 Iowa, 543, 44 L. R. A. 133, 70 Am. St. Rep. 216; *Johnson v. Parsons*, 4 N. E. 196, 140 Mass. 173.

Where an accommodation indorser indorsed, on the back of a note, waiver of "notice to defend for nonpayment," held, that there was no waiver of "demand for payment" from the maker when due. *Sprague v. Fletcher*, 8 Or. 367, 370, 34 Am. Rep. 587.

#### As dishonor.

The term "protested" has a fixed technical meaning, and, when contained in a notice with the statement that the holder looks to the indorser for indemnity, fairly and necessarily implies that the note or bill has been dishonored. *Brewster v. Arnold*, 1 Wis. 264.

Protest is a constituent part of a bill of exchange, indispensably necessary to be made to entitle the holder to recover the amount from the other party to the bill, and is by law made evidence of presentment and dishonor, and is made only on such presentment and dishonor. The words "protested for nonpayment" have come to have a technical meaning in matters of this nature. In them is included not only the idea that the bill is presented, but that payment of it has been demanded, and, not being paid, it is dishonored. *Spies v. Newberry* (Mich.) 2 Doug. 425, 428.

The word "protested," as used in Act 1837, descriptive of the bills on which petitions may be maintained by a trover against an acceptor, is synonymous with "dishonored." *Rice v. Hogan*, 38 Ky. (8 Dana) 133, 135.

The word "protested" is employed in giving notice of dishonor to the indorser of inland bills and notes, and clearly implies demand, nonpayment, and consequent dishonor of the bill or note in all cases where protest is made. *Annyville Nat. Bank v. Kettering*, 106 Pa. 531, 534, 51 Am. Rep. 538.

#### Presentment and refusal.

The term "protested for nonpayment," whether used in the case of a foreign or inland bill of exchange or promissory note, is equivalent to the statement of presentment for payment and refusal, and is sufficient to

charge the indorser. *Brewster v. Arnold*, 1 Wis. 264.

In the case of a foreign bill it has always been held that protest for nonacceptance implies the presentation at the proper time and place, and refusal to accept, and a protest for nonpayment, and proper demand and refusal; and notice that a bill has been protested is a brief mode of informing the drawer and indorser of the dishonor of the paper, though the words "protest" or "protested" mean, when used in reference to commercial paper, the taking of such steps as are requisite to charge the drawer and indorsers, viz., demand and refusal. *Beals v. Peck* (N. Y.) 12 Barb. 245, 249.

#### PROTEST, PAYMENT UNDER.

One who is called upon to pay an import duty, a tax, a subscription, or the like, which he thinks he ought not to be required to pay, but is unwilling to encounter the delay and expense of a lawsuit at that time, pays the sum demanded under protest; that is, he accompanies the payment by a written and attested declaration of what he deems the illegality of the demand, and of his rights of defense and denial. This protest preserves all those rights, and, in any subsequent suit or other effort to get the money back, the protest will prevent him from being impeded by his payment. Protest is otherwise defined to be a solemn declaration against an act about to be done, or already done, expressive of disapprobation or dissent, or made with a view of preserving such right, which but for such declaration might be taken to be relinquished. *Meyer v. Clark* (N. Y.) 2 Daly, 497, 509.

Under Rev. St. § 3011, providing that any person who shall have made payment under protest in order to obtain possession of goods may maintain an action to recover back any excess paid, but no recovery shall be allowed unless a protest and appeal shall have been taken as provided in section 2931, it is held that the words "payment under protest" signify a payment under the statutory protest prescribed in the last part of the act. *Birtwell v. Saltonstall* (U. S.) 63 Fed. 1004, 1006.

As used in reference to payments, "under protest" does not establish compulsion, but implies nothing more than that the act done is contrary to the desire of the party making the protest. *Matthews v. William Frank Brewing Co.*, 55 N. Y. Supp. 241, 242, 26 Misc. Rep. 46.

Payment under protest, upon a threat of suit, the party knowing all the circumstances, is not a payment under such compulsion of process as protects it from the infirmity of a voluntary payment. *Burnham*

*v. Town of Strafford*, 53 Vt. 610, 613 (citing *Wheatley v. Waldo*, 36 Vt. 237).

#### PROTESTABLE SECURITY.

At common law, promissory notes were not required, when dishonored, to be protested, and it cannot be presumed, in the absence of proof of a change of the common law in the state of Georgia, that promissory notes are protestable; and hence the protest of a notary public is not evidence in Alabama, where it is provided (Alk. Dig. 327) that the protest of a notary public, which shall set forth a demand, refusal, nonacceptance, or nonpayment of any inland bill of exchange, or other "protestable security" for money or other thing, and that legal notice, expressing in the said protest, the time when given of such fact or facts, was personally, or through the post office, given to any of the parties entitled by law to notice, shall be evidence of the facts it purports to contain, and entitle the holder of such security, to the damages to which by law, he may be entitled. *Dunn v. Adams*, 1 Ala. 527, 530, 35 Am. Dec. 42.

#### PROTESTANDO.

The purpose of a protestando is to preserve the liberty of disputing the fact protested against in some other suit or proceeding. *State v. Beasom*, 40 N. H. 367, 372.

#### PROTESTANT.

A Protestant is a Christian who protests against the doctrines and practices of the Roman Catholic Church; one who adheres to the doctrines of the Reformation. "Protestant" is usually employed as a general term comprehending all those who profess Christianity, yet are not in the communion of the Church of Rome. *Hale v. Everett*, 53 N. H. 9, 10, 16 Am. Rep. 82.

"Protestant," as used in a will giving money for the establishment of a permanent fund to be used for the charitable assistance and benefit of indigent unmarried Protestant females over the age of 18 years, includes all those who believe in the Christian religion, and do not acknowledge the supremacy of the Pope. *Appeal of Tappan*, 52 Conn. 412, 418.

#### PROTESTANT DISSENTERS.

"Protestant Dissenters" is not a term of fixed legal meaning, but of itself implies that the parties are protestants against the Church of Rome and dissentients from the Church of England, but that is all. It cannot include all those who are neither of the Church of Rome nor of that of England, for that would include all those who reject

Christianity altogether. *Drummond v. Attorney General*, 2 Eng. Law & Eq. 15, 24.

### PROTESTANT RELIGION.

"Protestant religion," as used in the Bill of Rights, requiring certain officers to be of the "Protestant religion," is used in its ordinary meaning to include all Christians who deny the authority of the Pope of Rome, but excluding Mohammedans, Jews, pagans, infidels, etc. *Hale v. Everett*, 53 N. H. 9, 10, 16 Am. Rep. 82.

### PROTHONOTARY.

A prothonotary is defined by Webster as, among other things, "a chief clerk or register of a court in some of the United States." *Trebilcox v. McAlpine*, 46 Hun, 469, 472, 11 N. Y. St. Rep. 847, 849.

The prothonotary of the court of common pleas in Pennsylvania is merely the clerk of that court. He has no authority, by virtue of his office, to act as the clerk, agent, or attorney of any person. It is his duty to record upon the minutes of the court all judgments rendered by or confessed before the court whose clerk he is. *Whitney v. Hopkins*, 19 Atl. 1075, 1076, 135 Pa. 246.

### PROTRACTED.

The word "protracted," when unqualified and applied to a line, means the extension of a line in its original direction. *Knight v. Wilder*, 56 Mass. (2 Cush.) 199, 211, 48 Am. Dec. 660.

### PROVABLE CLAIM.

A provable claim, as against the estate of a deceased person, is one not barred by the statute of limitations, and to establish which there is competent evidence. *Stevenson v. Valentine*, 57 N. W. 746, 748, 38 Neb. 902.

### PROVABLE DEBT.

In bankruptcy proceedings any debt which a person can recover at law or equity, either in his own name or in the name of any other person, is a provable debt. *In re Jordan* (U. S.) 2 Fed. 319, 320.

The term "provable debt," as used in 14 Stat. 517, providing that a creditor must have a debt provable under the act as a foundation for a petition in involuntary bankruptcy, includes equitable as well as legal demands. *Sigsby v. Willis* (U. S.) 22 Fed. Cas. 112, 113.

An allegation, in a petition in involuntary bankruptcy, that the petitioner and the

alleged bankrupt had been partners, that the partnership had been dissolved, but that no settlement had been made between them, and that the alleged bankrupt was indebted to the petitioner by reason of such partnership transaction for the assets and money of a copartnership, does not show a debt provable in bankruptcy under Bankr. Act 1867. *Sigsby v. Willis* (U. S.) 22 Fed. Cas. 112, 113.

A "provable debt," under Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], providing that the discharge shall release the bankrupt from all his provable debts, etc., means any claim that the creditor may make provable through the means provided by section 63b, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]. *In re Hilton* (U. S.) 104 Fed. 981, 982.

The expression "provable debt," as used in Rev. St. § 5106, enacting that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit against a bankrupt until the question of his discharge shall have been determined, includes all provable debts, whether subject to discharge by the terms of the act or otherwise. *In re Schwartz* (U. S.) 21 Fed. Cas. 765.

A penal bond, executed by a person thereafter adjudged a bankrupt, to secure the payment to the obligee of an annuity during life, is an instrument creating a fixed liability absolutely owing at the time of filing the petition in bankruptcy, payable in the future, and is provable as a debt against the bankrupt's estate, under Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], for the amount stated therein, where the value of the annuity, computed on the life tables, exceeds such penalty. *Cobb v. Overman*, 109 Fed. 65, 48 C. C. A. 223, 54 L. R. A. 369, 6 Am. Bankr. R. 324 (reversing 100 Fed. 270, 3 Am. Bankr. R. 788).

Debts are not the less provable, within the meaning of the bankrupt act, because the statute of limitations may be successfully pleaded against their allowance; and a judgment against a bankrupt was a provable debt, and the fact that the recovery upon it might be defeated by the plea of payment or a plea of limitations or any other plea in bar did not take it out of the class of provable debts. The term "provable debts" does not mean only such debts as are valid, and against the allowance of which no defense can be successfully interposed. *Hargadine-McKittrick Dry Goods Co. v. Hudson* (U. S.) 122 Fed. 232, 235, 58 C. C. A. 596.

The word "provable," as used in Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], providing that a set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which is not provable against the estate, means provable in its nature at the time when the

set-off is claimed, not provable in the pending bankruptcy proceedings. *Morgan v. Wordell*, 59 N. E. 1037, 1038, 178 Mass. 350, 55 L. R. A. 33.

## PROVE.

See "Clearly Proven."

Aver distinguished, see "Aver."

We find many courts and law writers referring to an alibi as "matter of defense," and also stating that it must be "proved" by defendant. We doubt the strict legal propriety of using either one of these expressions in those jurisdictions where it is held that an alibi is sufficiently established when a reasonable doubt is raised in the minds of the jurors as to the presence of the defendant at the scene of the crime. Yet these terms are used, and held unobjectionable, in all those instructions where the jury are clearly and fully told that a reasonable doubt in their minds as to the presence of the defendant at the scene of the homicide entitles him to an acquittal. In all those cases the word "proved" is held to mean the production of sufficient evidence to raise a reasonable doubt. *People v. Winters*, 57 Pac. 1067, 1068, 125 Cal. 325.

"'Proving a will in chancery' means the practice of courts in chancery, in entertaining bills, to perpetuate the testimony of the witnesses to a will devising lands at the suit of the devisee against the heir at law, it being alleged that the latter disputes its validity." *Ellis v. Davis*, 3 Sup. Ct. 327, 332, 109 U. S. 485, 27 L. Ed. 1006.

### In bankruptcy.

The phrase "prove his debt," as used in the federal bankrupt act (14 Stat. 526, 533, §§ 20, 22), relating to proving debts against the bankrupt's estate, should be construed as equivalent to the phrase "share in the distribution of assets." In *re California Pac. R. Co.* (U. S.) 4 Fed. Cas. 1060, 1063; In *re Bigelow* (U. S.) 3 Fed. Cas. 343, 344.

"Proved," as used in Insolvency Court Rule 10, providing that no claim once regularly proved shall be expunged or reconsidered except on a formal petition of some person interested, verified by oath, means a claim which has been, in due form, presented after being verified in the manner required by law. The word "proved" does not in this connection imply that there has been any hearing on the claim. *Tibbetts v. Trafton*, 14 Atl. 71, 72, 80 Me. 264.

## PROVED TO THE SATISFACTION OF THE COURT.

The phrase "proved to the satisfaction of the court," as used in Laws 1880, c. 86, p. 141, as amended by Laws 1888, c. 555, p. 911, authorizing comparison of disputed writ-

ing with any writing proved to the satisfaction of the court to be genuine, are to be construed in the light of the obvious purpose with which these statutes were enacted. While it is obvious that the words do not invest the trial court with a mere personal discretion which is to be exercised without reference to the rules of evidence, it is equally plain that the failure of these statutes to prescribe the precise method or degree of proof necessary to establish the genuineness of a writing for purposes of comparison with a disputed writing renders it necessary to resort to the general rules of the common law for that purpose. In civil cases the genuineness of such a paper must be established by a fair preponderance of evidence, and in criminal cases beyond a reasonable doubt. *Farrell v. Manhattan R. Co.*, 82 N. Y. Supp. 334, 336, 83 App. Div. 393 (citing *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193).

## PROVIDE—PROVIDE FOR.

In *Webst. Dict.*, "to provide" is defined, "To make ready for future use; to furnish; to supply." *Ware v. Gay*, 28 Mass. (11 Pick.) 106, 109.

The word "provide," as used in Act March 26, 1874, providing that a certain act should not thereafter apply to offenses committed in certain cities, the ordinances of which provide for the punishment of the unlicensed sale of liquors, etc., is used conditionally, and the time indicated by it is not restricted to the present, but by relation includes the future as well, though the word is in the present tense, which ordinarily indicates present time. *State v. Zeigler*, 46 N. J. Law (17 Vroom) 307, 311.

To regulate is to adjust by rule, method, or established mode; govern by or subject to certain rules or restrictions. To provide is to procure beforehand; get; collect or make ready for future use. There is a marked difference between the power to regulate the weighing of an article and the power to provide for the weighing of the same; and General Incorporation Act, art. 5, § 1, par. 54, giving cities and villages the power "to regulate the inspection, weighing, and measuring of brick, lumber, etc.," was intended to authorize them to establish and direct the manner in which the sale or weighing of the articles mentioned should be done by others, and not to permit such cities and villages themselves to go into the business of selling or weighing such articles. *City of Savanna v. Robinson*, 81 Ill. App. 471, 480 (quoting *Cent. Dict.*).

A city ordinance making it the duty of the city council to "provide means" to meet the payment of bonds and coupons when the same might become due, according to the contract entered into for the loan, does not



imply an agreement to levy a special tax separate from other taxes or other resources of the city, but implies that out of the various resources of the city, its general annual tax, its wharfage, its licenses, or its power to borrow money, some means would be provided by the city authorities for that purpose. *United States v. City of Burlington* (U. S.) 24 Fed. Cas. 1302.

The United States neutrality laws, making it a misdemeanor to "provide or prepare the means for" any military expedition or enterprise, includes the contribution of money, clothing for the troops, provisions, arms, or any other contributions which shall tend to forward the expedition or aid to the comfort or maintenance of those in it. *Charge to Grand Jury* (U. S.) 30 Fed. Cas. 1023 (citing *Id.*, 1018).

By a reference to the *Century Dictionary*, the word "provide" will be found to be defined as follows: "To take measures for counteracting or escaping something; often followed by 'against' or 'for.'" And it is so used in the title of an act "providing for unlawful levy and collection of public revenue." *Western Ranches v. Custer Co.*, 72 Pac. 659, 661, 28 Mont. 278.

The term "power to provide," as used in Code, § 779, giving certain municipalities power to provide for the construction of permanent sidewalks, cannot be construed otherwise than to mean that the city council is thereby invested with all necessary authority to make provision for carrying into effect the power granted. Power to provide being expressly conferred, it is a well-settled doctrine that there are included therein all such implied powers as may be necessary to carry into effect or make available the general power thus granted. *Zalesky v. City of Cedar Rapids*, 92 N. W. 657, 659, 118 Iowa, 714.

#### As adopt or approve.

Under Laws 1867, p. 73, § 9, amendatory of the charter of St. Louis, empowering the city through her council "to cause the construction \* \* \* of all streets, alleys, and public highways within the city, at such time and to such extent \* \* \* as may be provided by ordinance," it was competent for the city, where a contract entered into under a certain ordinance remained unexecuted, to adopt and approve such contract by an amendatory ordinance on condition that the contractors would file their written acceptance of the latter ordinance. Such adoption and approval were, within the meaning of the charter, a "providing by ordinance" for the performance of the work. *Strassheim v. Jerman*, 56 Mo. 104.

#### As beneficial provision.

"Provided for," as used in 2 Hill's Code, § 1465, providing that children of intestate

must be named or provided for in the will, refers to some beneficial legal provision, and will not be complied with by an absolute devise to another, even though the testator thought the interests of the children would be better subserved by such devise than by one directed to them. *Purdy v. Davis*, 42 Pac. 520, 13 Wash. 164; *Bower v. Bower*, 31 Pac. 598, 5 Wash. 225.

#### As direct and control.

"Provide for the location of any railroad," as used in General Incorporation Law, art. 5, § 1, cl. 25, authorizing a city to provide for the location of any railroad, is equivalent to the phrase "to direct and control the location of railroad tracks." *Chicago Dock & Canal Co. v. Garrity*, 3 N. E. 418, 451, 115 Ill. 155.

#### As named.

"Provided by law," as used in Pub. Laws 1890, c. 832, § 1, relating to appeals, and providing that the adverse party may have the judgment appealed from affirmed, by filing in the lower court a certificate of the clerk of the appellate court that the appeal has not been entered within the time provided by law, means within the days named in the statute, or within such further time as the appellate court on motion may allow. *Pearsons v. Webster*, 20 Atl. 230, 231, 17 R. I. 88.

#### As authorizing a purchase.

"Webster's International Dictionary defines the word 'provide' as follows: 'To procure as suitable or necessary; to prepare; to make ready for future use; to finish; to procure beforehand.' The definition in the *Century Dictionary* is: 'To make ready; to prepare; to furnish or supply.'" In Laws 1895, p. 210, § 19, as amended by Acts 1899, c. 666, providing that the board of county commissioners of certain counties shall provide a suitable and convenient place for the holding of the superior courts established for such counties, the word "provide" is to be construed as assigning a legislative intent to leave the question as to how the duty imposed shall be performed to the wisdom and sound discretion of the board, and therefore the board may purchase a suitable building, and is not confined to merely leasing a building. *Swartz v. Lake County Com'rs*, 63 N. E. 31, 34, 158 Ind. 141.

A statute providing that the city council may "provide for" and regulate the lighting of streets will include a provision to purchase. *State v. City of Hlawatha*, 36 Pac. 1119, 53 Kan. 477.

#### As support.

"Provide for," as used by a testator in bequeathing all his property and money to his wife, with the proviso that she "provide

for my adopted daughter," does not entitle the daughter to support from the testator's widow while she is otherwise provided for by her husband. *Taylor v. Elder*, 39 Ohio St. 535, 543.

# **PROVIDED.**

Otherwise provided, see "Otherwise."

"Provided they shall perform," as used in a contract providing that one party there-to shall not collect, receive, or ask for any further interest on the mortgage, provided they shall perform on their part the contract referred to, means so long as they shall perform. *Stoel v. Flanders*, 32 N. W. 114, 117, 69 Wis. 256.

"Provided," as used in Acts 1876-77, c. 60, establishing the "no fence law" in a certain district in a particular county, and enacting that the law shall not apply to stock kept east of the prescribed limits, provided a gate to be kept at a certain point, should be construed to mean "unless"; the act not being intended to cast upon the outside parties the burden of keeping up such gate, at the peril of being responsible for a trespass of other stock within the boundaries. *Burgwyn v. Whitfield*, 81 N. C. 261, 263.

The phrase "provided for," as used in Code Wash. § 1325, providing that, when a testator dies leaving a child or children not named or provided for in his will, he shall be deemed to have died intestate as to them, does not import an obligation on the part of a testator to leave his children a fortune, or to supply their material wants, or even give them any substantial share of his estate, whether it amounts to much or little; and therefore the statute was not intended to prevent children from being disinherited, but to require that the intention to disinherit them should clearly appear; and therefore a will which gives the testator's heirs one dollar each, and the bulk of his property to his wife, is valid. *Boman v. Boman* (U. S.) 47 Fed. 849.

## **As on condition.**

The word "provided" means "on condition." *De Vitt v. Kaufman Co.*, 66 S. W. 224, 226, 27 Tex. Civ. App. 332.

"Provided" is the appropriate word for creating a condition precedent. *Robertson v. Caw* (N. Y.) 3 Barb. 410, 418.

The word "provided" is recognized as implying a condition without the addition of any other words; so that, if one granted lands to another in fee, provided that the grantee pay to the grantor a specified sum at a certain time, there is a good condition without words of re-entry. *Paschall v. Passmore*, 15 Pa. (3 Harris) 295, 308.

The word "provided" generally creates a condition. Act July 2, 1839, provided that there should be a forfeiture of money bet on an election, provided suit be brought for it within two years from the bet. Held, that the provision as to the action was a condition, and not a statute of limitations, which must be set up against a suit for the money. *Forscht v. Green*, 53 Pa. (3 P. F. Smith) 138, 140.

While the word "provided" ordinarily indicates that a condition follows, there is no magic in the term, but the clause, in a contract or written instrument, is to be construed from the words employed, and from the purpose of the parties, gathered from the whole instrument. *Boston Safe-Deposit & Trust Co. v. Thomas*, 53 Pac. 472, 473, 59 Kan. 470; *Heaston v. Randolph County Com'rs*, 20 Ind. 398, 403.

The word "provided," as used in a law, does not necessarily mean that the matter which may succeed it is a proviso in its technical sense, as a restraint, or a modification or an exception to something which would otherwise have been within the law, the matter of the succeeding words determining whether or not it is a technical proviso. *Carroll v. State*, 58 Ala. 396, 401.

The word "provided," in the section of the Code granting exemptions on a certain quantity of land, provided that it is chiefly valuable for agricultural purposes, means "upon condition." *Piedmont Nat. Building & Loan Ass'n v. Bryant*, 41 S. E. 661, 663, 115 Ga. 417.

The word "provided," in a statute, does not always introduce a necessary condition. *Stanley v. Colt*, 72 U. S. (5 Wall.) 119, 18 L. Ed. 502. The whole section should be considered for the purpose of determining the legislative intent. *Smalley v. Ashland Brownstone Co.*, 72 N. W. 29, 30, 114 Mich. 107.

An insurance policy contained a provision as follows: "Provided, also, that the mortgagee or trustee shall notify the company of any change of ownership or increase of hazard which shall come to his or her knowledge, and shall have such change of ownership or increase of hazard indorsed on the policy." Held, that the term "provided," as here used, must be construed as a condition, for such was, without doubt, the intention of the parties. "No better word expresses a condition, and it is always so taken unless the context shows that the intent was to create a covenant." *Ormsby v. Phoenix Ins. Co.*, 58 N. W. 301, 303, 5 S. D. 72 (quoting And. Law Dict.).

"Provided," as used in a will giving a legacy, provided the legatee arrived at a certain age, means that the legacy is contingent. *Colt v. Hubbard*, 33 Conn. 281, 286.

The expression, "I give and bequeath to A. B. at the age of twenty-one," or "if he arrives at twenty-one," or "provided he lives to be twenty-one," or "in case of his arriving at twenty-one," or "when he arrives at the age of twenty-one," have all been held to be contingent legacies. *Gifford v. Thorn*, 9 N. J. Eq. (1 Stockt.) 702, 704, 729.

"Provided" usually indicates a condition, and, as used in a will creating a trust, provided, however, that on the death of the beneficiary his share should be paid to a certain institution, would seem to show that a trust for the life of the beneficiary was created, with a subsequent condition that on its termination the portion allotted to the beneficiary should pass to the institution. *Locke v. Farmers' Loan & Trust Co.*, 35 N. E. 578, 582, 140 N. Y. 135.

A bequest of money in bank, "provided" the said amount is collected from the assets of the stockholders of said bank, means upon condition or with the understanding that the amount shall be collected out of that debt, and, if not, then the bequest is not to be paid. *Appeal of Smith*, 103 Pa. 559, 562.

The word "provided," as used in a lease of oil and gas under a certain tract of land, by which the lessor is to be compensated solely by a share of the product, provided that a well shall be commenced on the described premises within a specified time, is a word of condition; so that, if the lessee makes no attempt to comply with the provision within the time specified, the lease becomes forfeitable at the option of the lessor. *Huggins v. Daley* (U. S.) 99 Fed. 606, 610, 40 C. C. A. 12, 48 L. R. A. 320.

In construing a will leaving certain lands to testator's wife, provided she had no lawful issue, the court said: "The probable intention of this proviso was, 'provided she has no lawful issue by me.' Men do not ordinarily look to remote occurrences in the structure of their wills, and especially unlearned men. The testator was young, and his wife was young, and it was natural for them not to despair of issue, although at the time of the will he was in ill health. In case of leaving children, posthumous or otherwise, he might think that the gift to his wife of the whole of his estate was more than conjugal affection would require or parental prudence justify. In that event he might mean to displace the whole estate of his wife, and leave her to her dower at the common law, and the children to their inheritance by descent. This interpretation would afford a rational exposition of the clause, and perhaps ought not to be rejected, although there is no express limitation in the words. In this view, it is not very material whether it be considered as a condition precedent or subsequent, though the general analogies of the law would cer-

tainly lead to the conclusion that it was in the latter predicament. As a condition, in the event proposed, the prior estate of the wife would be defeated; but there would be no estate devised to the issue. They would take by descent as heirs and not by devise. It would be going quite too far to construe mere words of condition to include a contingent devise to the issue; to infer from words defeating the former estate an intent to create a new estate in the issue, and that estate a fee, and a clear substitute for the former. No court would feel justified, upon so slender a foundation, to establish so broad a superstructure. Nor can any intention to give a fee to the wife be legally deduced from the proviso, in any way of interpreting the terms, because it is as perfectly consistent with the intention to defeat a life estate as a fee in the whole of the lands. The testator, with a limited property, might justly think it too much to take from his own issue the substance of their inheritance, during a long minority, in favor of a wife, who might live many years and form new connections. In such an event, leaving her to the general provision of law as to dower would not be unkindness nor injustice. But it is sufficient to say that the words are too equivocal to enable the court to ascertain from them the clear purpose of establishing a fee. And if the proviso refers to any lawful issue by any other husband, then it must be deemed a condition subsequent; and, in the events which have happened, the estate of the wife, whether it be for life or in fee, has been defeated." *Wright v. Page*, 23 U. S. (10 Wheat.) 204, 239, 6 L. Ed. 303.

#### As covenant or limitation.

The word "proviso" or "provided" itself is sometimes taken as a limitation and sometimes as a covenant. *Lyon v. Hersey*, 8 N. E. 518, 520, 103 N. Y. 264; (citing 2 Wash. Real Prop. 21); *Heaston v. Board of Com'rs of Randolph County*, 20 Ind. 398, 403.

The phrase "provided, however," when used in a deed, will be construed to be a covenant rather than a condition, when such construction can be reasonably given. *Hartung v. Witte*, 18 N. W. 175, 177, 59 Wis. 285.

The word "proviso" is an appropriate one to constitute a common-law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments; on the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust. *Stanley v. Colt*, 72 U. S. (5 Wall.) 119, 166, 18 L. Ed. 502; *Woodruff v. Woodruff*, 16 Atl. 4, 6, 44 N. J. Eq. (17 Stew.) 349, 1 L. R.

A. 380. It was so applied in construing a devise of real estate to a certain church, "provided that said real estate be not ever hereafter sold, but that the same be leased or let, and the annual rents or profits thereof applied," etc. *Stanley v. Colt*, 72 U. S. (5 Wall.) 119, 166, 18 L. Ed. 502. Where it was recited after the habendum clause of a deed, "provided nevertheless, and upon the following conditions," that if the grantor survives the grantee he shall have the right within a specified time to buy back the estate at a price to be fixed by arbitration, such clause creates a covenant in spite of the words with which it was introduced. *Woodruff v. Woodruff*, 16 Atl. 4, 6, 44 N. J. Eq. (17 Stew.) 349, 1 L. R. A. 380.

There has been much nice discussion upon the word "provided." 2 Co. 72; Cro. Eliz. 242, 385, 486, 560; Cro. Car. 128. It is certain, as is said by Justice Swift, that there is no word more proper to express a condition than this word "provided"; and it shall always be so taken unless it appears from the context to be the intent of the parties that it shall constitute a covenant. *Wright v. Tuttle* (Conn.) 4 Day. 328. It was stipulated by A., in a covenant between him and B., that B. should be entitled to use A.'s patent right three days in a week until the 27th of December, and that A. would not prosecute any action against B. for any former violation of A.'s right, provided B. should not run his machine after the 17th of December, or by any other machine infringe A.'s right during its continuance. Such proviso, thus introduced to limit A.'s covenants, did not operate as an estoppel against B. to prevent him from showing the truth in regard to the validity of the right claimed by A. *Rich v. Atwater*, 16 Conn. 409, 419.

The word "provided" is an apt word to create a condition, yet it does not necessarily import a condition; and it is often used by way of limitation or qualification only, especially when it does not introduce a new clause, but only serves to qualify or restrain the generality of a former clause. *Chapin v. Harris*, 90 Mass. (8 Allen) 594, 596 (citing *Cromwell's Case*, 2 Coke, 72a; Co. Litt. 146b, 203b).

"Provided such devise, legacy, or interest be not made to an heir at law of the testator," as used in St. 1833, tit. "Estates," c. 1, which provides that if any beneficial devise, legacy, or interest shall be made or given in any will or codicil, etc., to any person subscribing such will or codicil as a witness to the execution thereof, such devise, legacy, or interest shall be, as to such subscribing witnesses or persons claiming under them, null and void, etc., provided such devise, legacy, or interest be not made to an heir at law of the testator, qualifies

the entire enactment, and in effect declares that although, in all other cases where a devisee shall be a subscribing witness, the devise shall be void, and the devisee shall be incapable of taking under the will, yet this shall not extend to an heir at law of the testator standing in the same position. *Fortune v. Buck*, 23 Conn. 1, 8.

#### As creating a trust.

"Provided," as used in a devise to homes for aged men and women, provided the trustees and managers of such homes admit and receive one man and woman every year for each and every \$400 of the income to be derived from the property given, does not create a trust in favor of indefinite beneficiaries. The natural office of a proviso is not to create a trust. Ordinarily the term signifies a condition. *Bennett v. Baltimore Humane Impartial Society and Aged Women's and Aged Men's Homes*, 45 Atl. 888, 889, 91 Md. 10.

#### PROVIDED BY LAW.

See "As Provided by Law."

#### PROVIDENTIALLY HINDERED.

"Providentially hindered," as used in a contract for the sale and manufacture of certain timber, providing that, if either party should fail to carry out the contract faithfully, "then they are to pay all damages that should occur from their neglect to do so, unless providentially hindered," does not exempt liability for damage arising from the breakage of machinery. The words "providentially hindered" have a strict legal significance, are wholly unambiguous, and parties will be presumed to have contracted rather with reference to their strict legal significance than with reference to any understanding of theirs touching the import of them. They include such acts only as may be attributed to the act of God, and not to mere unavoidable cause, such as from accident resulting from and attributable to human conduct. *Day v. Jeffords*, 29 S. E. 591, 593, 102 Ga. 714.

#### PROVISION.

See "Special Provision."

Subject distinguished, see "Subject (Of Statute)."

As applied to legislation, the word "provision" has this well-understood meaning: "Actual expression in language"—the clothing of legislative ideas in words, which can be pointed out upon the page and read with the eye; not a conjecture, or a supposition, or an inference drawn from other language referring to a different subject or matter. *State ex inf. Crow v. Lund*, 67 S. W. 572, 576, 167 Mo. 228.

**As nomination to benefice.**

"Provisions," as used in the law of Edward III enacted to suppress usurpations of the papal see, was construed to restrain the nomination to benefices by the Pope (a very peculiar meaning of the term). *Middletown Bank v. Magill*, 5 Conn. 28, 52 (citing 1 Bl. Comm. 60).

**Terms, conditions, or stipulations.**

"Provision," as used in a stipulation that no agent of the insurer shall have power to waive any provision or condition of an insurance policy, is synonymous with "terms and conditions" contained in the body of the policy. The word "provision" is a word in common use to express the terms, stipulations, and conditions in deeds, contracts, statutes, and constitutions. In law the word "provision" is a stipulation; a rule provided; a distinct clause in an instrument or statute; a rule or principle to be referred to for guidance, as the provisions of law, the provisions of the Constitution. Cent. Dict. Substantially the same definition is given in Webster's Dictionary and in the Encyclopædic Dictionary. *Snyder v. Dwelling House Ins. Co.*, 37 Atl. 1022, 1023, 59 N. J. Law, 544, 59 Am. St. Rep. 625.

"Provision of the policy," within the meaning of a life policy providing that no agent of the company shall have power to waive any provision or condition of the policy, includes a stipulation in the policy requiring insured to furnish proofs of loss. *Dwelling House Ins. Co. v. Snyder*, 34 Atl. 931, 932, 59 N. J. Law, 18.

**PROVISIONAL APPOINTMENT.**

An officer provisionally appointed is one appointed to fill an office which is properly elective until the vacancy can be regularly filled. *State v. Lovell*, 12 South. 341, 343, 70 Miss. 309.

**PROVISIONAL GOVERNMENT.**

"A provisional government is one temporarily established in anticipation of and to exist and continue until another shall be instituted and organized in its stead." *Chambers v. Fisk*, 22 Tex. 504, 535.

**PROVISIONAL REMEDY.**

The word "provisional" is defined "provided for present need; for the occasion." Webst. Dict. A provisional remedy must therefore be something which is provided for present need, or for the occasion; that is, one adapted to meet a particular exigency. It is necessary to the commencement of an action that process should be served upon the defendant. The general rule is that such service must be personal. In some cases a

personal service is impossible. For such emergencies provision has been made for a substituted service. This remedy is one provided for a present need. It is not the ordinary one, but is given as a substitute therefor, and given because the case is a special one, to which the ordinary and general mode of procedure was inapplicable and useless. Therefore an order providing for a substituted service grants a provisional remedy, within the meaning of that term as used in the Code of Civil Procedure. *McCarthy v. McCarthy* (N. Y.) 54 How. Prac. 97, 100.

"Provisional remedies, as known under the Code and spoken of in our statutes, have generally been considered as quite distinct from special proceedings. Judge Hoffman, in the preface to his *Provisional Remedies*, says that the Code of Procedure, having divided remedies in the courts of justice into actions and special proceedings, has a subdivision under the head of actions, termed 'Of Provisional Remedies in Civil Actions.' Those form the subject of the seventh title of part 2 of the Code of New York; and that title is separated into five chapters. These chapters comprise the important subjects of arrest and bail, claim and delivery of personal property, attachments, and provisional remedies, embracing receivers and some miscellaneous proceedings. In his work he treats the foregoing as provisional remedies. Mr. Thompson's nomenclature of provisional remedies is the very same, except the fifth, which is entitled 'Receivers and Other Provisional Remedies,' to which he adds a sixth, namely, 'Writ of Ne Exeat.' It is well known that the Legislature of Wisconsin took the Code of New York as they found it on the day of its adoption, without one word added or one left out; and consequently the foregoing works are commentaries on our Code, as much as on that of New York." *Witter v. Lyon*, 34 Wis. 564, 574.

A provisional remedy is a collateral proceeding, permitted only in connection with a legal action and as one of its incidents. *Snively v. Abbott Buggy Co.*, 12 Pac. 522, 525, 36 Kan. 106.

Laws 1860, c. 264, § 10, subd. 3, giving an appeal from an order granting a provisional remedy, should be construed to include an order requiring the defendants to give plaintiff an inspection and copies of certain papers and documents in their possession; such remedy being formerly procured by an ancillary suit in equity for a discovery, but which is now granted by order in the principal cause. Such remedy is affirmative relief, given when the exigencies of the case require it, and it is a remedy outside of and beyond those ordinary proceedings in an action which relate merely to matters of practice and procedure, or which rest entirely in the discretion of the court. Such character

of the remedy makes the same a provisional remedy. *Noonan v. Orton*, 23 Wis. 386, 387.

The term "provisional remedy," in Code, § 139, which declares that from the time of the service of a summons in a civil action or the allowance of a provisional remedy the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings, does not include the approval of an undertaking by the sheriff in an action of claim and delivery. *Nosser v. Corwin* (N. Y.) 36 How. Prac. 540, 542.

## PROVISIONS.

See "Necessary Provisions"; "Pecuniary Provision"; "Properly Provisioned."

The word "provisions," as used in 2 Rev. St. p. 493, § 1, providing for a lien on vessels for provisions and stores furnished, etc., strictly considered, would be confined to such articles as enter into the food or substance for hands and passengers, but will include wood furnished a steamboat to supply her furnaces. *Crooke v. Slack* (N. Y.) 20 Wend. 177.

"Provision," as used in a statute prohibiting forestalling the market by buying any provision on its way there, refers to articles of food for human consumption, and does not embrace chop feed for animals. *Botelov v. Washington* (U. S.) 3 Fed. Cas. 962.

The word "provisions" includes oleomargarine and butterline and all articles of food, within the meaning of Pub. St. c. 68, § 1, providing that any person may carry about and expose for sale fruits, provisions, etc., without a license. *Commonwealth v. Luton*, 32 N. E. 348, 157 Mass. 392.

### Articles for sale.

"Provisions," as used in Gen. Laws, c. 224, § 2, exempting provisions from seizure under attachment, does not include meat purchased by a dealer to be sold again in his business. *Bond v. Tucker*, 18 Atl. 653, 65 N. H. 165.

The term "provisions," as used in a state statute exempting provisions of a debtor from execution, means articles of food stored at home or growing in the fields for home consumption, and does not include canned beans, peas, tomatoes, corned beef, sardines, or red herring, kept for sale by a mercantile firm of which the debtor is a member. In re *Lentz* (U. S.) 97 Fed. 486, 487.

St. 1857, c. 235 (Gen. St. c. 133, § 32) exempts from execution "provisions necessary, procured, and intended for the use of the family." Provisions were procured and intended by the party as a stock in trade, for the purpose of being sold by him, as well as for the use of his family. None of them

were set apart for that use before being seized on execution, nor did the party, after they were so seized, claim any part of them as exempt. It was held that such articles were not exempt from seizure. *Nash v. Farrington*, 86 Mass. (4 Allen) 157.

### Beans.

The term "provisions," in the tariff act, in reference to the taxation of provisions, includes beans, as they are raised for food. *Windmuller v. Robertson* (U. S.) 23 Fed. 652, 653.

### Brandy and wine.

A bequest of corn, fodder, meat, and other provisions includes wine and brandy kept by testator for his own use. *Mooney v. Evans*, 41 N. C. 363, 364.

### Cattle.

Fat cattle are "provisions or munitions of war," within Act Cong. July 6, 1812, making it a misdemeanor for any citizen of the United States to transport any naval or military stores, arms or munitions of war, or any article of provision from any place in the United States to any place in Canada. *United States v. Barber*, 13 U. S. (9 Cranch) 243, 244, 3 L. Ed. 719.

### Clothing, dry goods, or shoes.

The word "provisions" is defined in the Standard Dictionary as "a supply of food; that on which one subsists." "Subsists" means "to provide with subsistence; that which supports life, or food." As used in the Code, making "provisions" as a privilege claim against an administrator or administratrix, does not include items for clothing, dry goods, shoes, etc. *Succession of Moise*, 31 South. 990, 991, 107 La. 717.

### Corn.

"Provisions for family use," as used in Gould's Dig. c. 68, § 23, exempting from execution all such provisions as might be on hand for family use, will be construed in Arkansas to include corn, as corn is there generally used for bread. *Atkinson v. Gatcher*, 23 Ark. 101, 103.

Whatever is fit for the food of a family, and is usually eaten for food, including corn on the ear in the shock, is "provisions," within the meaning of Code, § 2039b, restricting the waiver of extension of provisions. *Cochran v. Harvey*, 14 S. E. 580, 581, 88 Ga. 352.

"Provisions actually prepared and designed for the subsistence of the debtor's family," within the meaning of a statute exempting such provisions from execution, does not include a field of standing corn. The debtor must not only have articles which may be provisions, but he must actually have prepared and appropriated them to the use of his own family. By no reasonable con-

struction of language could grain or corn standing in the field be called "provisions"; much less, provisions actually prepared and designed for the use of the debtor's family. *Donahue v. Steele*, 1 Ohio Dec. 130, 131.

#### **Cotton.**

Under a statute providing that no waiver of exemptions can be effectual to render wearing apparel, household and kitchen furniture, and provisions subject to execution, it is held that cotton belongs to none of these classes, though produced by labor performed under sustenance afforded by exempt provision, and that it does not take the place of the provisions consumed in its production, and is not exempt. *Butler v. Shiver*, 4 S. E. 115, 79 Ga. 172.

#### **Food for animals.**

Under a statute exempting from execution provisions and forage on hand for home consumption, cotton seed suitable for feeding stock is exempt. *Stephens v. Hobbs*, 36 S. W. 237, 14 Tex. Civ. App. 148.

#### **Fruits.**

The term "provisions," in Laws 1897, c. 76, § 1, providing that no person shall without a license peddle articles other than provisions and certain other things, includes fish, vegetables, meat, milk, bread, and fruits, which articles are specified in similar statutes immediately preceding the statute in question. "An ordinary meaning of the word 'provisions' is 'food; victuals; eatables.' Fruits, especially apples, pears, peaches, bananas, oranges, and pineapples, supply nutriment to the body, and are food. The use of them has largely increased in the last 40 years, and there is now less occasion than formerly to use the term 'fruits' in addition to the word 'provisions,' to describe them." *State v. Angelo*, 51 Atl. 905, 906, 71 N. H. 224.

#### **Ice.**

"Provisions," as used in Pub. St. c. 68, § 1, providing that any person may go from place to place in the same town, exposing for sale and selling, among other things, provisions, means food, victuals, fare, provender, etc., and does not include ice. *Commonwealth v. Reid*, 56 N. E. 617, 175 Mass. 325.

#### **Milch cow.**

"Provisions," as used in Code, § 5212, providing that a debtor may waive his extension rights, except as to household and kitchen furniture, and provisions not exceeding a certain amount in value, does not include a milch cow. *Wilson v. McMillan*, 6 S. E. 182, 183, 80 Ga. 733.

#### **Money or supplies.**

"Provisions," as used in Rev. Code, § 1858, giving a lien on crops for advances of

provisions, etc., to make a crop, means food for men and beasts employed in making the crop, and does not include money or supplies to pay the hire of laborers. *McLester v. Somerville*, 54 Ala. 670, 675.

#### **Unthreshed grain.**

Whether the word "provisions" as used in a statute exempting the provisions of a debtor from attachment, includes unthreshed wheat and oats, is a question of fact for the jury. *Ladd, J.*, dissenting, says that there is nothing technical, scientific, or unusual in the word "provisions" as used in the statute, calling for interpretation by the jury. It seems the question whether or not any given thing is "provision" within the meaning of the statute must depend on the nature of the thing itself, and the use to which it is and may be put. *Plummer v. Currier*, 52 N. H. 287, 297.

### **PROVISIONS OF LAW.**

The phrase "provisions for the payment thereof made by law," in Act June 2, 1859, § 11, authorizing the Secretary of State to examine and determine the claims of all persons against the state in cases where provisions for the payment shall have been made by law, etc., means under warrant of law previously enacted. *Shattuck v. Kincaid*, 49 Pac. 777, 778, 31 Or. 379.

Code Civ. Proc. § 414, providing that the "provisions of law" applicable to a certain case immediately before such act took effect should continue to be so applicable, notwithstanding the repeal thereof, does not refer simply to statutory provisions, but applies also to a rule or doctrine established by judicial decision. *Clark v. Lake Shore & M. S. Ry. Co.*, 94 N. Y. 217, 220.

Rev. St. § 6760, provides that quo warranto may be maintained against a public officer who does or suffers an act which by the "provisions of law" works a forfeiture of his office. Under the common law an officer might be removed for offenses of so infamous a character as to render the officer unfit to execute any public office, though such act had no immediate relation to the office; or for such acts as were against his official oath and official duties; or for those which were a violation of his official oath and also indictable. But section 6, art. 10, of the Constitution provides that county officers may be removed in such manner and "for such cause as shall be prescribed by law." Held that, the evident object of this provision being to vest the removal of office in the discretion of the Legislature, its discretion having been exercised in Rev. St. §§ 1021, 1032, 1034, 1085, 1246, 1329, 1685, 1732, 1736, 6900, 6909, 6917, a sheriff was not subject to removal by quo warranto unless he had committed some act which was a cause

of forfeiture or removal under such statutes. *State v. McLain*, 50 N. E. 907, 58 Ohio St. 813.

## PROVISO.

A proviso is generally intended to restrain the enacting clause, and to except something which would have otherwise been within it, or in some measure to modify the enacting clause. *Wayman v. Southard*, 23 U. S. (10 Wheat.) 1, 30, 6 L. Ed. 253; *Ex parte Lusk*, 2 South. 140, 142, 82 Ala. 519; *McRae v. Holcomb*, 46 Ark. 306, 310; *State v. Stapp*, 29 Iowa, 551, 553.

The office of a "proviso" generally is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview. *Minis v. United States*, 40 U. S. (15 Pet.) 423, 445, 10 L. Ed. 791; *In re Matthews* (U. S.) 109 Fed. 603, 614; *De Graff v. Went*, 45 N. E. 1075, 1077, 164 Ill. 485; *Ex parte Lusk*, 2 South. 140, 142, 82 Ala. 519. If repugnant to the purview, it is not void, but stands as the last expression of the Legislature. *Farmers' Bank of Fayetteville v. Hale*, 59 N. Y. 53, 59 (citing *Savings Inst. v. Makin*, 23 Me. [10 Shep.] 360). A proviso in a grant or enactment is something taken back from the power first declared. The grant or enactment is to read, not as if the larger power was ever given, but as if no more was ever given than is contained within the terms or bonds of the proviso. *People v. Kelly* (N. Y.) 5 Abb. N. C. 383, 404.

A proviso is defined to be a clause inserted in an act of the Legislature, a deed, a written agreement, or other instrument, which generally contains a condition that a certain thing shall or shall not be done, in order that an agreement contained in another clause shall take effect. The proper business of a proviso is now held to be, not to repeal the purview of the statute, but to except something from it, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent. *Wilkes-Barre Electric Light Co. v. Wilkes-Barre Light, Heat & Motor Co. (Pa.)* 4 Kulp, 47, 52.

A proviso in a statute is to be strictly construed. It takes no case out of the enacting clause which is not fairly within the terms of the proviso. *In re Matthews* (U. S.) 109 Fed. 603, 614; *De Graff v. Went*, 45 N. E. 1075, 1077, 164 Ill. 485; *McRae v. Holcomb*, 46 Ark. 306, 310. In short, a proviso covers special exceptions only out of the enacting clause, and those who set up any such exceptions must establish same as being within the words, as well as within the

reason, thereof. *McRae v. Holcomb*, 46 Ark. 306, 310. A corollary to this proposition is that no proviso should be construed so as to destroy the enacting clause; for it is fundamental that, if possible, a statute should be so construed as that all parts of it shall stand. *In re Matthews* (U. S.) 109 Fed. 603, 614.

In England the rule is that, where the proviso of an act of Parliament is directly repugnant to the main body of it, the proviso shall be held a repeal, as it speaks the last intention of the lawmakers. But in Pennsylvania a proviso is regarded as a saving clause, and where it is repugnant to the act it is a nullity. *In re Shewell Ave.*, 20 Pa. Co. Ct. R. 278, 280.

The ordinary office of a proviso in a statute is to except out of the act that which would otherwise be included, but this rule must not be carried too far. Such clauses are often introduced from excessive caution, and for the purpose of preventing a possible misinterpretation of the act, by including therein that which was not intended. The rule is therefore not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent, if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an ordinary application of the rule is not admissible. *Baggaley v. Pittsburg & Lake Superior Iron Co.* (U. S.) 90 Fed. 636, 638, 33 C. C. A. 202.

The term "proviso," from its origin, suggests the employment of prevision, as if the Legislature had declared: "Look out for it. See that the general words of the enacting clause shall not have a particular effect." *Sherman v. Santa Barbara Co.*, 59 Cal. 483.

### As applying to body of enactment.

The office of a "proviso" is to limit or restrict the general language preceding it, and not to enlarge the enacting clause. *Commonwealth v. Charity Hospital*, 48 Atl. 906, 907, 199 Pa. 119; *Patterson v. Winn*, 24 U. S. (11 Wheat.) 380, 387, 6 L. Ed. 500; *Van Reipen v. Jersey City*, 33 Atl. 740, 742, 58 N. J. Law, 262; *State v. Browne*, 57 N. W. 659, 660, 56 Minn. 269.

A proviso is something ingrafted upon a preceding enactment, generally introduced by the word "provided." *De Graff v. Went*, 45 N. E. 1075, 1077, 164 Ill. 485.

A proviso is something ingrafted upon a preceding enactment and is legitimately used for the purpose of taking special cases out of the general enactments and providing specially for them. *Butte & B. Consol. Min. Co. v. Montana Ore-Purchasing Co.*, 60 Pac.



1039, 1042, 24 Mont. 125; *Ex parte Lusk*, 2 South. 140, 142, 82 Ala. 519; *Sherman v. Santa Barbara County*, 59 Cal. 483; *Henderson Loan & Real Estate Ass'n v. People*, 45 N. E. 141, 143, 163 Ill. 196; *State ex rel. Crow v. City of St. Louis*, 73 S. W. 623, 629, 174 Mo. 125. The office of a proviso is either to except something from the enacting clause, or to qualify or restrict its generality, or to exclude some possible ground of misrepresentation of it, as understanding a case not intended by the Legislature to be brought within its purview. *Minis v. United States*, 40 U. S. (15 Pet.) 423, 10 L. Ed. 791. A proviso in deeds and laws is a limitation or exception to a grant made or authority conferred. *Sloat v. McComb*, 42 N. J. Law (13 Vroom) 485 (citing *Vorhees v. Bank of United States*, 35 U. S. [10 Pet.] 449, 9 L. Ed. 490).

The nature and office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it, unless it fairly appears to have been intended to apply to some other matter. It should be construed to relate to the immediately preceding parts of the clause to which it is attached, and will be so restricted, in the absence of anything in its terms or the subject it deals with evincing an intention to give it a broader effect. *State v. Bellew*, 56 N. W. 782, 784, 86 Wis. 189 (citing *Suth. St. Const. § 223*).

A proviso in deeds or laws is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised except in the case provided, and the rule is that where a general intention is expressed, and the act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception. *People v. Boston, H. T. & W. R. Co.* (N. Y.) 12 Abb. N. C. 230, 247.

"There are, no doubt, cases where a proviso might be confined as affecting the section only to which it is annexed; but we do not understand this to be the general rule." *Henderson Loan & Real Estate Ass'n v. People*, 45 N. E. 141, 143, 163 Ill. 196.

A proviso to a statute is intended to qualify what is affirmed in the body of the act, section, or paragraph preceding it. A proviso "should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and is substantially an exception. If it be a proviso to a particular section, it does not apply to others, unless plainly intended. It should be construed with reference to the immediately preceding parts of the clause to which it at-

taches." *Boynton v. People*, 46 N. E. 791, 792, 166 Ill. 64 (quoting *Suth. St. Const. § 223*).

#### As a condition.

A proviso is a clause which generally contains a condition that a certain thing shall or shall not be done, in order that something in another clause shall take effect. It implies a condition, and defeats the operation of the antecedent clause conditionally. It avoids such antecedent clause by way of defeasance. *Bouv. Law Dict. In Boon v. Juliet*, 2 Ill. (1 Scam.) 258, the court said that a proviso is intended to qualify what is affirmed in the body of an act, section, or paragraph preceding it, and is intended as a mere limitation. In *Sedg. St. & Const. Law*, 62, it is said, quoting from the opinion of the Supreme Court of the United States in *Voorhees v. Bank of United States*, 35 U. S. (10 Pet.) 449, 9 L. Ed. 490: "A proviso in deeds or laws is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided." In *Wayman v. Southard*, 23 U. S. (10 Wheat.) 1, 30, 6 L. Ed. 253, it was said that the proviso is generally intended to restrain the enacting clause. *Walsh v. Van Horn*, 22 Ill. App. 170, 173.

"For time out of mind conditions have usually been preceded by such words as 'proviso,' 'ita quod,' and 'sub conditione,' or their modern equivalents." *Graves v. Deterling*, 24 N. E. 655, 657, 120 N. Y. 447 (quoted in *Trustees of Union College v. City of New York*, 73 N. Y. Supp. 51, 53, 65 App. Div. 553).

A proviso in a statute always implies a condition, unless modified by subsequent words. *Waffle v. Gable* (N. Y.) 53 Barb. 517, 522.

"Proviso," when used, always implies a condition, unless subsequent words change it to a covenant. *Snyder v. Dwelling House Ins. Co.*, 37 Atl. 1022, 1023, 59 N. J. Law, 544, 59 Am. St. Rep. 625 (citing 2 *Bouv. Law Dict.* 299).

#### As a covenant.

A "proviso," as the term is used with reference to contracts, is the statement of something extrinsic to the subject-matter of the contract, which shall go in discharge of the contract, as a covenant by way of defeasance. *Wilmington & R. R. Co. v. Robeson*, 27 N. C. 391, 393.

A proviso in a covenant "is, properly speaking, a statement of something extrinsic of the subject-matter of such covenant, which shall go in discharge of that covenant by way of defeasance." *La Point v. Cady* (Wis.) 2 Pin. 515, 522, 2 Chand. 202 (citing 1 *Saund. Pl. & Ev.* 393).

**Exception distinguished.**

A proviso in a statute is a clause which defeats its operation conditionally, and differs from an exception, which exempts something absolutely from the operation of the statute by express words in the enacting clause. *Acker, Merrill & Condit v. Richards*, 71 N. Y. Supp. 929, 931, 63 App. Div. 305; *Waffle v. Goble* (N. Y.) 53 Barb. 517, 522; *Rowell v. Janvrin*, 45 N. E. 398, 400, 151 N. Y. 60; *Western Assur. Co. v. J. H. Mohlman Co.* (U. S.) 83 Fed. 811, 815, 28 C. C. A. 157, 40 L. R. A. 561.

An exception takes out of the statute something that otherwise would be part of the subject-matter of it. A proviso avoids them by way of defeasance or excuse. *Rowell v. Janvrin*, 45 N. E. 398, 400, 151 N. Y. 60; *Western Assur. Co. v. J. H. Mohlman Co.* (U. S.) 83 Fed. 811, 815, 28 C. C. A. 157, 40 L. R. A. 561.

"An exception is frequently put in the form of a proviso, and not infrequently what is in form a proviso is in addition an enacting clause, and enlarges what precedes." *State v. Browne*, 57 N. W. 659, 660, 58 Minn. 269.

In determining whether a provision is an exception or a proviso, the mere location of the clause, as to whether it is in close connection or not with the subject-matter of the insurance, is not of course controlling; nor is it to be construed as if it were removed from its position among the provisos and incorporated with the clause descriptive of the subject-matter by the mere use of the words "except as hereinafter provided." The most important element, however, in determining whether a particular clause expresses a condition or an exception, is in the nature of the clause itself. So that a clause in an insurance policy among the provisos, which provides that "if the building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease," such provision was a condition subsequent, and not an exception. *Western Assur. Co. v. J. H. Mohlman Co.* (U. S.) 83 Fed. 811, 815, 28 C. C. A. 157, 40 L. R. A. 561.

"There is a clear distinction between the proviso and an exception. In the case of an exception, in the purview of the act, it must be negated in pleading; but a proviso need not, even though it is found in the same section, if it be not referred to and ingrafted on the enacting clause." *State v. Stapp*, 29 Iowa, 551, 553.

**As a limitation.**

A proviso in deeds and laws is a limitation or an exception to a grant made or authority confirmed, the effect of which is to declare that the one shall not operate or the other be exercised, unless in the case pro-

vided. *Voorhees v. Bank of United States*, 35 U. S. (10 Pet.) 449, 471, 9 L. Ed. 490; *City of Stockton v. Weber*, 33 Pac. 332, 334, 98 Cal. 433; *State v. Bellew*, 56 N. W. 782, 784, 86 Wis. 189.

The natural and appropriate office of a proviso is to limit and qualify what is expressly enacted, and it is usually so identified with the text of a statute which it qualifies that, if such enacting part is repealed by a subsequent statute repugnant to it, the proviso will fail also. *Whitworth v. McKee*, 72 Pac. 1046, 1048, 32 Wash. 83.

A proviso is generally used in a statute to qualify, limit, or restrain the operation of general terms contained in a previous part of the section or act, and not to introduce a distinct and independent proposition. *Allen's Lessee v. Parish*, 3 Ohio (3 Ham.) 187. The proviso should be confined to what immediately precedes, unless the contrary intent clearly appears. *Zumstein v. Mullen*, 66 N. E. 140, 144, 67 Ohio St. 382.

The province of a proviso is to modify and limit the act in matters inherent therein or incidental thereto. *Pennsylvania R. R. Co. v. Philadelphia Belt Line R. R. Co.*, 10 Pa. Co. Ct. R. 625, 631.

A recognized effect and operation of a proviso is to deny or prohibit, and, when connected with the delegation of authority, it is tantamount to a command not to exercise the authority. *State ex rel. Illinois Cent. R. Co. v. Levee Com'rs of Orleans Dist.*, 33 South. 385, 398, 109 La. 403.

A proviso is something ingrafted on a preceding enactment by way of limitation or otherwise, and is held to operate as a repeal of the purview of the act where it is inconsistent with it, as expressing the last intention of the lawgiver. *Waffle v. Goble* (N. Y.) 53 Barb. 517, 522.

**PROVOCATION.**

See "Adequate Provocation"; "Considerable Provocation"; "Just Provocation"; "Lawful Provocation"; "Legal Provocation"; "Reasonable Provocation."

Provocation means, in law, that treatment by another which arouses anger or passion, and it does not enter into the plea of self-defense. *State v. Byrd*, 30 S. E. 482, 52 S. C. 480.

No words or gestures, however contumelious, are a sufficient provocation to extenuate a killing and make it only manslaughter. *State v. Bell* (Pa.) Add. 155, 162.

The law does not define "provocation," or the degree thereof which should be deemed considerable. The word has no meaning in law different from that of popular acceptance. Webster defines it as the "state of

being provoked; vexation; anger." Whatever would conduce to arouse anger is proper to be proved in determining whether a defendant, in a prosecution for assault with a deadly weapon, had acted under the influence of rage and passion so provoked. Words do excite the passions, and arouse anger and rage, and while they are not sufficient in law to justify an assault, or an assault and battery, yet they are proper for consideration in connection with the conduct of the prosecutor, when it is to be determined whether defendant is guilty under the statute of acting without considerable provocation. *Ruble v. People*, 67 Ill. App. 438, 439, 440.

## PROVOKE

"To provoke is to excite, to stimulate, to arouse." So that, where violent language aroused the bad passions of another, so that he replied in kind, strife and contention were provoked. *State v. Warner*, 34 Conn. 276, 279.

In the law relative to the subject of provoking difficulty, the word "provoke" is used in its ordinary sense, as meaning to excite to anger or passion, to exasperate, to irritate or enrage. *Cook v. State*, 63 S. W. 872, 874, 43 Tex. Cr. R. 182, 96 Am. St. Rep. 854; *Casner v. State*, 62 S. W. 914, 915, 43 Tex. Cr. R. 12.

## PROVOKING A DIFFICULTY.

The term "provoking a difficulty," within the meaning of the rule that a person provoking a difficulty cannot kill his opponent in self-defense, means that he must have provoked it with intent to kill his adversary or do him great bodily harm, or to afford him a pretext for wrecking his malice upon his adversary. It is not every provocation, just or unjust, which he may offer that will justify an assault on him, or the menace of one, from which he cannot defend himself. *Foutch v. State*, 34 S. W. 423, 424, 95 Tenn. (11 Pickle) 711, 45 L. R. A. 687.

## PROWL

The word "prowl" means to rove or wander over in a stealthy manner; to collect by plunder; to rove or wander stealthily, as one in search of plunder. *Swart v. Rickard*, 42 N. E. 665, 666, 148 N. Y. 264.

## PROWLERS.

See "Armed Prowlers."

## PROXIMATE.

Proximate means direct or immediate. *Jung v. City of Stevens Point*, 43 N. W. 513, 514, 74 Wis. 547.

Proximate is defined as immediate, nearest, next in order. *Smith v. Los Angeles & P. Ry. Co.*, 33 Pac. 53, 54, 98 Cal. 210.

All dominion has two causes, proximate and remote. Remote is the title which vests a right to the thing, and gives cause of action against the vendor, who has not delivered the thing sold; and proximate is the obtaining possession by delivery of the thing sold, which, without anything else, being preceded by the title, vests the right in the thing, which is the dominion. The consequence is that the right to the thing gives a personal action, and the right in the thing gives the right of action against any possessor. *Coles v. Perry*, 7 Tex. 109, 136.

The rule of law requires that the damages chargeable to a wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's derelictions and the loss. *Wiley v. West Jersey R. Co.*, 44 N. J. Law (15 Vroom) 247, 251 (citing *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. Law [6 Vroom] 17, 10 Am. Rep. 205; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. Law [10 Vroom] 299, 23 Am. Rep. 214); *Carter v. Cape Fear Lumber Co.*, 39 S. E. 828, 831, 129 N. C. 203; *Newark & S. O. Ry. Co. v. McCann*, 34 Atl. 1052, 1053, 58 N. J. Law (29 Vroom) 642, 33 L. R. A. 127.

## PROXIMATE CAUSE.

Great ability and research have been expended in attempting to arrive at and determine upon some general definition of the terms "proximate cause" and "remote cause," and establish a rule and a line of demarkation between the two. Such efforts appear to have been but partially successful. Both have received various definitions, though differently worded, amounting to practically the same thing; but in almost every instance where they have been attempted to be applied, their applicability seems to have been determined by the peculiar circumstances of the case under consideration. Webster defines proximate cause as that which immediately precedes and produces the effect, as distinguished from the remote, mediate, or predisposing cause. *Anderson's Law Dictionary* defines it as "the nearest, the immediate, the direct cause; the efficient cause; the cause that sets another or other causes in operation; the dominant cause." With these definitions in view, when two causes unite to produce the loss, the question still remains, which was the proximate cause? *Blythe v. Denver & R. G. Ry. Co.*, 25 Pac. 702, 703, 15 Colo. 333, 11 L. R. A. 615, 22 Am. St. Rep. 403.

Much ingenuity has been displayed in efforts to make a general definition of prox-

imate cause in accident and marine insurance cases, but none of them are altogether satisfactory. In accident cases the real question is: What was the cause of the occurrence? What was it that put the plaintiff in peril? *Murphy v. Leggett*, 51 N. Y. Supp. 472, 473, 29 App. Div. 309.

The doctrine of proximate cause has a different relation to an action for negligence from that which it bears to a contract to indemnify for the result of a given cause. In the former it measures the liability, while in the latter the contract fixes the extent of the liability. *Travelers' Ins. Co. v. Melick* (U. S.) 65 Fed. 178, 184, 12 C. C. A. 544, 27 L. R. A. 629.

"The doctrine of proximate and remote cause has undergone great discussion in this country and in England; and, while the courts have attempted to define what is proximate and what is remote damage, it may be truthfully said: 'There can be no fixed and immediate rule on the subject that can be applied to all cases. It must therefore depend on the circumstances of each particular case.' Parsons, in referring to the confusion in which the question is left by the decisions, says: 'We have been disposed to think that there is a principle derivable, on the one hand, from the general reason and justice of the question, and, on the other hand, applicable as a test in many cases, and perhaps useful, if not decisive, in all. It is that every defendant shall be held liable for all those consequences which might have been foreseen and expected as a result of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into his consideration.' Proximate and real damages are the result of proximate and remote causes, coming in an inverse order. Strictly speaking, there are no remote causes and no remote damages. The proximate cause is that which produces the damage. The remote cause is used by comparison, as the irresponsible agent which seeks shelter behind a responsible one. The proximate cause is the vis major which intervenes and usurps the place of the primary force, or unites with it or overcomes it, so as to become the principal and real cause of the damage sustained; or it is the primary cause, traced back through intermediate causes, by natural and continuous succession, from an injury resulting to the wrong committed." *Pielke v. Chicago, M. & St. P. R. Co.*, 41 N. W. 669, 671, 5 Dak. 444; *Kelsey v. Chicago & N. W. Ry. Co.*, 45 N. W. 204, 206, 1 S. D. 80.

It has been found impracticable to prescribe, by abstract definition applicable to all possible states of facts, which is a proximate and what a remote cause. *Cleveland v. City of Bangor*, 32 Atl. 892, 896, 87 Me. 259, 47 Am. St. Rep. 326.

### Concurring or contributing cause.

Proximate cause may refer to more than one event or occurrence, as, where each party to an accident had been guilty of negligence, the negligence of each is a proximate cause. *Johnson v. Northwestern Telephone Exch. Co.*, 51 N. W. 225, 226, 48 Minn. 433.

Proximate cause means an act which concurred directly in producing the injury. *Troy v. Cape Fear & Y. V. R. Co.*, 6 S. E. 77, 81, 99 N. C. 298, 6 Am. St. Rep. 521.

The proximate cause of an injury may in general be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted, notwithstanding the latter. *Railroad v. Kelly*, 91 Tenn. (7 Pickle) 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902; *Chattanooga Light & Power Co. v. Hodges*, 70 S. W. 616, 617, 109 Tenn. 331, 60 L. R. A. 459, 97 Am. St. Rep. 844 (citing *Deming v. Merchants' Cotton Press & Storage Co.*, 90 Tenn. [6 Pickle] 303, 17 S. W. 89, 13 L. R. A. 518; *Postal Telegraph Cable Co. v. Zopf*, 93 Tenn. [9 Pickle] 369, 24 S. W. 633; *Anderson v. Miller*, 96 Tenn. [12 Pickle] 35, 33 S. W. 615, 31 L. R. A. 604, 54 Am. St. Rep. 812); *Postal Telegraph Cable Co. v. Zopf*, 24 S. W. 633, 634, 93 Tenn. (9 Pickle) 369 (citing *Deming v. Merchants' Cotton Press & Storage Co.*, 90 Tenn. [6 Pickle] 353, 17 S. W. 89, 13 L. R. A. 518).

Negligence cannot be regarded as the proximate cause of an injury, so long as it appears that some other thing contributed to produce the result. *Moore v. Inhabitants of Abbot*, 32 Me. 46, 53.

Where the negligence of the defendant and the act of a third person concurred to produce the injury complained of, so that it would not have happened in the absence of either, the negligence was the proximate cause of the injury. *Johnson v. Northwestern Telephone Exch. Co.*, 51 N. W. 225, 226, 48 Minn. 433.

The proximate cause of an injury, within the rule of law which relieves a defendant from liability where the contributory negligence of the plaintiff is the proximate cause of the injury, does not mean the sole and direct cause, but it includes all such acts or omissions as may have contributed to the injury complained of; and there may be more than one proximate cause. *Gunter v. Graniteville Mfg. Co.*, 15 S. C. 443, 452.

In an action for injuries to a servant, a direction that the jury find whether "the want of ordinary care and prudence on the part of plaintiff was the proximate cause of his injury" was error, as the question was, "Did the want of care and prudence contrib-

ute to produce the injury?" *Bigelow v. Danielson*, 78 N. W. 593, 599, 600, 102 Wis. 470.

Where several causes concur to produce certain results, either cause may be termed a "proximate cause," if it is an efficient cause of the result in question. *Young v. Syracuse, B. & N. Y. R. Co.*, 61 N. Y. Supp. 202, 204, 45 App. Div. 296.

To constitute a negligent act the proximate cause of the injury, it need not be the sole cause; but it is sufficient if it is the concurring cause, from which such a result might reasonably have been contemplated as involving the result under the attending circumstances. *San Antonio & A. P. R. Co. v. Jazo* (Tex.) 25 S. W. 712, 714; *City of San Antonio v. Porter*, 59 S. W. 922, 924, 24 Tex. Civ. App. 444; *Sickles v. Missouri, K. & T. Ry. Co.*, 35 S. W. 493, 495, 13 Tex. Civ. App. 434; *Texas & P. Ry. Co. v. Bigham* (Tex.) 36 S. W. 1111, 1112; *Galveston, H. & S. A. Ry. Co. v. Sweeney*, 6 Tex. Civ. App. 173, 178, 24 S. W. 947; *Mexican Nat. Ry. Co. v. Mussette*, 86 Tex. 708, 719, 26 S. W. 1075, 24 L. R. A. 642.

The rule that the negligence of the injured party, which proximately contributes to the injury of which he complains, precludes him from recovering, does not apply where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him. In *Kerwhaker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172, 62 Am. Dec. 246, it is held that when the negligence of the defendant in a suit upon such ground of action is the proximate cause of injury, but that of the plaintiff only remote, consisting of some act or omission not occurring at the time, the action is maintainable, and such is the well-settled law. *Cincinnati, H. & D. R. Co. v. Kassen*, 31 N. E. 282, 284, 49 Ohio St. 230, 16 L. R. A. 674.

Where several acts or conditions of things, one of them the wrongful act or omission of the defendant, produce the injury complained of, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury, if it be one which might reasonably be anticipated as an actual consequence of the act or omission. *La Londe v. Peake*, 84 N. W. 726, 727, 82 Minn. 124; *Hansen v. St. Paul Gaslight Co.*, 84 N. W. 727, 728, 82 Minn. 84; *Gulf, C. & S. F. Ry. Co. v. Roland*, 38 S. W. 756, 90 Tex. 365; *Central Texas & N. W. Ry. Co. v. Hoard* (Tex.) 49 S. W. 142, 143.

While the front brakeman of a railway train was signaling with his lantern, the light went out. He started to the engine to relight it, when the engineer put on the air and stopped the train, causing the brake-

man to fall off the car. Held, that the proximate cause of the accident was the extinguishment of the light, inasmuch as it brought on and set in motion the intermediate series of incidents that resulted in the brakeman's injuries. *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 33 N. E. 795, 798, 39 Am. St. Rep. 251.

If a disease resulting in death is the effect of an accident, so as to be a mere link in the chain between such death and accident, the death is not to be attributed to the disease, but to the accident alone. *Western Commercial Travelers' Ass'n v. Smith* (U. S.) 85 Fed. 401, 405, 29 C. C. A. 223, 40 L. R. A. 653.

An instruction in a personal injury action, defining "proximate cause" as "the direct and natural" and the "direct and producing cause, without the existence of which such injury would not have occurred," is defective, as it is sufficient to constitute proximate cause if the effect follows naturally and probably, though not directly and immediately. *Meyer v. Milwaukee Electric Ry. & Light Co.*, 93 N. W. 6, 8, 116 Wis. 336.

The sting of an insect is the "proximate cause" of death ensuing from blood poisoning caused by the sting. *Omberg v. United States Mutual Acc. Ass'n*, 40 S. W. 909, 910, 101 Ky. 303, 72 Am. St. Rep. 413.

#### Continuous, natural sequence.

The proximate cause of an event must be understood to be that which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. *Bosqui v. Sutro R. Co.*, 63 Pac. 682, 684, 131 Cal. 390 (citing *Shear. & R. Neg. § 26*); *Lutz v. Atlantic & P. R. Co.*, 30 Pac. 912, 916, 6 N. M. 496; *Ohl v. Bethlehem Tp.*, 49 Atl. 288, 199 Pa. 588; *City of Mt. Vernon v. Hoehn*, 53 N. E. 654, 655, 22 Ind. App. 282; *Reid v. Evansville & T. H. R. Co.*, 35 N. E. 703, 705, 10 Ind. App. 385, 53 Am. St. Rep. 391; *Dickson v. Omaha & St. L. R. Co.*, 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 476, 46 Am. St. Rep. 424; *Hudson v. Wabasha Western Ry. Co.*, 101 Mo. 13, 15, 14 S. W. 15; *Glick v. Kansas City, Ft. S. & M. R. Co.*, 57 Mo. App. 97, 104; *Saxton v. Missouri Pac. Ry. Co.*, 72 S. W. 717, 719, 98 Mo. App. 494 (citing *Ætna Fire Ins. Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395); *Denver & R. G. R. Co. v. Sipes*, 55 Pac. 1093, 1095, 26 Colo. 17; *Setter's Adm'r v. City of Maysville (Ky.)*, 69 S. W. 1074, 1075; *Liming v. Ry. Co.*, 47 N. W. 66, 67, 81 Iowa, 246; *Wehner v. Lagerfelt*, 66 S. W. 221, 224, 27 Tex. Civ. App. 520; *Butcher v. West Virginia & P. R. Co.*, 16 S. E. 457, 461, 37 W. Va. 180; *Smith v. County Court*, 11 S. E. 1, 3, 33 W. Va. 713, 3 L. R. A. 82; *Western Ry. v. Mutch*, 97 Ala. 194, 196, 11 South. 894, 21 L. R. A. 316.

38 Am. St. Rep. 179; *Roedecker v. Metropolitan St. R. Co.*, 84 N. Y. Supp. 300, 303, 87 App. Div. 227.

The proximate cause of an injury is that from which the injury immediately follows, as a sequence, without any intervening act adding to the damage or aiding to bring the person or thing injured within the exposure thereto. It is that from which the injury flows as the usual, ordinary, natural, and probable result. *West v. Ward*, 42 N. W. 309, 310, 77 Iowa, 323.

Consequences which follow an unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate. *Christianson v. Chicago, St. P., M. & O. Ry. Co.*, 69 N. W. 640, 641, 67 Minn. 94.

The proximate cause is that which, in a natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred; the cause which is most proximate in the order of responsible causation. *Lutz v. Atlantic & P. R. Co.*, 30 Pac. 912, 916, 6 N. M. 496, 16 L. R. A. 818.

A proximate cause is one which, in natural sequence, undisturbed by any independent cause, produces the result complained of. —*Behling v. Southwest Pennsylvania Pipe Lines*, 23 Atl. 777, 778, 160 Pa. 359, 40 Am. St. Rep. 724.

The test of proximate cause is whether the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that the final result cannot be said to be the natural and probable consequence of the primary cause. *Quinlan v. City of Philadelphia*, 54 Atl. 1026, 1027, 205 Pa. 309 (citing *Thomas v. Central R. Co. of New Jersey*, 184 Pa. 511, 45 Atl. 344).

#### Direct or immediate cause.

Proximate cause is defined to be that cause which immediately precedes and directly produces an effect, as distinguished from a remote or predisposing cause. *Burlington & M. R. R. Co. v. Budin*, 40 Pac. 503, 6 Colo. App. 275; *Travelers' Ins. Co. v. Murray*, 26 Pac. 774, 776, 16 Colo. 296, 25 Am. St. Rep. 265; *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393, 406, 71 Am. Dec. 78; *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271, 294; *Troy v. Cape Fear & Y. V. R. Co.*, 6 S. E. 77, 81, 99 N. C. 298, 6 Am. St. Rep. 521.

The direct cause may not be the proximate cause, and the proximate cause may not be the direct cause. Neither time nor distance is essentially a controlling element in determining whether a certain cause of an

injury is the proximate cause of such injury. So that an instruction that the words "direct" and "proximate" mean about the same thing—mean the cause which naturally produced the accident—is erroneous. *Wills v. Ashland Light, Power & St. Ry. Co.*, 84 N. W. 998, 1000, 108 Wis. 255.

An instruction that the term "proximate cause" means the direct cause, and that the words "direct cause" are equivalent to "proximate cause," proximate cause being the immediate and antecedent cause of the injury, and the word "direct" meaning the same thing, is erroneous. *Ward v. Chicago, M. & St. P. R. Co.*, 78 N. W. 442, 444, 102 Wis. 215.

Proximate cause is defined to be that cause which is nearest, most immediate to, and is the direct cause of the injury complained of. *Chicago, B. & Q. R. Co. v. Martelle*, 91 N. W. 364, 365, 65 Neb. 540.

Ordinarily that condition is usually termed the proximate cause whose share in the matter is the most conspicuous and is the most immediately preceding and proximate in the event. *Webster v. Monongahela River Consol. Coal & Coke Co.*, 50 Atl. 964, 966, 201 Pa. 278 (citing *Moulton v. Inhabitants of Sanford*, 51 Me. 127, 134).

By proximate cause is meant the first direct cause producing the injury. *Thackston v. Port Royal & W. C. Ry. Co.*, 18 S. E. 177, 178, 40 S. C. 80.

There is a distinction between a proximate and an immediate cause of an injury, and between a proximate and a remote cause. If the intoxication of a person was a remote cause only of his death by drowning, an action therefor could not be maintained against the person furnishing him the liquor; but if it was the proximate, although not the immediate, cause of death, the action was made out. The judge, in charging the jury, illustrated the difference between immediate and proximate cause by supposing the case of an intoxicated man falling into the water and drowning, in which case, said the judge, "the drowning is the immediate cause, and the intoxication, if that is what caused him to fall into the water, is the proximate cause." *Davis v. Standish* (N. Y.) 26 Hun, 608, 615.

"Proximate" is the opposite of "remote," meaning that which stands next in causal connection. Where the precise point in issue was whether or not "directly," in an instruction that contributory negligence, to be available, must have contributed directly to plaintiff's injury, was a stronger word than "proximately," it was held that the sense of both terms was that of closeness of connection, or being next in order, so that the use of the term "directly," instead of "proximately," was not erroneous or misleading.

Missouri, K. & T. R. Co. of Texas v. Lyons (Tex.) 53 S. W. 96, 97.

The "proximate cause" of an injury is that cause which immediately precedes and directly produces the injury, without which the injury would not have happened. *Lindvall v. Woods* (U. S.) 44 Fed. 855, 857.

A proximate cause is the immediate, direct, or efficient cause of the injury. *Ready v. Peavey Elevator Co.*, 94 N. W. 442, 444, 89 Minn. 154.

The words "immediate" and "proximate" are indiscriminately used to express the same meaning. *Longabaugh v. Virginia City & T. R. Co.*, 9 Nev. 271, 294 (citing *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393, 406, 71 Am. Dec. 78; *Kline v. Central Pac. R. Co.*, 37 Cal. 400, 406, 99 Am. Dec. 282; *Fitch v. Pacific R. Co.*, 45 Mo. 322, 327).

Civ. Code, § 3300, in providing that the measure of damages for the breach of an obligation arising from contract is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom, means such as next immediately follow and are produced by the act complained of. *Friend & Terry Lumber Co. v. Miller*, 8 Pac. 40, 42, 67 Cal. 464.

Where personal injury is the direct cause of a diseased condition, which results in paralysis or death, the injury is the proximate cause of the paralysis or death. *Bishop v. St. Paul City Ry. Co.*, 50 N. W. 927, 929, 48 Minn. 26; *Martin v. Manufacturers' Acc. Indemnity Co.*, 45 N. E. 877, 380, 151 N. Y. 94.

"So long and so far as an ultimate result can be traced to a first cause, though through successive stages, the responsibility rests with the one who put in operation the chain of events which caused the wrong or injury." *Purcell v. Lauer*, 14 App. Div. 33, 40, 43 N. Y. Supp. 988.

#### **Dominant cause.**

The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 133, 24 L. Ed. 395; *Owen v. Cook*, 81 N. W. 285, 288, 9 N. D. 134, 47 L. R. A. 646.

The proximate cause is the dominant controlling one, and not those which are mere incidents. *Yoders v. Amwell Tp.*, 33 Atl. 1017, 1020, 172 Pa. 447, 51 Am. St. Rep. 750.

#### **Efficient cause.**

The proximate cause of an accident is a cause without which the accident would not

have occurred. *Nashville R. v. Norman*, 67 S. W. 479, 481, 108 Tenn. 324; *Taylor v. Baldwin*, 21 Pac. 124, 125, 78 Cal. 517.

The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. *Mallen v. Waldowski*, 67 N. E. 409, 410, 203 Ill. 87 (citing *Ætna Fire Ins. Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395); *Owen v. Cook*, 81 N. W. 285, 288, 9 N. D. 134, 47 L. R. A. 646; *Byrne v. Wilson*, 15 Inst. C. L. 332, 342 (cited and approved in *Loeser v. Humphrey*, 41 Ohio St. 378, 383, 52 Am. Rep. 86); *Hawthorne v. Siegel*, 25 Pac. 1114, 1115, 88 Cal. 159; *Walrod v. Webster County*, 81 N. W. 598, 599, 110 Iowa, 349, 47 L. R. A. 480; *Turner v. Nassau Electric R. Co.*, 58 N. Y. Supp. 490, 492, 41 App. Div. 213; *Danville Ry. & Electric Co. v. Hodnett*, 43 S. E. 606, 609, 101 Va. 361 (citing *Ætna Fire Ins. Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395). The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. *Ætna Fire Ins. Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395; *American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co.* (U. S.) 57 Fed. 301, 6 C. C. A. 333, 21 L. R. A. 572; *Myers v. Chicago, M. & St. P. Ry. Co.* (U. S.) 101 Fed. 918, 919; *Washburn v. Farmers' Ins. Co.* (U. S.) 2 Fed. 304, 306; *Smith v. Los Angeles & P. Ry. Co.*, 33 Pac. 53, 54, 98 Cal. 210; *Monahan v. Eldlitz*, 69 N. Y. Supp. 335, 337, 59 App. Div. 224; *Trapp v. McClellan*, 74 N. Y. Supp. 130, 133, 68 App. Div. 362.

Generally speaking, the term "proximate cause" means the first or the efficient cause of the result, the cause acting first and directly producing the result, or which sets other causes in motion producing such injury; there being an intimate and close causal connection between such first cause and the final result. In either case the producing cause is held to reach to the injury and be the proximate cause of it. *Peltier v. Chicago, St. P., M. & O. R. Co.*, 60 N. W. 250, 251, 88 Wis. 521.

When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause, unless without its operation the accident would not have happened. *Ring v. City of Cohoes*, 77 N. Y. 83, 90, 33 Am. Rep. 574; *Phillips v. New York Cent. & H. R. R. Co.*, 27 N. E. 978, 979, 127 N. Y. 657.

A proximate cause in the law of negligence is such a cause as operates to produce particular consequences, without the inter-

vention of any independent, unforeseen cause, without which the injuries would not have occurred. *Schwartz v. New Orleans & C. R. Co.*, 34 South. 667, 670, 110 La. 534.

That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed. *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, 443; *Hawthorne v. Siegel*, 25 Pac. 1114, 1115, 88 Cal. 159, 22 Am. St. Rep. 291.

Whether a cause is proximate or remote does not depend alone upon the closeness in the way of doing in which certain things occur. An efficient, adequate cause, being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. *Travelers' Ins. Co. v. Murray*, 26 Pac. 774, 776, 16 Colo. 296, 25 Am. St. Rep. 267.

That negligence is the proximate cause of the injury which sets in motion a train of events that in their natural sequence might and ought to be expected to produce an injury, if undisturbed by any independent or intervening cause. *Holwerson v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 773, 157 Mo. 216, 50 L. R. A. 850.

In an action by a lessor against his lessee for damages to the building by the unauthorized act of the lessee in storing cotton therein, through which the building was injured by fire, and instruction was given that by proximate cause was meant the efficient, controlling event or act that produced the injury—the act or event which, without any intervening cause, brought about the injury complained of. This instruction was approved on appeal, the court saying: "The definitions of proximate cause are easily given in general terms, but they are very difficult in practical application to the facts of each particular case. There is, however, a marked distinction between the proximate cause of an accident and the proximate cause of the injury resulting from the accident. This is illustrated in the case of *Deming v. Merchants' Cotton-Press & Storage Co.*, 90 Tenn. (6 Pickle) 306, 353, 17 S. W. 89, 13 L. R. A. 518, in which the court said: 'It is true, the fire destroyed the cotton, and in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned by it, had not the breaking of the train happened while it was being removed, so that, but for this fact, the cotton would have been saved. This [the breaking of the train] must therefore be held to be the proximate cause of the loss, and, if it was the result of negligence, the carrier must answer for it.' In *East Tennessee, V. & G. Ry. Co. v. Kelly*, 91 Tenn. (7

Pickle) 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902, goods were consumed by fire which was not the result of defendant's negligence, but the goods would never have been exposed to the fire but for the negligent failure and refusal to deliver the goods on demand previous to the fire; so that, while the fire caused the loss, the failure to deliver caused the injury. In *Postal Telegraph Cable Co. v. Zopf*, 93 Tenn. (9 Pickle) 369, 374, 24 S. W. 633, the same distinction is illustrated, where the fall of a young girl was caused by the slippery condition of a walk way, but the injury proximately resulted from the telegraph company negligently leaving its pole where she fell upon it, and received an injury which would not have resulted but for the presence of the pole, even though she had fallen." *Anderson v. Miller*, 33 S. W. 615, 618, 96 Tenn. (12 Pickle) 35, 31 L. R. A. 604, 54 Am. St. Rep. 812.

In *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540, it is said that the active, efficient cause that sets in motion the train of events, which brings about the result without the intervention of any cause starting and working independently from a new source, is the direct and proximate cause referred to in the cases. *Moge v. Société de Bienfaisance St. Jean Baptiste*, 45 N. E. 749, 750, 167 Mass. 298, 35 L. R. A. 736.

Where different forces and conditions concur in producing a result, it is often difficult to determine which is proper to be considered the cause. The law will not go further back than to find the active, efficient, and procuring cause, of which the event under consideration is a natural consequence. *Freeman v. Mercantile Mut. Acc. Ass'n*, 156 Mass. 351, 30 N. E. 1013, 1014, 17 L. R. A. 753.

#### Foreseen or expected result.

The practical construction of a proximate cause has been said to be one from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. *City Council of Montgomery v. Wright*, 72 Ala. 411, 422 (citing *Shear. & R. Neg.* § 10); *Williams v. Southern Pac. Ry. Co. (Cal.)* 9 Pac. 152, 155; *Texas & P. Ry. Co. v. Woods*, 28 S. W. 416, 418, 8 Tex. Civ. App. 462; *American Exp. Co. v. Risley*, 53 N. E. 558, 559, 179 Ill. 295; *City Council of Montgomery v. Wright*, 72 Ala. 411, 422 (citing 3 Pars. Cont. [6th Ed.] § 179). See, also, *Missouri, K. & T. R. Co. v. Byrne (U. S.)* 100 Fed. 359, 362.

In *Thomp. Neg.* § 47, it is said that a long series of judicial decisions has defined "proximate cause" to be the ordinary and natural results of negligence, such as are usual, and therefore might have been expect-



ed. *Setter's Adm'r v. City of Maysville (Ky.)* 69 S. W. 1074, 1075.

In determining what is the proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. *Robb v. Pennsylvania Co. for Insurance on Lives and Granting Annuities*, 40 Atl. 969, 970, 186 Pa. 456, 65 Am. St. Rep. 868; *Gulf, C. & S. F. Ry. Co. v. Trott*, 25 S. W. 419, 420, 86 Tex. 412; *Ohl v. Bethlehem Tp.*, 49 Atl. 288, 199 Pa. 588.

It is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 256; *Lutz v. Atlantic & P. R. Co.*, 30 Pac. 912, 916, 6 N. M. 496, 16 L. R. A. 819; *Illinois Cent. R. Co. v. Woolley*, 28 South. 26, 27, 77 Miss. 927; *Hansen v. St. Paul Gaslight Co.*, 84 N. W. 727, 728, 82 Minn. 84.

"Proximate cause" is a cause from which a man of ordinary experience and sagacity could foresee that the result might ensue. *Shear. & R. Neg.* § 10. And that cause will be held proximate which is shown to be active, operative, and continuing, and the probable and natural source of the injury. *Lake Erie & W. R. Co. v. Charman*, 67 N. E. 923, 926, 161 Ind. 95.

Strictly defined, an act is the "proximate cause" of an event, when in the natural order of things and under the particular circumstances surrounding it, such an act would necessarily produce that event; but the practical construction of "proximate cause" by the courts is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. *Enocks v. Pittsburgh, C., C. & St. L. Ry. Co.*, 145 Ind. 635, 637, 44 N. E. 658, 659.

The proximate cause of an injury is that which naturally led to, and which might have been expected to be directly instrumental in producing, the result. *Consolidated Electric Light & Power Co. v. Koepp*, 68 Pac. 608, 609, 64 Kan. 735; *State v. Manchester & L. R. R.*, 52 N. H. 528, 529.

"Proximate cause is what leads to, and might be expected directly to produce, the injury; that is, such a cause as naturally suggests itself to the mind of a prudent man as likely to cause the accident which produces the damage." *Jacksonville, T. & K.*

*W. Ry. Co. v. Peninsular Land Transportation & Mfg. Co.*, 9 South. 661, 673, 676, 27 Fla. 1, 157, 17 L. R. A. 33, 65.

Where the question is whether a cause proximated to the accident, the test is whether it was such that a person of ordinary intelligence and prudence should have foreseen that the accident was liable to be produced by that cause. *Wilber v. Follansbee*, 72 N. W. 741, 742, 97 Wis. 577; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 378, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Davis v. Chicago, M. & St. P. Ry. Co.*, 67 N. W. 16, 19, 93 Wis. 470, 33 L. R. A. 654, 57 Am. St. Rep. 935.

An instruction that, in order to find proximate causation, they must be satisfied that the injury was the natural and probable consequence of the defect, foreseeable by exercise of ordinary care, is correct; these being the essential elements of proximate cause. *Nix v. C. Reiss Coal Co.*, 90 N. W. 437, 440, 114 Wis. 493.

The proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer. 1 *Thomp. Neg.* 156. Nervous prostration from fright caused by defendant's trespassing by stealthily entering in the nighttime plaintiff's house is a proximate result of the wrong, for which recovery may be had. *Watson v. Dilts*, 89 N. W. 1068, 1069, 116 Iowa, 249, 57 L. R. A. 559, 93 Am. St. Rep. 239.

In determining whether or not an act is the proximate cause of an injury, the legal test is: "Was the injury of such a character as might reasonably have been foreseen or expected as the natural result of the act complained of?" *Newman v. Chicago & St. P. Ry. Co.*, 45 N. W. 1054, 1056, 80 Iowa, 672; *Gulf, C. & S. F. Ry. Co. v. Rowland*, 38 S. W. 756, 757, 90 Tex. 365; *Holwerson v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 773, 157 Mo. 216, 50 L. R. A. 850.

"Proximate damages are such as are the ordinary and natural results of the omission or commission of acts of negligence, and such as are usual and might have been reasonably expected. Remote damages are such as are the unusual and unexpected result not reasonably to be anticipated. \* \* \* The law regards only the direct and proximate results of negligent acts as creating any liability." *Braun v. Craven*, 51 N. E. 657, 659, 175 Ill. 401, 42 L. R. A. 199.

In cases of negligence, in order to create a proximate cause, it is not in reason or by authority made necessary that the wrongdoer should have anticipated that his act would produce the result complained of. *Laible v. New York Cent. & H. R. R. Co.*,

43 N. Y. Supp. 1003, 1009, 13 App. Div. 574. See, also, *White Sewing Mach. Co. v. Richter*, 28 N. E. 446, 2 Ind. App. 331.

The rule of common sense and human experience is that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind. In an action against a carrier for carrying plaintiff beyond her destination, the anxiety and physical injury caused by her exposure to rain and cold after being returned to her destination were not proper elements of damage. *Louisville & N. R. Co. v. Quick*, 28 South. 14, 16, 125 Ala. 553.

#### Inevitable or necessary result.

"Proximate cause" was substantially the same originally as "causa causans," or the cause necessarily producing the result; but the practical construction of the term has now come to be the cause which naturally led to, and which might have been expected to produce, the result. *State v. Manchester & L. R. R.*, 52 N. H. 528, 532.

A proximate cause is one which involves the idea of necessity. It is one the connection between which and the effect is plain and intelligible. *Koch v. Zimmermann*, 83 N. Y. Supp. 339, 342, 85 App. Div. 370. It is one which can be used as a term by which a proposition can be demonstrated; that is, one which can be reasoned from conclusively. *Seifter v. Brooklyn Heights R. Co.*, 62 N. E. 349, 350, 169 N. Y. 254; *Marks v. Rochester Ry. Co.*, 58 N. Y. Supp. 210, 216, 41 App. Div. 66; *Hoey v. Metropolitan St. Ry. Co.*, 70 App. Div. 60, 63, 74 N. Y. Supp. 1113; *Laidlaw v. Sage*, 52 N. E. 679, 688, 158 N. Y. 73, 44 L. R. A. 216.

In cases of negligence, in order to create a proximate cause, it is not in reason or by authority made necessary that the wrongdoer's act would have necessarily produced the result complained of. *Laible v. New York Cent. & H. R. R. Co.*, 43 N. Y. Supp. 1003, 1009, 13 App. Div. 574.

That is the proximate cause which is most proximate in the order of responsible causation. If it cannot be said that the result would have inevitably occurred by reason of the defendant's negligence, it cannot be found that it did so occur, and the plaintiff has not made out his case. *Butcher v. West Virginia & P. R. Co.*, 16 S. E. 457, 461, 37 W. Va. 180, 18 L. R. A. 519.

An act is said to be the proximate cause of an event when, in the natural order of things and under the existing circumstances, it would necessarily produce the result or

event. *Thackston v. Port Royal & W. C. Ry. Co.*, 18 S. E. 177, 178, 40 S. C. 80; *Oakland Bank of Savings v. Murfrey*, 9 Pac. 843, 847, 68 Cal. 455.

Proximate cause is the first and direct power of producing the result, or the "causa causans" of the schoolmen. *Beach, Contrib. Neg. § 10*. If the wrong and resulting damages are not known by common experience to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently joined or concatenated as cause and effect to support the action. *Cooley, Torts, § 69*; *Oakland Bank of Savings v. Murfey*, 9 Pac. 843, 847, 68 Cal. 455.

An injury is the result of an act when without the act the injury would not have been inflicted. *Mexican Nat. Ry. Co. v. Mussette*, 26 S. W. 1075, 1079, 86 Tex. 708, 24 L. R. A. 642.

#### Intervening agency.

Though a negligent act or omission be removed from the injury by intermediate causes and effects, yet, if the party guilty ought reasonably to have foreseen the ultimate consequence, such negligence is deemed in law the proximate cause of the injurious effect. *Gulf, C. & S. F. Ry. Co. v. Rowland*, 38 S. W. 756, 757, 90 Tex. 365.

What is in law a proximate cause is well expressed in the definition, often quoted with approval, given in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256: The primary cause may be the proximate cause of a disaster, though it operate through successive instruments, as an article at the end of a chain may be moved by force applied to the other end, that force being the proximate cause of the movement; or, as in the oft-cited case of squibs thrown in the market place. *Scott v. Shepherd*, 2 W. Bl. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? There may be a succession of intermediate causes, each produced by the one preceding and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. *Mack v. South Bound R. Co.*, 29 S. E. 905, 910, 52 S. C. 323, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Atkinson v. Goodrich Transp. Co.*, 18 N. W. 764, 771, 60 Wis. 141, 50 Am. Rep. 352; *Purcell v. St. Paul City Ry. Co.*, 50 N. W. 1034, 48 Minn. 134, 16 L. R. A. 203.

An injury that is not the natural consequence of the negligence, and would not

have resulted from it but for the interposition of some new individual cause that could not have been anticipated, is not actionable; the negligence not being the proximate cause. *Missouri K. & T. Ry. Co. v. Byrne* (U. S.) 100 Fed. 359, 362, 40 C. C. A. 402.

If, subsequent to the original or negligent act, a new cause has intervened of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote. The original wrongful or negligent act will not be regarded as the proximate cause, where any new agency not within the contemplation of the wrongdoer has intervened to bring about the injury. Where, however, the intervening cause and its probable or reasonable consequences are such as could reasonably have been anticipated by the original wrongdoer, the causal connection between the original wrongful act and the consequent injury is not broken, and it is the proximate cause of the other. *Seale v. Gulf, C. & S. F. Ry. Co.*, 65 Tex. 274, 277, 57 Am. Rep. 602.

It has often been held that it is not every intervening agency that shields the wrongdoer from responsibility where an injury results from his wrongful act. Where an injury is attributable to two causes, both proximate, one the result of negligence and the other not, and the injury would not have occurred but for the negligent act, the party who is guilty of the negligent act or omission will be held liable. Whether the act complained of was in legal contemplation the proximate cause of the injury does not depend entirely upon its having been the mediate or immediate source of such injury, as proximity in point of time is not necessarily decisive of the question as to what was the proximate cause. *Reid v. Evansville & T. H. R. Co.*, 35 N. E. 703, 705, 10 Ind. App. 385, 53 Am. St. Rep. 391.

The cause of an injury in the contemplation of law is that which immediately produces it as its natural consequence; and therefore if a party be guilty of an act of negligence, which would naturally produce an injury to another, but before such injury actually results a third person does some act which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is in no degree responsible therefor, though the injury could never have occurred but for his negligence. The casual connection between the first act of negligence and the injury is broken by the intervention of the act of a responsible party, which act is in law regarded as the sole cause of the injury, according to the maxim, "In jure non remota causa, sed proxima, spectatur." *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190, 196; *Clark v. Wilmington & W. R. Co.*, 14 S. E. 43, 47, 109 N. C. 430, 14 L. R. A. 749; *Louisville & N. R. Co. v. Quick*, 28 South. 14, 16, 125 Ala. 553.

Where there is negligence and injury flowing from it, and there is also an intermediate cause disconnected from the negligence, and the operation of this cause produces the injury, the person guilty of the negligence cannot be held responsible for the injury. The inquiry must always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produced the injury. *Wehner v. Lagerfelt*, 66 S. W. 221, 224, 27 Tex. Civ. App. 520.

Where a result is not the probable or legitimate result of a first cause, and might not have resulted but for some new, intervening cause, or this is a matter of contest, in such cases the intervening cause may be regarded as the "proximate cause," and the first as too remote. If the result was the necessary and inevitable effect of a first cause, and a new independent force intervened sufficient of itself to produce the effect, and only hastened the result, this does not make the first cause too remote. In such cases both causes necessarily contribute to the result. Where an injury inflicted was fatal, but before death poison was given sufficient to cause death, and was the immediate cause of death, the poison is not to be regarded as the "proximate cause," so as to relieve the inflicter of the first injury from liability. *Thompson v. Louisville & N. R. Co.*, 8 South. 406, 407, 91 Ala. 496, 11 L. R. A. 146.

As was said by Mr. Justice Cushing in the leading case of *Scripture v. Lowell Mut. Fire Ins. Co.*, 64 Mass. (10 Cush.) 356, 57 Am. Dec. 111: "If, then, a combustible substance, in the process of combustion, produces explosion also, it is not easy to perceive why, of the two diverse but concurrent results of the combustion, the one should be ascribed to fire any less than the other. The plain fact here is the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediate damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance; and, as the combustion is the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff." *American Steam Boiler Ins. Co. v. Chicago Sugar Refinery Co.* (U. S.) 57 Fed. 294, 301, 6 C. C. A. 336, 21 L. R. A. 572.

Where one party has been negligent, and the second party, knowing of such antecedent negligence, fails to use ordinary care to prevent an injury which the antecedent negligence rendered possible, and the injury follows by reason of such failure, the negligence of the second party is the sole proximate cause.

mate cause of the injury. *Bostwick v. Minneapolis & P. Ry. Co.*, 51 N. W. 781, 785, 2 N. D. 440.

The doctrine of proximate cause in cases of accident resulting from the frightening and consequent running away of horses on the highway, as deduced from the numerous adjudications thereon, seems to be that the negligence which causes the fright and consequent running away of the horse is the proximate cause of the injury, and that this is so, although some intervening cause contributed to the injury. *Willis v. Providence Telegram Pub. Co.*, 38 Atl. 947, 20 R. I. 285.

#### Natural and probable result.

Where an injury is the natural and ordinary result of some cause, the same is the proximate cause. *Harris v. Union Pac. R. Co.* (U. S.) 13 Fed. 591, 592.

✓ An injury that is the natural and probable consequence of an act of negligence is actionable, because that act is its proximate cause. *Missouri, K. & T. R. Co. v. Byrne* (U. S.) 100 Fed. 359, 362, 40 C. C. A. 402.

By proximate cause we mean that the damage must be the direct and natural consequence of the defendant's negligence, without any intervening force or power operating as a cause of the injury. *Ryan v. Gross*, 68 Md. 377, 12 Atl. 115.

The proximate cause of an injury is said to be such as "by the usual course of events would result, unless independent disturbing moral agencies intervene, in the particular injury." *City Council of Montgomery v. Wright*, 72 Ala. 411, 422, 47 Am. Rep. 422 (citing *Whart. Neg.* § 324).

In *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653, it was said: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence, as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act." *Banks v. Wabash Western Ry. Co.*, 40 Mo. App. 458, 464.

An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. A proximate cause is a natural consequence of an act, a result which may be reasonably anticipated. *Cole v. German Savings & Loan Soc.* (U. S.) 124 Fed. 113, 115, 59 C. C. A. 593, 63 L. R. A. 416.

The true rule as to the proximate cause of an injury is not that the injury sustained must be the necessary result of the wrongful act, but that it shall be a natural or probable consequence, or one likely to ensue from it. *Houston & T. C. R. Co. v. McDonough*, 1 White & W. Civ. Cas. Ct. App. §§ 651, 655.

In order to constitute "proximate cause" of an injury, the injury must be the natural and probable result of the negligent act or omission. Where a common carrier failed to make prompt delivery of goods, and they were thereby lost in an unprecedented storm, the act of God and not the carrier's negligence was the proximate cause of the loss. *International & G. N. R. Co. v. Bergman* (Tex.) 64 S. W. 999, 1000.

Proximate cause is that cause producing the injury that was the natural and probable consequence of the negligence complained of, and that ought to have been foreseen in the light of attending circumstances. *Texas Cent. R. Co. v. Bender* (Tex.) 75 S. W. 561, 562.

A cause may be proximate, although it is the first of a series of acts resulting in an injury, if each of the subsequent acts be a natural and probable result of the first. *Swift v. Rutkowski*, 67 Ill. App. 209, 210.

In order to warrant a finding that negligence or an act not amounting to a wanton wrong is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. *Western Union Tel. Co. v. Partlow*, 71 S. W. 584, 586, 30 Tex. Civ. App. 599 (citing *Fererro v. Western Union Tel. Co.*, 9 App. D. C. 455, 35 L. R. A. 548).

#### Nearest or next cause.

In the use of the words "proximate cause," negligence occurring at the time of the injury is meant. *Kilpatrick v. Grand Trunk Ry. Co.*, 47 Atl. 827, 828, 72 Vt. 263, 82 Am. St. Rep. 939.

By "proximate cause" or "negligence which proximately contributed to the accident," is meant negligence occurring at the time of the event; that is, negligence having immediate or present relation to the accident. *Bierbach v. Goodyear Rubber Co.* (U. S.) 14 Fed. 826, 829.

By "proximate cause" is not meant the last act of cause or nearest act to an injury, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause. *Texas & P. R. Co. v. Bigham* (Tex.) 36 S. W. 1111, 1112 (citing *Mexican Nat. Ry. Co. v. Mussette*, 86 Tex. 708, 719, 26 S. W. 1075, 24 L. R. A. 642; *Galveston, H. & S. A. Ry. Co. v. Sweeney*, 6 Tex. Civ. App. 173, 178, 24 S. W. 947; *Sickles v. Missouri, K. & T. Ry. Co. of Texas*, 35 S. W. 493, 495, 18 Tex. Civ. App. 434).

Strictly speaking, the proximate cause is that which immediately precedes and directly occasions a loss. It is not denied that, in

numerous cases where insured property has not been at all injured or affected by the direct action of the peril, the insurers have been held responsible for a subsequent loss, even when its immediate cause has been an act or event not mentioned in the policy; nor is it denied that in all such cases the law attributes the loss to the original peril as its proximate cause. It was held in this case that an insurance company, insuring against fire, was responsible for the loss of goods stolen during the fire, although fire was the only risk mentioned in the policy. *Tilton v. Hamilton Fire Ins. Co. (N. Y.) 14 How. Prac. 363, 368.*

By "proximate cause" we do not mean the last act of cause, or nearest act to the injury, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the result under the attending circumstances. *Gonzales v. City of Galveston, 19 S. W. 284, 285, 84 Tex. 3, 31 Am. St. Rep. 17.*

The cause of an event is the sum total of the contingencies of every description, which being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily that condition is usually termed the cause whose share in the matter is the most conspicuous and is the most immediately preceding and proximate to the event. *Jucker v. Chicago & N. W. Ry. Co., 8 N. W. 862, 52 Wis. 150.*

"Proximate cause literally means the cause nearest to the effect produced, but in legal terminology the terms are not confined to their literal meaning." *Gulf, C. & S. F. Ry. Co. v. Rowland, 38 S. W. 756, 757, 90 Tex. 365; Central Texas & N. W. Ry. Co. v. Hoard (Tex.) 49 S. W. 142, 143.*

The proximate cause is the nearest or next cause, as distinguished from a remote or predisposing cause. *Story v. Chicago, M. & St. P. Ry. Co., 44 N. W. 690, 692, 79 Iowa, 402.*

An instruction that the proximate cause of an injury is the near cause is erroneous. *Delsenrieter v. Kraus-Merkel Malting Co., 72 N. W. 735, 739, 97 Wis. 279.*

The cause nearest in order of causation which is adequate to produce the result is the direct or proximate cause, and the only cause considered in law. A person slipped and fell on the smooth surface of ice formed in a depression in a sidewalk. In such case the ice was the proximate cause of the injury, and the depression in the walk where the ice formed, if a cause of the injury in any sense, was the remote, and not the proximate,

cause thereof. *Chamberlain v. City of Oshkosh, 84 Wis. 289, 293, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928.*

Ordinarily the direct and proximate cause is the cause that sets in motion the train of events which brings about the result, without the intervention of any force operating and working actively from a new and independent source. For example, a negligent act causes a nervous shock; a nervous shock causes a physical injury. The proximate cause of the injury is the negligent act. The proximate cause is not necessarily the one nearest the effect for which the person is responsible. Where by the terms of an exception in an accident insurance policy it was stipulated that the company was not to be liable when death resulted wholly or partially and directly or indirectly from hernia, and insured, in starting to run through a half open door of his residence to catch a passing street car, ran against the door knob, receiving an injury called hernia, from which he died, the hernia was not the proximate cause of his death. *Miner v. Travelers' Ins. Co., 3 Ohio Dec. 289, 290.*

#### Nearest in time or place.

Proximate cause does not mean the direct cause in point of time, but may mean the nearest by relation. *Bailey, Mast. Liab. p. 418; Maryland Steel Co. v. Marney, 42 Atl. 60, 65, 88 Md. 482, 42 L. R. A. 842, 71 Am. St. Rep. 441.*

A proximate cause is that which has been next in causation to the effect, not necessarily in time or space, but in causal relation. *Pullman Palace Car Co. v. Laack, 32 N. E. 285, 291, 143 Ill. 242, 17 L. R. A. 818.*

Proximate cause means such cause as would probably lead to injury, and which has been shown to have led to it. It need not appear from the evidence that the injuries complained of resulted instantly and immediately from the negligence. The law regards the one as the proximate cause of the other, without regard to lapse of time, where no other cause intervenes or comes between the negligence charged, and the injuries received to contribute to it. There must be nothing to break the causal connection between the alleged negligence in the injuries. *Henry v. Cleveland, C., C. & St. L. R. Co. (U. S.) 67 Fed. 426, 429.*

Proximate cause is not always, nor generally, the act or omission nearest in time or place to the effect it produces. In the sequence of events there are often many remote or incidental causes nearer in point of time and place to the effect than the efficient moving cause, and yet subordinate to it, and often themselves influenced, if not produced, by it. *Missouri Pac. Ry. Co. v. Moseley (U. S.) 57 Fed. 921, 925, 6 C. O. A. 641; Travelers' Ins. Co. v. Melick (U. S.)*

65 Fed. 178, 184, 12 C. C. A. 544, 27 L. R. A. 629; *Holwerson v. St. Louis & S. Ry. Co.*, 57 S. W. 770, 773, 157 Mo. 216, 50 L. R. A. 850.

Proximate cause means closeness of causal connection, and not nearness in time or distance, and the word "proximate" is intended to qualify the generality of the idea expressed by the word "natural." *Kuhn v. Jewett*, 32 N. J. Eq. (5 Stew.) 647, 649; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. Law (10 Vroom) 299, 308, 23 Am. Rep. 214. Many results of an act are perfectly natural, and yet the consequences are so remote from the act done as not to involve legal responsibility; for instance, the natural tendency of fire, when kindled, is to spread and destroy all combustible matter in its progress, and the destruction of a building, however far distant from the place where the fire was kindled, is a natural consequence of the fire, and yet its destruction may be so disconnected from the wrongful or negligent act of building the fire that the wrongdoer would not be legally responsible for the loss. *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. Law (10 Vroom) 299, 308, 23 Am. Rep. 214.

Proximity in point of time or space, however, is no part of the definition; that is, it need not be the nearest in point of time to the injury. *Ohl v. Bethlehem Tp.*, 49 Atl. 288, 199 Pa. 588; *Dickson v. Omaha & St. L. Ry. Co.*, 27 S. W. 476, 478, 124 Mo. 140, 25 L. R. A. 320, 46 Am. St. Rep. 429. This is of no importance, except as it may afford facts for or against proximity of causation. *Dickson v. Omaha & St. L. Ry. Co.*, 27 S. W. 476, 478, 124 Mo. 140, 25 L. R. A. 320, 46 Am. St. Rep. 429.

By proximate cause is not meant the last cause or the nearest act to the injury, but such act, wanting in ordinary care, as actively aided in producing the injury as a direct and existing cause. *San Antonio & A. P. R. Co. v. Jazo*, 25 S. W. 712, 714.

The negligent burning of a house, the spreading of the fire to a neighboring house, and the burning thereof, do not give the owner of the last house a cause of action against the owner of the house in which the fire originated, since the damages are too remote. *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, 91 Am. Dec. 49.

By proximate cause is meant that cause which directly precedes and produces the effect, as distinguished from the remote causes. Whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. The application of the principles relating to proximate cause is not necessarily controlled by time or distance, nor by the succession of events. An efficient, adequate cause,

having been found, must be deemed the true cause, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result. *McCarthy v. Travelers' Ins. Co. (U. S.)* 15 Fed. Cas. 1254, 1256.

#### Probable cause.

It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable cause. *Davis v. Chicago, M. & St. P. Ry. Co.*, 67 N. W. 16, 19, 93 Wis. 470, 33 L. R. A. 654, 57 Am. St. Rep. 935 (citing *Block v. Milwaukee R. Co.*, 89 Wis. 378, 61 N. W. 1101).

Proximate cause is probable cause. *Armour v. Golkowska*, 66 N. E. 1037, 1038, 202 Ill. 144; *Watson v. Dilts*, 89 N. W. 1068, 1069, 116 Iowa, 249, 57 L. R. A. 559, 93 Am. St. Rep. 239.

#### PROXIMATE DAMAGE.

Proximate and remote damages are the result of proximate and remote causes, reasoning in an inverse order. Strictly speaking, there are no remote causes and no remote damages. The proximate cause is that which produces the damage. The remote cause is used by comparison as the irresponsible agent which seeks shelter behind the responsible one. *Pielke v. Chicago, M. & St. P. Ry. Co.*, 41 N. W. 669, 671, 5 Dak. 444.

Proximate damages are the immediate and direct damages and natural results of negligence, such as are usual and might have been expected. *Henry v. Southern Pac. R. Co.*, 50 Cal. 176, 183.

Proximate damage is the natural sequence of a wrongful act or omission flowing directly from it in obedience to some well-understood and recognized force. *Kuhn v. Jewett*, 32 N. J. Eq. (5 Stew.) 647, 649.

#### PROXIMATELY.

The words "approximately" and "proximately" are not synonymous, but closely allied in meaning. The use of the former in an instruction that one who is injured by the negligence of another cannot recover damages therefor, if the injured party by his own negligence or willful wrong approximately contributed to the injury so that it would not have happened but for his own fault, could not have misled the jury. *Pledger v. Chicago, B. & Q. R. Co. (Neb.)* 95 N. W. 1057, 1060.

#### PROXIMITY.

See "Close Proximity."

## PROXY.

See "Right to Vote by Proxy."

A proxy is an authority or power to do a certain thing. *Tunis v. Hestonville*, M. & N. Pass. R. Co., 149 Pa. 70, 84, 24 Atl. 88, 15 L. R. A. 665.

## PRUDENCE.

See "Ordinary Prudence"; "Reasonable Prudence."

Prudence means that degree of care required by the exigencies or circumstances under which it is to be exercised. *Cronk v. Chicago, M. & St. P. Ry. Co.*, 52 N. W. 420, 422, 3 S. D. 93 (citing *And. Law Dict.*).

## PRUDENT PERSON.

See "Ordinarily Prudent Man"; "Reasonably Prudent Person."

Cautious distinguished, see "Cautious."

The expression "prudent person," as used in a definition of ordinary care as that which a prudent person would exercise under the same circumstances, means the average prudent person or the ordinarily prudent person, so that such a definition is not erroneous because of the absence of the word "ordinarily" before the expression "prudent person." *Texas & N. O. R. Co. v. Black (Tex.)* 44 S. W. 673, 675.

The term "prudent person" does not mean the same as a person of ordinary prudence, since a prudent person may include a person of more than ordinary prudence. *La Puelle v. Fordyce*, 23 S. W. 453, 454, 4 Tex. Civ. App. 391.

## PRUDENTIAL AFFAIRS.

"Prudential affairs," as used in *Prov. St. 1692* (Anc. Charters, 249), by which freeholders in any town meeting were empowered to make and agree upon necessary rules for directing the prudential affairs of the town, means that class of miscellaneous subjects affecting the accommodation and convenience of the inhabitants, such as public schools, burying grounds, wells, and reservoirs, etc. *Willard v. Inhabitants of Newburyport*, 29 Mass. (12 Pick.) 227, 231.

"Prudential affairs," as used in *Rev. St. c. 3, § 59, par. 1*, authorizing municipalities to adopt ordinances for managing their "prudential affairs," are very indefinite and unsatisfactory words, making it a very difficult matter in many cases to determine just what is or is not included within the meaning of the expression; but it does not cover matters enumerated in the other paragraphs

of the section of the statute authorizing the passage of ordinances for certain specified purposes. *State v. Boardman*, 44 Atl. 118, 120, 93 Me. 73, 46 L. R. A. 750.

The phrase "prudential affairs," in *Laws 1830*, p. 453, providing that the selectmen of a town shall have the management of all prudential affairs, includes the assessment and collection of taxes. *Pike v. Middleton*, 12 N. H. 278, 282.

Under a statute authorizing selectmen to superintend the prudential concerns of their respective towns, they have no authority to adjust controversies or suits of the corporation, or to bind them to the payment of money for such an adjustment by a written contract. *Underhill v. Gibson*, 2 N. H. 352, 355, 9 Am. Dec. 82.

Under the statute providing that selectmen of a town shall have the ordering and managing of all its prudential affairs, a selectman may discharge, in behalf of the town, debts which are due and of such a character that they should be paid. *Sanborn v. Town of Deerfield*, 2 N. H. 251, 252.

*Rev. St. c. 34, § 2*, making it the general duty of selectmen to manage all the "prudential affairs of the town," does not authorize them to borrow money upon the credit of the town without a vote of the town for that purpose. *Rich v. Town of Errol*, 51 N. H. 350, 354, 357.

## PRUNE.

A lease of an orchard, in which the lessees agreed to properly "prune and cultivate the orchard according to good horticultural methods," requires the doing of those things which are essential to keep the trees in good condition and preserve their fruit-bearing qualities, which would include the cutting of suckers and water sprouts, when necessary to the health of trees, as well as the taking of proper steps to remove insect pests, which sap their lives when the trees are so infested. *Anderson v. Hammon*, 24 Pac. 228, 229, 19 Or. 446, 20 Am. St. Rep. 832.

## PTOMAIN.

A poisonous product of putrefaction. *People v. Buchanan*, 39 N. E. 846, 849, 145 N. Y. 1.

## PUBERTY.

By the common law, for matrimonial purposes, puberty is fixed at 12 years in females. This rule was derived from the civil and common law, though the latter did not regard the age as conclusive, but permitted the fact of puberty to be proved by ac-

tual inspection. *State v. Pierson*, 44 Ark. 265, 266.

## PUBLIC.

Mr. Webster says that in general "public" expresses something common to mankind at large, to a nation, state, city, or town, and is opposed to "private," which denotes that which belongs to an individual, to a family, to a company, or to a corporation. *Chamberlain v. City of Burlington*, 19 Iowa, 395, 402.

The word "public" is used variously, depending for its meaning on the subjects to which it is applied; thus "public law," in one sense, is a designation given to international law, as distinguished from the laws of a particular nation or state, while in another sense a law or statute that applies to the people generally of the nation or state adopting it or enacting it is denominated a "public law" as contradistinguished from a "private law" affecting only an individual or a smaller number of persons. The terms "public debt" and "public security," used in statutes, are terms generally applied to national or state obligations and dues, and would rarely, if ever, be construed to include town debts or obligations; nor would the term "public revenue" ordinarily be applied to funds arising from town taxes. *Morgan v. Cree*, 46 Vt. 773, 786, 14 Am. Rep. 640.

The term "public" does not mean all the public, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few. When, considered with reference to an alleged nuisance, the public is mentioned, it does not mean all the people, or all the public, but only such considerable number of them as show that more than a few merely are meant. *State v. Luce* (Del.) 32 Atl. 1076, 1077, 9 Houst. 396.

"Public," as used in Pasch. Dig. art. 2030, providing for the punishment of a person making an indecent exhibition in public, does not mean a public place, but has reference rather to persons who do or can see it. A public road in the nighttime, or a remote and unfrequented part of the country, may be, and often is, such a place that such an exhibition as might be there made would not be made in public. On the other hand, the place may itself be private, and yet the person be so exhibited to public view as to be an exhibition in public. *Moffit v. State*, 43 Tex. 346.

Some affairs of a railroad company are public, and some are private. The honesty of a clerk or servant in the office of the company is a matter for the clerk and the company only. The safety of a bridge on the line of the railroad is a subject of public

concern. The public in this sense is a number of persons who are or will be interested, and yet who are at present unascertainable. All the future passengers on the road are the public, in respect to the safety of the bridge. *Crane v. Waters* (U. S.) 10 Fed. 619, 621.

By the words "the public," used with respect to the collective body in whose behalf a prosecution to abate a common nuisance must be brought, is meant all those who are affected by the nuisance in the same way, or who, having occasion to come in contact with it, may be affected in the same way, though differing in the extent or degree to which they may be injured. *Jones v. City of Chanute*, 65 Pac. 243, 244, 63 Kan. 243.

The terms "public" and "general" are sometimes used as synonymous, meaning merely that which concerns a multitude of persons. *Stockton v. Williams* (Mich.) 1 Doug. 546, 570 (citing Greenl. Ev. 152).

### As open to common use.

We call that "public" which is open for general or common use for entertainment, as a public highway or road, or a public house, and yet the term is more comprehensive than this definition. *Austin v. Soule*, 36 Vt. 645, 650.

The word "public" has two proper meanings. A thing may be said to be public when owned by the public, also when its uses are public. *Hennepin County v. Brotherhood of the Church of Gethsemane*, 8 N. W. 595, 596, 27 Minn. 460.

### As the people or state.

The public consists of the entire community—persons who pay taxes, and persons who do not. Their interest is the raising of revenue, by taxation or otherwise, to provide for the expenses of government, public works, public institutions, and public charges. *Knight v. Thomas*, 45 Atl. 499, 501, 93 Me. 494.

Const. art. 16, § 5, declares the water of every natural stream not heretofore appropriated within the state of Colorado to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided. Held, that the words "public" and "people" were used synonymously. *Wyatt v. Larimer & W. Irr. Co.*, 29 Pac. 906, 911, 1 Colo. App. 480.

A debt due to the Bank of the State of South Carolina is not a debt due to the public, within the provisions of Pub. Laws, p. 494, providing that, next after funeral expenses, charges of probate of a will, and letters of administration, "debts due to the public" by a testator or intestate shall be



paid. *Bank of State v. Gibbs* (S. C.) 3 McCord, 377.

#### **As opposite of private.**

"Public," is a convertible term, and, when used in an act of assembly, may refer to the whole body politic—that is, all the inhabitants of the state—or to the inhabitants of a particular place only. It may be properly applied to the affairs of a state, or of a county, or of a community. In its most comprehensive sense, it is the opposite of "private." *Houston Tp. Poor Dist. v. Benzette Tp. Poor Dist.*, 19 Atl. 1060, 1061, 135 Pa. 393.

In Gen. St. § 2951, authorizing and perpetuating grants for religious, public, and charitable uses, the term "public" was not used in its technical sense, as referring to the public at large, but in its more natural sense, to distinguish the use provided for from a private charity for the benefit of some arbitrary class, set apart without reference to the good of others. The fact that relief provided for in a will is confined to members of one or two particular churches of a particular denomination does not make the bequest subject to the rule against perpetuities. *Appeal of Elliot*, 51 Atl. 558, 564, 74 Conn. 586.

The term "public" is opposed to the term "private," and according to the best lexicographers means pertaining to or belonging to the people, relating to a nation, state, or community; but to make a matter a public matter it need not pertain to the whole nation or state. It is sufficient if it pertains to any separate or distinct portion thereof, or community. *State v. Whitesides*, 30 S. C. 579, 584, 585, 9 S. E. 661, 3 L. R. A. 777.

In determining the popular meaning of the words "public charity," the court says that the word "public," to the common mind and ear, is the antithesis of "private." The road which all may travel is a public highway, while the avenue which leads to a man's residence for his own convenience is a private road. We speak of a hotel as a public house, although it is really private property. Churches are called houses of public worship, although owned and controlled by separate sects. A gallery of art or course of lectures is said to be open to the public; and this, without regard to the purpose or character of the management, or to the imposition of an admission fee. So it is held that a school owned and controlled exclusively by a particular religious sect, to which all children, irrespective of creed or race, are admitted, only those being required to pay who are able to do so, is an institution of purely public charity. *O'Hara v. Miller* (Pa.) 1 Kulp, 288, 295.

#### **PUBLIC ACCOMMODATION.**

See "Place of Public Accommodation."

#### **PUBLIC ACKNOWLEDGMENT.**

The fact that the father of an illegitimate child paid for the care and maintenance of its mother during her confinement, and spoke of the child to a very limited number of persons as "his boy," and paid the expense of sending the child to school, without receiving the child into his family or ever acknowledging it as his child among his relatives and friends, did not constitute a "public acknowledgment" of the child within the meaning of Civ. Code, § 230, providing that the father of an illegitimate child by "publicly acknowledging" it as his own, and receiving it, with the consent of his wife, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it. *In re Jessup*, 22 Pac. 742, 743, 81 Cal. 408, 6 L. R. A. 594.

Under Mill. & V. Code, § 5651, providing that on trial for bigamy, in the absence of a certified copy of the first marriage license, a "public acknowledgment" by the party charged shall be competent evidence of the first marriage, the acknowledgment need not be before a court or public tribunal, but may be made by a confession, or by conduct in the presence of others. *Crane v. State*, 28 S. W. 317, 319, 94 Tenn. (10 Pickle) 86.

#### **PUBLIC ACT.**

Public acts are those which relate to the public at large. *People v. Chautauqua County Suprs*, 43 N. Y. 10, 17. A public act is a statute affecting the public at large. *Stephenson v. Walt* (Ind.) 8 Blackf. 508, 46 Am. Dec. 489.

Public or general acts are such as relate to or concern the interests of the public at large; such as those concerning the government and its co-ordinate departments; those concerning the whole spirituality; those concerning trade in general, or which relate to all subjects of the realm; acts which concern all persons, though of a special nature, such as acts concerning assizes, or woods or forests, chases, fisheries, and private acts when recognized by a public act. *Bretz v. City of New York* (N. Y.) 3 Abb. Prac. (N. S.) 478, 479 (citing *Smith's Comm. on Stat.* § 795).

In *Smith on Constitutional Construction*, p. 913, § 795, it is said: "The general description of public acts is that they relate to or concern the interests of the public at large, or relate to a general genus in relation to things." *People v. Wright*, 70 Ill. 388, 398.

If the law be such a law that persons placing themselves in the position contemplated by the law must take notice of it at their peril, it is a public law. *Crawford v. Linn County*, 5 Pac. 738, 747, 11 Or. 482.

A statute which is obligatory on all the citizens, and of which they must take no-

tice at their peril, is a public statute. *Burnham v. Webster*, 5 Mass. 266, 268.

A "public statute" is defined by Blackstone to be "a universal rule that regards the whole community." A public law may be general, local, or special. It can never, however, be a private law. A general law is essentially a public law, but the converse of the proposition is not true, nor can a general law be local in its operation. A public statute affects the public at large, either throughout the entire state, or within the limits of a particular locality where the act operates. *Sasser v. Martin*, 29 S. E. 278, 281, 101 Ga. 447 (citing *Suth. St. Const.* § 198).

The words "public acts," as used in *Const. U. S. art. 4, § 1*, providing, "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," etc., mean, presumably, public statutes. *Crippen v. Loughton*, 44 Atl. 538, 541, 69 N. H. 540, 46 L. R. A. 467, 76 Am. St. Rep. 192.

In this country the disposition has been to enlarge the limits of the class of public acts, and to treat all acts of a general character, or which in any way affect the community at large, although affecting only a particular locality, if they apply to all persons, as public acts. *Sedgwick Stat. and Const. Law*, 25. Hence it has been held that the establishment of towns and counties, and their boundaries, courthouses, jails, bridges, and ferries, are all matters of public policy, and acts relating to them public acts. *Village of Winoski v. Gokey*, 49 Vt. 282, 285.

Among the English legal maxims, we find that every statute that concerns the King, and every statute that relates to all subjects of the realm, are public statutes. 10 Co. 57; *Holland's Case*, 4 Coke, 77. An act incorporating a turnpike company, with a clause vesting the road in the people on the happening of a certain event, is a public statute. *Jenkins v. Union Turnpike Co.* (N. Y.) 1 Caines, Cas. 86, 93.

The distinction between a public and a private act does not depend upon the clause, which is often inserted, directing that it shall be deemed and taken as a public act. The objects and purposes contemplated, and the scope and general provisions of the act, must be looked to to ascertain its character. A statute relating to trade in general is a public statute, but if it concerns a particular trade merely, or an individual of that trade, it is private. *Holland's Case*, 4 Coke, 76. Act 1852 (12 Stat. p. 212), incorporating certain banks, and directing that their bills and notes shall be received by treasurers, tax collectors, and other public officers in payment for taxes and other moneys due the

state, is a public act. *Bank of Newberry v. Greenville & C. R. Co.* (S. C.) 9 Rich. Law, 495, 496.

A private statute is one which concerns only certain designated persons, and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations. *Ann. Codes & St. Or.* 1901, § 735; *Rev. St. Utah* 1898, § 3377.

All statutes other than private statutes are public, in which are included statutes creating or affecting corporations. *Code Civ. Proc. Cal.* 1903, § 1898.

#### Charter.

The tendency of modern decisions in the United States has been to enlarge the class of laws deemed public; and, in particular, a village charter, being obligatory on all persons who are or may become residents of the village, should be deemed a public act, of which the courts of the state enacting it will take notice without its being pleaded. *Village of Winoski v. Gokey*, 49 Vt. 282, 285.

The charter of a bank is a public act, and courts will take judicial notice thereof. *Terry v. Merchants' & Planters' Bank*, 66 Ga. 177, 178.

A public act is one affecting the public generally, either in its proper rights or applicable to its liberties, and hence a charter of a canal company which began business under a general law which contained a transfer of the interest of the state to the canal company, with a reservation for the benefit of the state, was a public act. *Hankins v. Lawrence* (Ind.) 8 Blackf. 266, 267.

#### Class legislation.

Judge Cooley's definition of "public legislation" is that laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application. They may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like. The Legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. And it may be a matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and poli-

cy the Legislature must judge. Quoted with approval in *People v. Bellett*, 99 Mich. 151, 57 N. W. 1094, 22 L. R. A. 696, 41 Am. St. Rep. 589, holding that a statute making it unlawful for barbers to carry on their business on Sundays was valid. *State v. Nichols*, 69 Pac. 372, 374, 28 Wash. 628.

#### General act distinguished.

The terms "general" and "public" law are frequently used synonymously, but they are not the equivalent of each other. Every general law is necessarily a public law, but every public law, as defined, is not a general law. A general law is a law which operates throughout the state alike upon all the people or all of a class. Any law affecting the public within the limits of the county or community would be a public law, though not a general law. The effect of the statute, more than its wording or phraseology, must determine its character as a public, general, special, or local statute. *Holt v. City of Birmingham*, 19 South. 735, 736, 111 Ala. 369.

#### Local law.

Public statutes are such as relate to, concern, and affect the public generally, the community at large, without distinction in any respect. They operate alike and in the same degree upon all individuals and classes of persons and their interests, subject to law where they are in the same condition and circumstances, and this is so whether the law applies to the whole state or to a locality or localities in the state. It is a quality of public, general, and common right or purpose that makes the statute a public one. A statute may be a public statute although it is local; so it is held that a statute forbidding the sale of liquors within two miles of a certain locality is a public statute, though local. *State v. Chambers*, 93 N. C. 600, 602.

Any statute which affects the public at large, though operating within the limits of a particular locality, is generally declared to be a public statute. *Holt v. City of Birmingham*, 19 South. 735, 736, 111 Ala. 369.

It is not necessary, however, in order to constitute a statute a public act, that it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute. *People v. Wright*, 70 Ill. 388, 398; *Pierce v. Kimball*, 9 Me. (9 Greenl.) 54, 56, 23 Am. Dec. 537.

"While it is true that public acts are usually general in their character and operation, and equally applicable in all parts of the state, there are other acts which are considered public, and of which all persons are bound to take notice at their peril, which are notwithstanding local, because the vio-

lation of them is and must be local." *Pierce v. Kimball*, 9 Me. (9 Greenl.) 54, 56, 23 Am. Dec. 537.

#### PUBLIC ACTION.

Actions are of two kinds, public and private. A public action can only be prosecuted by the people of a state as a party, and it may be criminally against a person charged with a public offense for the punishment thereof, or civilly against corporations or natural persons for the usurpation of franchises or any part of the sovereign power not delegated to them, or the misuser or non-user of corporate power, or breaches of public trust, or violations of public duty. Violations of public trusts by corporations or public bodies may be restrained and corrected by equitable action prosecuted by the state. *Ketchum v. City of Buffalo*, 14 N. Y. 356, 370.

#### PUBLIC ADDRESS.

As used in an ordinance prohibiting the making of a public address in a public park, the term "public address" includes a sermon or religious discourse. *Commonwealth v. Davis*, 39 N. E. 113, 162 Mass. 510, 26 L. R. A. 712, 44 Am. St. Rep. 389.

#### PUBLIC AMUSEMENT.

See, also, "Amusement."

The term "public amusement" will be construed not to include a school for instruction in dancing. "Such a case is not within the language of the statute, nor probably one of the evils sought to be remedied by it." *Commonwealth v. Gee*, 60 Mass. (6 Cush.) 174, 179.

A dance hall to which the public is admitted on payment of a small fee is a "public amusement" within Pub. St. c. 102, § 116, providing that whoever carries on any public show, amusement, or exhibition without a license shall be fined. *Commonwealth v. Quinn*, 40 N. E. 1043, 164 Mass. 11.

#### PUBLIC APPLICANT FOR AID.

A student who, for the purpose of pursuing his studies, applies for and obtains aid in the nature of a loan from his college, is not a "public applicant for aid." In re *Ward*, 20 N. Y. Supp. 606, 611, 29 Abb. N. C. 187.

#### PUBLIC ASSEMBLY.

The charge in an indictment that the defendants disturbed females "at the fair grounds in or near the city of Montgomery, met for the purpose of instruction, amusement, or recreation," is not an averment of

a disturbance of females "in public assembly." *Smith v. State*, 63 Ala. 55, 56.

"Public assembly," as used in a statute forbidding disturbance of a public assembly, includes a justice of court in session and engaged in the trial of a cause. *Summerlin v. State*, 3 Tex. App. 444, 446.

### **PUBLIC AUCTION.**

See "Auction."

### **PUBLIC BAR.**

The term "public bar," in a statute in reference to the keeping of such bars, has been said to include a bar kept open to the public in a hotel, so that all customers of the hotel are supplied with intoxicating liquors which are drank on the premises, if at the same time the customers do not order or eat food of any kind. If, however, the counter over which the liquor is furnished is customarily kept as a lunch counter, and is designed and used for furnishing lunches, it is not a public bar merely because sales of liquor are sometimes made over it. *Commonwealth v. Everson*, 2 N. E. 839, 840, 140 Mass. 292; *Commonwealth v. Rogers*, 135 Mass. 536, 539.

A public display of liquors by any means is not an essential element in determining the question whether a bar is a public bar, and a person who sells and delivers intoxicating liquors indiscriminately to such persons as may call for them over a bar or counter is guilty of keeping a public bar, though there was no display of liquors and the bar was also used for lunching purposes. *Commonwealth v. Rogers*, 135 Mass. 536, 539.

### **PUBLIC BENEFIT.**

"Public benefit," as used in Gen. St. 1870, p. 954, § 4, providing that lands may be flowed, whenever it would, in the opinion of the commissioners, and the court, if required, should inquire and be of the opinion that it would, be of public benefit, means benefit accruing from the use the public would have of the flowage, or of the mill for the running of which the flowage was created. Where the only benefit to the public comes from the use that the owner of the mill who seeks the flowage, and his successors, might make of the flowage and the mill by the grinding of grain for hire, it is not a "public benefit" within the meaning of the statute. *Tyler v. Beacher*, 44 Vt. 648, 652, 8 Am. Rep. 398.

The term "public benefit," within the meaning of the rule that the erection of wharves, etc., in a navigable river does not constitute a nuisance if a public benefit, was construed to include the construction of

staiths for the loading of coal on ships, by which means coal could be supplied at a cheaper rate. In this case the court approved a charge of the trial court that "notwithstanding an individual is the proprietor of the staith, notwithstanding it gives him an opportunity of bringing his commodity to market, yet if it is beneficial to the public that that thing should be brought to the market in that way, then the thing is useful to the public who go to that staith for the purpose of having their vessel loaded, and to the people who want to carry coal to the London market. Both the man who receives the coal at the staith, and the man who buys his coal at London, coming from that staith, are benefited if they are either got by this means cheaper, or if they are got by those means better than they otherwise would be. Thus it is a public benefit that the thing should be there." *Rex v. Russell*, 6 Barn. & C. 566.

The public benefit which will authorize the collection of a tax for the aid of an institution deemed to be of public benefit does not apply to the incidental benefit which may arise to the people of the town by the location of a private educational institution in the town. *Curtis' Adm'r v. Whipple*, 24 Wis. 350, 354, 1 Am. Rep. 187.

A railroad is a "public benefit" within the meaning of the rule that taking the property by eminent domain can only be exercised for the public benefit. *Beekman v. Saratoga & S. Ry. Co.* (N. Y.) 3 Paige, 45, 73, 22 Am. Dec. 679.

### **PUBLIC BLOCKADE.**

A public blockade is one which is not only established in fact, but of which notice is given, by the government directing it, to other governments. *The Circassian*, 69 U. S. (2 Wall.) 135, 150, 17 L. Ed. 796.

### **PUBLIC BODY.**

A county is a public body. *Harris v. Whiteside County Sup'rs*, 105 Ill. 445, 451, 44 Am. Rep. 808.

### **PUBLIC BRIDGE.**

Public bridges are such as form part of the highway, common, according to their character as foot, horse, or carriage bridges, to the public generally, with or without toll, though their use may be limited to particular occasions or the seasons of flood or frost. *State v. Street*, 23 South. 807, 808, 117 Ala. 203 (citing *Bouvier*); *Union Pac. R. R. v. Colfax County Com'rs*, 4 Neb. 450, 456.

Public bridges are structures across a creek, river, or other natural body of water, or canal, ditch, or other artificial waterway

erected for the accommodation of the public. A bridge is usually regarded as an essential part of a road, and the locating of a bridge is but the laying out of a highway. *State v. Street*, 23 South. 807, 808, 117 Ala. 203 (citing Elliott, Roads & S. 4, 5).

Public bridges are such bridges as all his Majesty's subjects had used freely and without interruption, as of right, for a period of time competent to protect them and all who should thereafter use them from being considered as wrongdoers, and in respect to such use, in any mode of proceedings, civil or criminal, in which the legality of such use might be questioned. A free and uninterrupted use of a bridge for nearly 90 years is sufficient for the purpose of protection. The circumstances of the removal and application of the materials of the bridge to his Majesty's use cannot render it less a public bridge if it had effectually become so prior to that period. *Rex v. Inhabitants of Bucks County*, 12 East, 192, 204.

A public bridge is a structure which affords a safe, convenient, and complete passageway over some obstruction that without it would prevent, hinder, or delay the free transit of those who desire to pass along a public highway. *Everett v. Bailey*, 150 Pa. 152, 153, 24 Atl. 700; *Commonwealth v. Westfield Borough*, 11 Pa. Co. Ct. R. 369, 372.

A public bridge is a part of a highway, —*Cascade County v. City of Great Falls*, 46 Pac. 437, 438, 18 Mont. 537; *People v. Buffalo County*, 4 Neb. 150, 158; and, whether constructed by the state or any of its public corporations, is held in trust for the public use. *Bank of Idaho v. Malheur County*, 45 Pac. 781, 782, 30 Or. 420, 35 L. R. A. 141.

A bridge built by an individual in a public way, of public utility and used by the public, is a "public bridge" within the meaning of the law requiring the county to repair public bridges. *Rex v. Inhabitants of Yorkshire*, 2 East, 342, 349.

## PUBLIC BUILDING.

As charity, see "Charity."

Other public buildings, see "Other."

"Public buildings," as used in Pen. Code, art. 417, providing that if any person shall willfully injure or deface any public building in the state he shall be punished, etc., and article 418, declaring that the term "public building" means the capitol or other buildings in the capitol grounds, including the general land office, the executive mansion, various state asylums, and all buildings belonging to either, all college or university buildings erected by the state, all courthouses and jails, and all other buildings held for public use by any department or branch of government, state, county, or municipal,

and the specific enumeration does not exclude other buildings, not named, properly coming within the meaning and description of the term "public building"—means public buildings owned or controlled and held by the public authorities for public use. *Brown v. State*, 16 Tex. App. 245, 247.

"Public buildings," as used in Pol. Code, §§ 3233, 3234, providing that contracts for labor, etc., on public buildings shall provide that 8 hours shall be a day's work, etc., and also relating to materials used therein, seem to refer exclusively to the buildings of the state. *Babcock v. Goodrich*, 47 Cal. 488, 510.

Where the owners of land platted it into lots and blocks for city purposes, and reserved a block which they did not plat into lots, and which they stated was reserved for public buildings and park purposes, the dedication did not authorize the construction thereon of a county courthouse, since the words "public buildings" will be deemed to refer solely to city public buildings. *McIntyre v. El Paso County*, 61 Pac. 237, 240, 15 Colo. App. 78.

Hospitals, courthouses, and jails are declared to be "public buildings" by Pol. Code, § 4046, subd. 9, authorizing the erection of public buildings by counties. *Yolo County v. Barney*, 21 Pac. 833, 835, 79 Cal. 375, 12 Am. St. Rep. 152.

In the construction of statutes the term "public buildings" shall include a statehouse, courthouse, county house, townhouse, arsenal, magazine, prison, jail, workhouse, poorhouse, market, or other building belonging to the state, or to any county, town, city, or borough in the state, and any church, chapel, meetinghouse, or other building generally used for religious worship, and any college, academy, schoolhouse, or other building generally used for literary instruction. *Gen. St. Conn. 1902*, § 1.

The term "public building," as used in all laws relative to the employment of labor, shall mean all buildings or premises used as a place of public entertainment, instruction, resort, or assemblage. *Rev. Laws Mass. 1902*, p. 917, c. 106, § 8.

The term "public building," as used in the article punishing an injury or defacement of a public building, means the capitol and all other buildings in the capitol grounds at the seat of government, including the general land office and the executive mansion, the various state asylums, and all buildings belonging to either, all college or university buildings erected by the state, all courthouses and jails, and all other buildings held for public use by any department or branch of government, state, county, or municipal; and the specific enumeration of the above shall not exclude other buildings, not named, properly coming within the meaning and descrip-

tion of a public building. Pen. Code Tex. 1895, art. 500.

### Bridge.

A bridge is a public building. *Arnell v. London & N. W. Ry. Co.*, 16 C. B. 697.

### Church.

"Public building," as used in Pen. Code, § 725, making it a misdemeanor for any person to designedly "destroy, injure, or deface any public building, its appurtenances, or furniture," relates exclusively to buildings owned by the public as such, as the state capitol, courthouses, city halls, and the like, and does not include a church. *Collum v. State*, 35 S. E. 121, 109 Ga. 531.

### Infirmary.

Within a local act imposing a certain rate on all halls, jails, almshouses, and other public buildings, the term "public buildings" includes an infirmary for sick persons, supported by voluntary contributions, standing within its own grounds, because it is a building devoted to public purposes. All those buildings which are not devoted to public purposes are to be rated as private buildings. It is a building for the reception, not of some particular persons, but of any sick persons who may be brought to it. *Bedford General Infirmary v. Town of Bedford Com'rs*, 7 Exch. 768, 777.

An infirmary is a "public building" within the meaning of 34 Geo. III, c. 98, providing that public buildings shall be free from all parliamentary and parochial taxes, etc. *Guardians of Bedford Union v. Bedford Imp. Com'rs*, 14 Eng. Law & Eq. 424, 425.

### Schoolhouse.

A house may be a public schoolhouse without being a public house held for public use by the state, county, or town. A private individual may own a house and yet use it as a public schoolhouse, as that is for the use of the public generally who desire to patronize his school by sending pupils to it. Hence an indictment charging the defacing of a schoolhouse, "being then and there a public schoolhouse, held by the county as a public schoolhouse," is insufficient, as it does not charge the defacing of a public building held for public use by the county. *Brown v. State*, 16 Tex. App. 245, 247.

The seventy-ninth section of the charter of the city of Bayonne authorizes the city to issue bonds for the purpose of purchasing sites for markets, public buildings, and wharves, and for the purpose of erecting improvements on said sites, "or for the purpose of purchasing sites for schoolhouses." Held, that the separation of the power to purchase sites for schoolhouses and the power to purchase sites for parks, markets, pub-

lic buildings, and wharves indicated an intent that the term "public building," as used in the section, should not include schoolhouses, and that therefore there was no authority given in such section for the issuance of bonds for the building of schoolhouses. *Field v. City of Bayonne*, 8 Atl. 114, 115, 49 N. J. Law (20 Vroom) 308.

### PUBLIC BUSINESS.

Absence from the state as a volunteer soldier or officer in the federal army constitutes "absence on public business," within an Indiana statute providing that the statute of limitations shall not run, etc., during the time in which defendant is absent from the state on public business. *Gregg v. Matlock*, 31 Ind. 373, 375.

Where property is leased under a covenant that no "public business" shall be carried on within the premises, the covenant is broken by using the house as a day school. *Wickenden v. Webster*, 6 El. & Bl. 387, 391.

County supervisors are "traveling on public business" in going to the place of meeting of the board at the beginning of the session, and in returning to their homes at the end of it, but if during the session a supervisor makes daily visits to his home, such visits must be deemed to have been made for his own convenience, comfort, or economy, or to attend to his own private affairs, and not on public business. *Howes v. Abbott*, 20 Pac. 572, 573, 78 Cal. 270.

The expression "public business," in Gen. St. 1878, c. 124, § 1, prohibiting public business and the service of civil process on February 22d, does not include the taking of an acknowledgment of the execution of a deed by a notary public, since the act of the notary is simply the doing of his private business. *Slater v. Schack*, 41 Minn. 269, 43 N. W. 7.

### PUBLIC BUYER.

A "public buyer" is a person buying from the public generally, though he sells to one person only, within the meaning of Laws 1888, p. 14, providing for a license tax on a public buyer of cotton seed. *Jones v. State*, 13 South. 728, 69 Miss. 406.

The phrase "public cotton-seed buyer," as used in Code 1892, § 3342, imposing a privilege tax on "each public cotton-seed buyer, except merchants in their legitimate business," includes a merchant who, in addition to buying cotton seed from customers who take his goods in payment or on account with those who are indebted to him, buys it from the public generally to fill contracts with others and to sell in the best market. *Johnson v. Jennings*, 72 Miss. 349, 16 South. 791.

**PUBLIC CHARACTER.**

One who is among the foremost inventors of his time is a "public character," within the rule that a public character cannot enjoin the publication of his portrait in the absence of breach of contract or violation of confidence in securing the photograph from which the publication is made. *Corliss v. E. W. Walker Co.* (U. S.) 64 Fed. 280, 282, 31 L. R. A. 283.

**PUBLIC CHARITY.**

See "Purely Public Charity."

A public charity is whatever is given for the love of God, or for the love of one's neighbor in the catholic and universal sense, and given to such ends free from the stain or taint of every consideration that is personal, private, or selfish. This is a charity in its highest and noblest sense. *Fire Ins. Patrol v. Boyd*, 15 Atl. 553, 554, 120 Pa. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745.

"Whatever is gratuitously done or given in relief of the public burdens or for the advancement of the public good is a purely public charity." *Episcopal Academy v. City of Philadelphia*, 25 Atl. 55, 56, 150 Pa. 565.

A public charity is one derived from gift or bounty, and it is the source from whence the sums are derived, and not the purpose for which they are dedicated, which constitutes the use charitable. If derived from the gift of the Crown or the Legislature, or a private gift for improving a town, they are charitable; but where a fund is derived from rates and assessments, being in no respect derived from bounty or charity, it is not charitable. *Attorney General v. Federal Street Meetinghouse*, 69 Mass. (3 Gray) 1, 50.

A public charity is a gift to a general public use; a gift for an object which the state itself ought to or lawfully might undertake and accomplish with public resources. As said by the Supreme Court of the United States in *Mormon Church v. United States*, 136 U. S. 50, 10 Sup. Ct. 792, 34 L. Ed. 481: "The law respecting property held for charitable uses depends on the legislation and jurisprudence of the county in which the property is situated and the uses are carried out, so that a gift which might be a valid public charity in England may not be so in the United States." *Troutman v. De Bois-siere O. F. O. H. & I. School Ass'n*, 71 Pac. 286, 288, 66 Kan. 1.

A "public charity," observes Judge Shaw, "in legal contemplation, is derived from gift or bounty." *Attorney General v. Federal Street Meetinghouse*, 69 Mass. (3 Gray) 50. In the case of *Attorney General v. Heells*, 2 Sim. & S. 77, it is said by the vice chancellor that it is the source whence

the funds are derived, and not the purpose to which they are dedicated, which constitutes the use charitable. If derived from the gift of the Crown or the Legislature, or a private gift for improving a town, they are charitable. So a subscription by a benefit society for mutual relief is a private, and not a public, charity. The essential features of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite, unrestricted quality that gives it this public character. *City of Bangor v. Rising Virtue Lodge*, No. 10, Free and Accepted Masons, 73 Me. 428, 434, 40 Am. Rep. 369.

The essential features of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public, and it is this indefinite or unrestricted quality that gives it its public character. *Appeal of Donohugh*, 86 Pa. 306, 318; *Doyle v. Whalen*, 82 Atl. 1022, 1025, 87 Me. 414, 31 L. R. A. 118; *City of Bangor v. Rising Virtue Lodge*, No. 10, Free and Accepted Masons, 73 Me. 428, 434, 40 Am. Rep. 369.

A public charity is one in which the public generally are entitled to enjoy its benefits. It is not necessary that it should be owned by the public, but its objects and uses must be public, and in no sense private or limited to private individuals. *Hennepin County v. Brotherhood of Gethsemane*, 8 N. W. 595, 596, 27 Minn. 460, 38 Am. Rep. 298; *People v. Ryan*, 27 N. E. 1095, 138 Ill. 263.

To constitute a public charity, there "must be some benefit to be conferred on or duty to be performed towards either the public at large, or some part thereof, or an indefinite class of persons. If a trust were created for the benefit of the poor of a particular town or parish, or persons of a specified class or occupation, as seamen, laborers, or mechanics, it would not be doubted that it would be good as a charity. So if a sum were bequeathed, the income of which from time to time, or in the discretion of the trustees, was to be applied to the relief of the destitute by distribution of fuel or provisions or any other similar mode, the gift would be enforced as a public charity; but a gift of two-thirds of testator's estate in trust for the benefit of 'his descendants who may at any time be destitute' and, in the opinion of trustees, need such aid, is not a public charity, since the only public interest that there can be in connection with it is that certain destitute persons, descendants of the testator, who might otherwise become a public charge, will be entitled to relief from this fund." *Kent v. Dunham*, 7 N. E. 730, 732, 142 Mass. 216, 56 Am. Rep. 667.

"Public charity," as used in Const. art. 9, § 1, and Act May 14, 1874, exempting from taxation the property of all institutions founded and maintained by public charity,

means an enterprise not carried on for the benefit or profit of its promoters or managers, but for the benefit of the general public. And an institution whose object is to improve the temporal, moral, and religious welfare of the community, or a portion thereof, does not cease to be a charitable institution because a part or all of its expenses are defrayed by charges for the services it renders, such charges not being intended as a source of profit, and being in fact insufficient to defray expenses, the deficit being made up by voluntary contribution. *City of Philadelphia v. Women's Christian Ass'n*, 17 Atl. 475, 476, 125 Pa. 572.

There are two classes of public charities: One where the institutions are public; that is, owned by the state or some subdivision thereof, created for governmental purposes, and maintained at the public expense. These institutions are absolutely under the control and management of the public, through its proper representatives. As respects them, no vested or private rights pertain. It does not follow, however, that because this class of public charitable institutions are subject to absolute public control, another class whose property consists of private donations, and to which the organized public has contributed nothing, shall also be subjected to such absolute governmental control, because the charity they administer has been christened a "public charity" in legal parlance. *State v. Neff*, 40 N. E. 720, 52 Ohio St. 375, 28 L. R. A. 409.

The words "public or private," as used in a devise of property for the purpose of benevolence or charity, public or private, "must be taken in their natural meaning, and according to the construction given to them by the courts in the great majority of similar cases, as indicating the mode or distribution only. The manifest intention of the clause is the general relief of the poor, either through public institutions or through almshouses, by the agency of individuals." *Saltonstall v. Sanders*, 93 Mass. (11 Allen) 446, 470.

#### College.

In common acceptation, colleges are not "charitable institutions," though in law they administer a public charity. This means no more than that the public are incidentally benefited by the education of some of its members, the immediate advantage accruing to the individual members who have received instruction. The unbroken current of authority declares that the property of such institutions is private property, and the corporations themselves private corporations. *State v. Neff*, 40 N. E. 720, 724, 52 Ohio St. 375, 28 L. R. A. 409.

A bequest to Harvard College to hold as a permanent fund and apply the net income

is one to a public charitable corporation within the Massachusetts laws relating to the management of charities. *Dexter v. Harvard College*, 57 N. E. 371, 374, 176 Mass. 192.

#### Hospital.

An institution established, maintained, and operated for the purpose of taking care of the sick, without any profit or view to profit, but at a loss, which has to be made up by benevolent contribution, and the benefits of which the public are entitled to enjoy, is an institution of "public charity" within the meaning of Gen. St. 1878, c. 11, § 5, exempting all buildings belonging to such institutions from taxation. *Hennepin County v. Brotherhood of Gethsemane*, 8 N. W. 595, 596, 27 Minn. 460, 38 Am. Rep. 298.

#### Library.

A library in which the use of the books within the building was free to all alike without a charge, but charging a small hire for the taking out of books, and allowing the members of the library corporation to take books on the payment of an annual sum instead of a separate hire, is a "public charity." *Philadelphia Library Co. v. Donohugh* (Pa.) 12 Phila. 284, 285.

A library association incorporated for the purposes of the diffusion of useful knowledge and the acquirement of the arts and sciences by the establishment of a library of scientific and miscellaneous books for general circulation, and a reading room, lectures, and cabinets, open to all persons, without distinction, upon equal terms, and the income and revenues of which are devoted exclusively to such objects and purposes, is an "institution of purely public charity" within the meaning of Act March 21, 1864, cl. 6, exempting such institutions from taxation. *Cleveland Library Ass'n v. Pelton*, 36 Ohio St. 253, 260.

#### Masonic home.

A masonic home, which by means of voluntary contributions, without charges to the beneficiaries, profits to itself, or pay to its officers, houses and maintains indigent, afflicted, and aged persons unable to support themselves, is not an institution of purely public charity exempt from taxation by Const. art. 9, § 1, since its benefits are limited to Free Masons. In this connection the court remarks that, when the eligibility of those admitted is determined by whether or not the applicant for admission is a Mason, the institution is withdrawn from public, and put in the class of private, charities. A charity may restrict its admission to a class of humanity and still be public; it may be for the blind, the mute, those suffering special diseases, for the aged, for infants, and, as long as the classification is determined by such distinctions which involuntarily affect



or may affect any of the whole public, although only a small number may be directly benefited, it is public. But when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which does not concern the public at large. *City of Philadelphia v. Masonic Home of Pennsylvania*, 23 Atl. 954, 955, 160 Pa. 572.

#### **Mutual benefit association.**

A subscription by a benefit society for mutual relief is to a private, and not a public, charity. *Attorney General v. Federal Street Meetinghouse*, 69 Mass. (3 Gray) 1, 50.

To constitute a public charity, there must be an absolute gift to a charitable use for the benefit of the public, and a voluntary association for the mutual benefit of its members cannot be held to be a public charitable institution. *Coe v. Washington Mills*, 21 N. E. 966, 149 Mass. 543.

#### **Religious services.**

The maintenance of religious services in accordance with the views of any denominations of Christians is a "public charity" within the meaning of the Connecticut statute of charitable uses. *Appeal of Mack*, 41 Atl. 242, 246, 71 Conn. 122.

Within a statutory provision that where a trust is for a "public charity," etc., the Attorney General is the proper person to institute an action to enforce the trust, etc., a public charity may be constituted by gifts for the erection of a house for public worship or for the use of the ministry, if there is no definite body for whose use the gift was intended capable of receiving, holding, and using it in the manner intended; but when there is a body or definite number of persons ascertained or clearly pointed out by the terms of the gift to receive, control, and enjoy its benefits, it is not a public charity; and hence an unincorporated religious society is not a "public charity" in view of Pub. St. c. 39, § 9, giving such associations power to use and employ any donation or gift made to it. *Attorney General v. Clark*, 45 N. E. 183, 184, 167 Mass. 201.

#### **Young Men's Christian Association.**

Since the purposes of a Young Men's Christian Association are social as well as charitable, and include the giving of lectures and other entertainments for the benefit of its members, the provision of a gymnasium for promoting their health, and the selling of food at a lunch counter, the association is not a "public charitable corporation" within the meaning of a Massachusetts statute exempting such corporations from liability for injuries arising from the negligent construction of its building. *Chapin v. Holyoke Y. M. C. A.*, 42 N. E. 1130, 1131, 165 Mass. 280.

#### **PUBLIC COMMON.**

A public highway is not a "public common" nor an uninclosed piece of land, within Burns' Rev. St. 1894, § 2833, authorizing any resident of the township to take up and impound domestic animals found running at large or pasturing thereon. *McManaway v. Crispin*, 53 N. E. 840, 841, 22 Ind. App. 368.

#### **PUBLIC CONCERN.**

An act of the Legislature appropriating a sum of money for the purchase of certain relics, to be paid on the certificate of three persons, named, that the relics are in their opinion genuine, and that it is desirable in their judgment that they should be placed in the museum of the state library, is not a provision for arbitration to determine controversies between individuals, or in matters of private concern, in which all the appraisers are required to act, but was an appointment of appraisers to act between an individual and the state, and as a matter of "public concern," in which a majority act as the whole when all have met. *People v. Nichols*, 52 N. Y. 478, 481, 482, 11 Am. Rep. 734.

#### **PUBLIC CONTRACT.**

A "private contract" may be regarded as one between individuals only and affecting only private rights, while a "public contract" is one to which the state is a party, and which concerns all its citizens. *People v. Palmer*, 14 Misc. Rep. 41, 45, 35 N. Y. Supp. 222.

#### **PUBLIC CONVENIENCE.**

Public use distinguished, see "Public Use."

The term "public convenience requires," in a decree of a board of aldermen laying out a highway, which recites their judgment that "public convenience requires" the laying out of the highway, is equivalent to finding that the highway is necessary, within the meaning of Dig. 1844, p. 319, § 2, providing that if it be found necessary that other highways be laid out in any town, besides such as have been or shall be laid out by the proprietors, it shall be lawful for the town council to order a highway to be laid out so far, and through such parts of the same town, as they may deem necessary. *Hunter v. City of Newport*, 5 R. I. 325, 328.

#### **PUBLIC CONVEYANCE.**

"Public conveyance," as used in an accident policy wherein the insurer assumed liability for any accident occurring to the insured while traveling in any public conveyance, meant any vehicle employed in the general conveyance of passengers. *Ripley v.*

Passengers' Assur. Co., 83 U. S. (16 Wall.) 336, 338, 21 L. Ed. 469.

"Public conveyances," as used in an ordinance prohibiting all public conveyances from standing on certain streets, means conveyances which the public are entitled to use for a compensation. A hotel omnibus only used to carry the guests of the hotel is not a "public conveyance" within the meaning of the act. *City of Oswego v. Collins* (N. Y.) 33 Hun, 171, 172.

### PUBLIC CORPORATE BODY.

The phrase "public corporate body," as used in Act June 16, 1836, relating to executions, and providing that all executions which shall be issued from any court of record against any corporation, not being a county, township, or public corporate body, shall command the sheriff, etc., includes a city. *Parke v. Pittsburgh* (Pa.) 1 Pittsb. R. 218, 221.

### PUBLIC CORPORATION.

See "Quasi Public Corporation."

See, also, "Municipal Corporation."

The term "public corporations" is synonymous with the terms "municipal corporations" or "political corporations." *Winspear v. District Tp. of Holman*, 37 Iowa, 542, 544; *Cook v. Port of Portland*, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533; *Curry v. District Tp. of Sioux City*, 17 N. W. 191, 192, 62 Iowa, 102.

A public corporation is an investing of the people of a place with the local government thereof. *People v. Morris* (N. Y.) 13 Wend. 325, 334; *Ex parte Slattery*, 3 Ark. 484, 487.

A public corporation is the embodiment of political power for the purposes of public government. *Wooster v. Plymouth*, 62 N. H. 193, 208.

A public corporation is a corporation which is an agency in the administration of civil government. *People v. McAdams*, 82 Ill. 356, 361.

A public corporation is "a corporation created by the government for political purposes, and having subordinate and local powers of legislation." *Curry v. Sioux City Dist. Tp.*, 17 N. W. 191, 192, 62 Iowa, 102 (cited in *Cook v. Port of Portland*, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533).

The term "public corporations" is often used to designate a community clothed with extensive civil authority. *Winspear v. District Tp. of Holman*, 37 Iowa, 542, 544.

Public corporations are those which assume some of the duties of the state relating

to the public police. *McKim v. Odom* (Md.) 3 Bland, 407, 417.

Public corporations are those that are created for political purposes, with political powers to be exercised for purposes connected with the public good in the administration of civil government. *Wooster v. Plymouth*, 62 N. H. 193, 208; *Columbia County Com'rs v. King*, 13 Fla. 451, 470; *Downing v. Indiana State Board of Agriculture*, 28 N. E. 123, 126; 129 Ind. 443, 12 L. R. A. 664; *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. Law (2 Dutch.) 148, 171, 69 Am. Dec. 595.

A corporation is a public one when, among other features, it is required to give all persons the same measure of service for the same measure of money. *State v. Towers*, 42 Atl. 1083, 1086, 71 Conn. 657.

A public corporation is not a legal entity, or person, whose interest can be considered separate and apart from the people. It is but an instrumentality created and perpetuated for their benefit. Its officers, as such, are nothing more than agents of the public. They must act within the scope of their authority, and their acts outside are perfectly impotent. *Ogden City v. Bear Lake & River Water Works & Irrigation Co.*, 52 Pac. 697, 699, 16 Utah, 440, 41 L. R. A. 305.

Judge Dillon, in his work on Municipal Corporations, says: "All corporations intended as agencies in the administration of civil government are public, as distinguished from private corporations. Thus, an incorporated district or county, as well as a city, is a public corporation, but the school district or county is not, while the city is a municipal corporation." *Brown v. Board of Education*, 57 S. W. 612, 613, 108 Ky. 783; *Knowles v. Board of Education*, 7 Pac. 561, 564, 566, 33 Kan. 692; *Coyle v. McIntire* (Del.) 30 Atl. 728, 731, 7 Houst. 44, 40 Am. St. Rep. 109.

A public corporation is one which has for its object the government of a portion of the state, or which are founded for public purposes, although not political or municipal, such as a bank organized by the government for public purposes. *Cleaveland v. Stewart*, 3 Ga. 283, 291.

Public corporations, commonly called "municipal corporations," are not associations, but subdivisions of the state. The charter of such a corporation is not a contract between the corporation and the state, nor between the corporators themselves. The effect of an act of the Legislature incorporating a municipality is to invest the government authorities of the municipality with the power of local government over the inhabitants of that district. Such an act confers powers which did not exist before. It confers on the governing authorities the pow-

er of laying taxes and passing local laws for the purposes named in the act, without the previous consent of the people of the district. The governing authorities possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or by other statutes applicable to them. *Goodwin v. Town of East Hartford*, 38 Atl. 876, 884, 70 Conn. 18.

While generally given the power of acquiring and holding property, it is not a necessary incident of public corporations. *McKim v. Odom* (Md.) 3 Bland, 407, 417.

Public corporations are such as are formed or organized for the government of a portion of the state. This definition is also given in *Angel & Ames on Corporations*, § 14. "It is generally called public when it has for its object the government of a portion of the state, and though, in such a case, it involves some private interests, yet, as it is endowed with a portion of political power, the term 'public' has been deemed more appropriate." Public corporations are the auxiliaries of the government in the important business of municipal rule, and "where a corporation is composed exclusively of officers of the government, having no personal interest in it or with its concern, and only acting as the organs of the state in effecting a great public improvement, it is a public corporation. *Dean v. Davis*, 51 Cal. 406, 409.

A public corporation is one having for its object the administration of a portion of the powers of government, delegated to it for that purpose. Such are municipal corporations. *Civ. Code Ga.* 1895, § 1833.

A "public corporation" is one that has for its object the government of a portion of the state. *Gen. St. Kan.* 1901, § 1246; *Civ. Code S. D.* 1903, § 402.

Public corporations are formed or organized for the government of a portion of the territory. *Rev. St. Okl.* 1903, § 936.

#### Legislative control.

A public corporation is a corporation created for political purposes, or to exercise some of the functions and powers of government, such as cities, towns, etc.; also some others founded for the public use, but not for political purposes. The essence of a public corporation is that it is to be governed according to the law of the land, and that the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises. *Regents of University of Maryland v. Williams* (Md.) 9 Gill & J. 365, 401, 31 Am. Dec. 72; *Mayor and City Council of Baltimore v. Keeley Institute*, 31 Atl. 437, 438, 81 Md. 106.

A public corporation is "an instrument of the government, subject to the control of the Legislature and its members, officers of the government, for the administration or discharge of public duties." *Regents of University v. Williams* (Md.) 9 Gill & J. 365, 397, 31 Am. Dec. 72; *Downing v. Indiana State Board of Agriculture*, 28 N. E. 123, 126, 129 Ind. 443, 12 L. R. A. 664; *Columbia County Com'rs v. King*, 13 Fla. 451, 470; *City of Baltimore v. Keeley Institute*, 31 Atl. 437, 438, 81 Md. 106; *Pumphrey v. City of Baltimore*, 47 Md. 145, 151, 28 Am. Rep. 446.

Public corporations are such corporations as are created by the government for political purposes, such as counties, cities, towns, and villages. Such corporations are invested with subordinate legislative powers to be exercised for local purposes connected with the public good, and such powers are subject to the control of the Legislature of the state. *Parke v. Pittsburgh*, 1 Pittsb. R. 218, 221.

Public corporations are towns, cities, counties, parishes, and the like, which are created and continued for public purposes. Such institutions are the auxiliaries of the state in municipal rule, and have no pretension to sustain their privileges or their acts on anything like a contract between them and the Legislature. *Sweatt v. Boston, H. & E. R. Co.* (U. S.) 23 Fed. Cas. 530, 532. See, also, *McKim v. Odom* (Md.) 3 Bland. 407, 417.

The powers of public corporations are subject to the control of the Legislature, and the charter of such incorporations may be altered or repealed at the pleasure of the Legislature. *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. Law (2 Dutch.) 148, 171, 69 Am. Dec. 565.

Public corporations are but parts of the machinery employed in carrying on the affairs of the state, and their charters may be changed, modified, or repealed as exigencies of the public service or public welfare may demand. Such corporations are composed of all the inhabitants of the territory included in the political organization, and the attribute of individuality is conferred on the entire mass of such residents, and it may be modified or taken away at the mere will of the Legislature according to its own views of public convenience, and without the consent of those composing the body politic. *Laramie County v. Albany County*, 92 U. S. 307, 310, 23 L. Ed. 552.

Public corporations, like counties and towns, being subdivisions of the state for governmental purposes, are really a part of the state government, and their authorities are charged with certain duties, which may be changed, enlarged, or diminished by the General Assembly by general law, subject, of course, to any restriction imposed by the

**Constitution.** *Heffner v. Cass and Morgan Counties*, 62 N. E. 201, 206, 193 Ill. 439, 58 L. R. A. 353.

Public corporations are not voluntary associations, and there is no contractual relation between the corporators who compose them. They are merely government institutions created by law for the administration of the public offices of the community. States, counties, and municipalities are examples of public corporations. *Mor. Priv. Corp.* (2d Ed.) § 3. A corporation organized for maintaining an inebriate asylum, with power to elect its own directors and adopt such by-laws as it may think proper for the management of its business, and subject to no control by the state, is a private corporation within *Const.* 1870, forbidding donations by municipal corporations to such corporations, though its charter provides that it may receive persons sentenced to a house of correction for drunkenness. *Washington Home of Chicago v. City of Chicago*, 41 N. E. 893, 895, 157 Ill. 414, 29 L. R. A. 798.

#### **As person.**

See "Person."

#### **Public purpose.**

Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties. *Spalding v. People*, 49 N. E. 993, 995, 172 Ill. 40; *Burhop v. City of Milwaukee*, 21 Wis. 257, 259; *Bonaparte v. Camden & A. R. Co.* (U. S.) 3 Fed. Cas. 821, 829. "Those are private where the stock is owned by individuals, though their use may be public, such as banks, insurance companies, and corporations for building bridges, canals, and railroads." *Burhop v. City of Milwaukee*, 21 Wis. 257, 259; *Bonaparte v. Camden & A. R. Co.* (U. S.) 3 Fed. Cas. 821, 829.

Public corporations "are generally esteemed such as exist for public, political purposes only, such as towns, cities, parishes, and counties, and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government." *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 667, 4 L. Ed. 629; *Adams v. Boston, H. & E. R. Co.* (U. S.) 1 Fed. Cas. 90, 92; *Board of Education v. Bakewell*, 10 N. E. 378, 379, 381, 122 Ill. 339; *Trustees of New Gloucester School Fund v. Bradbury*, 11 Me. (2 Fairf.) 118, 124, 26 Am. Dec. 515; *Inhabitants of Yarmouth v. Inhabitants of North Yarmouth*, 34 Me. 411, 417, 56 Am. Dec. 666; *Board of Directors for Leveeing Wabash River v. Houston*, 71 Ill. 318, 322; *City of Wheeling v. Campbell*, 12 W. Va. 36, 57 (citing *Armstrong v. Dalton*,

15 N. C. 568). If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted either by the bounty of the founder or the nature and objects of the institution. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 667, 4 L. Ed. 629; *Adams v. Boston, H. & E. R. Co.* (U. S.) 1 Fed. Cas. 90, 92; *Allen v. McKean* (U. S.) 1 Fed. Cas. 489, 497. See, also, *State v. Heyward* (S. C.) 3 Rich. Law, 389, 408. All corporations invested with subordinate powers for public purposes fall within this class, and are subject to legislative control. *Inhabitants of Yarmouth v. Inhabitants of North Yarmouth*, 34 Me. 411, 417, 56 Am. Dec. 666. "But a corporation is not public merely because its object is of a public character. A bank created by the government for its own uses, and where the stock is exclusively owned by the government, is a public corporation. But a bank whose stock is owned by private persons is a private corporation, though its object and operation partake of a public nature, and though the government may have become a partner in the association by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike, and railroad companies. The uses may in a certain sense be called 'public,' but the corporations are private, equally as if vested in a single person." *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. Law (2 Dutch.) 148, 171, 69 Am. Dec. 565 (citing 2 Kent, Comm. 305; *Angell & A. Corp.* §§ 14, 30-36); *Huntington, C. & I. Turnpike Road Co. v. Wallace* (Pa.) 8 Watts, 316, 317.

Public corporations are political corporations, or such as are founded wholly for public purposes, and the whole interest is in the public. The fact of the public having an interest in the works or property or objects of the corporation does not make it a public one. All corporations, whether public or private, are, in the contemplation of law, founded on a principle that they will promote the interest or convenience of the public. A bank is a private corporation, yet it is in the eye of the law designed for public benefit. A turnpike company is a private corporation, yet the public have an interest in the use of their works. The interest, therefore, which the public may have in the property or objects of a corporation, whether direct or incidental, unless it has the whole interest, does not determine its character as a private or public corporation. *Ten Eyck v. Delaware & R. Canal Co.*, 18 N. J. Law (3 Har.) 200, 204, 37 Am. Dec. 233.

"A public corporation is one which cannot carry out the purposes of its organization without charter rights from the commonwealth." *Allegheny County v. McKeesport Diamond Market*, 18 Atl. 619, 621, 123 Pa.

164; *St. Mary's Gas Co. v. Elk County*, 43 Atl. 321, 322, 191 Pa. 458. Railroads, canals, and gas companies must have the right of eminent domain in order to perform their functions. *St. Mary's Gas Co. v. Elk County*, 43 Atl. 321, 322, 191 Pa. 458.

Public or quasi public corporations are such as are organized for the purpose of pursuing an object or business in which the public is interested. Thus, whenever the aid of the government is granted to a private company in the form of a monopoly, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made. *Corrigan v. Coney Island Jockey Club*, 22 N. Y. Supp. 394, 396, 2 Misc. Rep. 512 (citing *Mor. Priv. Corp.* § 1114, etc.).

It matters not that private or individual interests may be invested in the corporation or under the authority of the charter, so far as the denomination of the institution is concerned. The only sensible distinction between public and private institutions is to be found in the authority by which and the purpose for which they are created and exist. Because, therefore, a corporation may fall under the denomination of "private corporations" in the artificial distinction between public and private corporations, it is none the less a public or political institution. The distinction between public and private corporations is somewhat arbitrary, and by no means determines whether the corporation is a public or private institution. If the stock in a banking, railroad, or insurance corporation be exclusively owned by the government, the institution is denominated a "public corporation"; but if a private individual be allowed to own a single share of the stock in common with the government, it is said that it becomes a private corporation. Eleemosynary corporations established for the purpose of public charity, or for the advancement of religion, education, or literature, on donations or bequests made exclusively for these great and beneficial public purposes, without the right to or expectation of dividends, repayment, or other individual or private interest therein, in fact, are denominated "private corporations." But an incorporated village in the use or expenditure of whose property the citizens of the village have individual and private interest, and receive daily individual and private benefits, is denominated a "public corporation." To say that an incorporated bank, authorized and created from considerations of public policy, and endowed by law with the extraordinary power and sovereign attribute of creating, in fact, the circulating medium of the country and regulating the standard of value, is not a public institution of the state for the purpose of internal

improvement because it falls under the artificial denomination of "private corporations," would be arrogant absurdity, and it would be equally as absurd to treat a railway corporation as a private corporation which is endowed with extensive powers and the extraordinary sovereign authority of exercising the right of eminent domain by taking private property for public purposes. In truth and in reality, whatever arbitrary or fictitious distinctions may have been created by mere verbiage, these corporations are in fact public institutions, created by public authority from considerations of public policy, and endowed with highly important civil powers for the advancement of the public welfare. It would be unreasonable to say that, because some private interests are invested in these corporations, therefore they must be denominated "private institutions," and for that reason placed beyond the reach of responsibility to the lawmaking power of the state, by which they were created. *Toledo Bank v. Bond*, 1 Ohio St. 622, 642.

#### **Public support.**

An institute incorporated for the promotion of the mechanic arts, holding its property in its own right, and managing its business according to its discretion, within the limitations of its charter, is a private corporation, notwithstanding an act renewing its charter granted it an annual appropriation. *State v. Maryland Institute for Promotion of Mechanic Arts*, 41 Atl. 126, 129, 87 Md. 643.

#### **Agricultural society.**

The Minnesota State Agricultural Society cannot be deemed to be a public corporation organized for the sole purpose of discharging governmental functions. *Lane v. Minnesota State Agricultural Soc.*, 64 N. W. 382, 384, 62 Minn. 175, 29 L. R. A. 708.

#### **Bank.**

A bank created by the government for its own uses, and where the stock is exclusively owned by the government, is a public corporation. *State v. Heyward* (S. C.) 3 Rich. Law, 389, 408.

#### **Gas company.**

See "Gas Company."

#### **Hospital.**

A hospital founded by a private benefactor is in point of law a private corporation, though dedicated by its charter to general charity. *State v. Heyward* (S. C.) 3 Rich. Law, 389, 408.

#### **Market.**

A public corporation is one which cannot carry out the purposes of its organization without some charter rights from the com-

monwealth. Railroads, canals, and gas companies must have the right of eminent domain in order to perform their functions, while a private corporation stands in no different condition from an individual corporation. A borough, owning a public square, agreed with the assignor of plaintiff, a corporation created for that purpose, that the latter should build thereon a public market, possession to be given to the borough, after 10 years, on the payment of the cost of the building less 10 per cent. While in possession, the assignor was to have control of the building and receive the rents and profits. The building was erected and used only for the market, and was indispensable for that purpose. It represented part of and was actually included in the capital stock of the corporation, and as such paid the usual state taxes. Held, that the interest of plaintiff in the building was the property of a private corporation, and liable to be taxed under Act April 15, 1834, requiring all houses, etc., to be assessed. *Allegheny County v. McKeesport Diamond Market*, 123 Pa. 164, 169, 16 Atl. 619.

#### **Railroad company.**

A "public corporation," as used in Rev. St. c. 188, § 12, declaring that members of public corporations shall be competent witnesses in cases affecting the interests of such corporation, is one which was created for public purposes and for those only, and all of the franchises of which were exercised for public purposes, and the property of which belonged to the public, such as counties, towns, parishes, and school districts; hence such term could not be extended to include a railroad company, though Act Dec. 24, 1844, § 3, declares that all railway corporations which shall be unable to purchase the land for their roads of the owners on the respective routes at rates to be agreed on shall be public corporations. *Dearborn v. Boston, C. & M. R. R.*, 24 N. H. (4 Fost.) 179, 189.

Railroad companies are "public corporations" in a limited sense, though the right of way and the track thereon are for the exclusive use of the owners, over which only their own conveyances are propelled. *Illinois Cent. R. Co. v. Copiah County*, 33 South. 502, 503, 81 Miss. 685 (citing *Illinois Cent. R. Co. v. Willenborg*, 7 N. E. 698, 117 Ill. 203, 57 Am. Rep. 862).

#### **School district.**

A school district is, by virtue of Pol. Code, § 1575, a public corporation, which may sue and be sued in its own name. *San Bernardino County v. Southern Pac. R. Co.*, 70 Pac. 782, 783, 137 Cal. 659.

#### **University.**

Public corporations are "not voluntary associations at all, and there is no con-

tractual relation between the corporators who compose them. They are municipal governmental institutions created by law for the administration of the affairs of the community." *Mor. Priv. Corp.* (2d Ed.) § 3. The University of California comes within the definition of a "public corporation." It was founded by the state; its original and primary endowment was by the United States, by grant to the state for this special purpose. All its property is property of the state. It was created by the state, and is subject to the laws of the state as a state institution, within the limits of the new Constitution, which has declared it to be a public trust, and that its organization and government shall be perpetually continued in the form and character prescribed by the organic act. *In re Royer's Estate*, 56 Pac. 461, 463, 123 Cal. 614, 44 L. R. A. 364.

#### **PUBLIC CROSSING.**

A place used as a crossing by the public is as much a public crossing as a place commonly used by the public for a crossing, at which a railroad company must exercise ordinary care in operating its cars to prevent injury to persons. *Galveston, H. & S. A. Ry. Co. v. Kief* (Tex.) 58 S. W. 625, 626.

#### **PUBLIC DEBT.**

The term "public debt," as used in Const. art. 5, § 34, prohibiting payment of money from the treasury except on appropriations made by law, and on a warrant drawn by the proper officer in pursuance thereof, except interest on the public debt, includes not only bonded indebtedness, but also other debts for which warrants have been issued. *State v. Hickman*, 29 Pac. 92, 11 Mont. 541.

A judgment entered on a claim or evidence of indebtedness incurred in excess of the ordinary revenue of the county without a vote of the people, or in excess of the constitutional limitation, is not a "public debt," within the meaning of Const. art. 15, § 5, providing that a county may, in addition to the taxes levied to defray the ordinary expenses, levy taxes to pay the public indebtedness. *Grand Island & N. W. Ry. Co. v. Baker*, 45 Pac. 494, 502, 6 Wyo. 369, 34 L. R. A. 835, 71 Am. St. Rep. 926.

The terms "public debt" and "public securities," used in legislation, are terms generally applied to national or state obligations and dues, and are rarely, if ever, construed to include town debts or obligations. *Morgan v. Cree*, 46 Vt. 773, 786, 14 Am. Rep. 640.

#### **PUBLIC DEFAMATION.**

A statement by a wife to her confidential friend, charging her husband with improper conduct with another woman, made without

malice, but to induce the friend to intercede with the husband and induce him to return to the matrimonial domicile, is not a public defamation, though it be untrue in fact, so as to entitle the husband to a divorce therefor. *Ashton v. Grucker*, 20 South. 738, 740, 48 La. Ann. 1194.

#### **PUBLIC DEPARTMENT.**

A public department is defined as a division of official duties or functions, a branch of government, a distinct part of a governmental organization—as the legislative, executive, and judicial departments; and Pub. Acts 1897, No. 205, § 2, providing that no veteran holding an office in the public works of a city shall be removed, cannot be extended to include public departments. *Ellis v. City of Grand Rapids*, 82 N. W. 244, 245, 123 Mich. 567.

#### **PUBLIC DETECTIVE.**

A public detective is a detective "engaged by the public for the protection of society." *Byrnes v. Mathews*, 12 N. Y. St. Rep. 74, 81.

#### **PUBLIC DOCUMENT.**

Letters addressed to a public officer in his official capacity, when received, become public documents, to be proved in like manner as other public documents. *Hammatt v. Emerson*, 27 Me. (14 Shep.) 308, 335, 46 Am. Dec. 598.

#### **PUBLIC DOMAIN.**

See, also, "Public Land."

"Public domain" is synonymous with "public lands," and is used to describe such as are subject to sale or other disposal under general laws. *Barker v. Harvey*, 21 Sup. Ct. 690, 693, 181 U. S. 481, 45 L. Ed. 963.

The Cherokee statute of limitations provides that judgment shall not be rendered for the recovery of any improvement on the public domain in any suit, unless instituted within three years, etc. Held, that the phrase "public domain" applies to town lots and town sites which have been segregated from the public domain by law, and the right of occupancy sold to individual citizens of the nation. *Rush v. Thompson*, 53 S. W. 333, 334, 2 Ind. T. 557.

The sections of land reserved for use of the state by Act Cong. Feb. 4, 1856, incorporating a certain railroad company, ceased to be a part of the public domain when surveyed and delineated on the map of the district surveyor. *Kuechler v. Wright*, 40 Tex. 600, 605.

"Public domain," as used in Act March 15, 1881, which provided for the issuance of

land certificates in favor of surviving soldiers of the Texas Revolution and others, and that the same should be located on any of the public domain, means any unappropriated public domain; that part of the public domain which has not been set apart for some other use. *Day Land & Cattle Co. v. State*, 4 S. W. 865, 875, 68 Tex. 526.

#### **PUBLIC DRAIN.**

4 Geo. IV, c. 55, cl. 35, giving the trustees of turnpike roads free passage along "public or parish drains" without paying toll, cannot be construed to include a public river on which, on account of the expense incurred of diverting and deserting the old course to make it direct, tolls have been granted, for it is not a drain in its proper sense. *Coulton v. Ambler*, 13 Mees. & W. 403, 418.

#### **PUBLIC DUES.**

A special assessment for paving is not a "tax or public due of any kind," within the meaning of a lease requiring a certain annual rent besides all taxes and public dues of any kind; the court stating that the phrase in question extended only to ordinary and usual taxes and public dues, and could not be regarded as including an expense which, like the one in question, was unknown to the parties, incalculable as to amount, uncertain as to time, and in which the lessee could have no certain interest. *Bolling v. Stokes* (Va.) 2 Leigh, 178, 181, 21 Am. Dec. 606.

Taxes levied by a county court to pay a railroad aid subscription are "public dues" of the county, within the statute rendering the collector of taxes liable therefor on failure to pay over the same. *Anderson v. Thompson*, 73 Ky. (10 Bush) 132, 136.

#### **PUBLIC EASEMENT.**

The easement of the public over the highways of a city includes the right to use the street for purposes of passage by the public, and therefore to employ any means directly conducive to that end, which do not substantially interfere with the customary use of the street by any portion of the public, or with the recognized rights of abutting owners. Hence it is held that the trolley system of propelling street cars, as at present used for the transportation of passengers through the streets of a city, is within the public easement, and does not impose an additional servitude. *Kennelly v. Jersey City*, 30 Atl. 531, 57 N. J. Law (28 Vroom) 293, 26 L. R. A. 281.

"The 'public easement,' as interpreted in this state, is primarily a right of passage over the surface of a highway, and of so

using and occupying the land within it as to facilitate such passage. In this primary right are included the grading, paving, cleaning, and lighting of the highway, the construction and maintenance of street railways with the apparatus proper for their use, and the maintenance of appliances conducive to the protection and convenience of travelers." The right of a telephone company to erect a telephone line within the limits of a public highway upon land, the fee of which is owned by private persons, imposes an additional servitude upon the fee, and can be acquired against such persons only by the exercise of eminent domain. *Nicoll v. New York & N. J. Telephone Co.*, 42 Atl. 583, 584, 62 N. J. Law, 733, 72 Am. St. Rep. 666.

### PUBLIC ELECTION.

A "public election," within the meaning of the article punishing betting upon the result of a public election, is any election for a public officer under the authority of the Constitution and laws of the United States or of this state. *Pen. Code Tex.* 1895, art. 396.

### PUBLIC EMOLUMENTS OR PRIVILEGES.

The phrase "public emoluments or privileges," as used in a constitution providing that no man or set of men are entitled to exclusive, separate, public emoluments or privileges from the community but in consideration of public services, means the superiority of personal and political rights, distinctions of rank, birth, or station. It has no reference to the private relations of the citizens, nor to the action of the Legislature in passing laws regulating the domestic policy and business affairs of the people or any portion of them. An act exempting certain land from taxation does not confer any exclusive, separate, public emoluments or privileges to any man or set of men, for it operates on the things, not on the person, and is neither an emolument nor a privilege to any particular individual or class of men in the community, for it passes with the property to any and all persons to whom the land may be conveyed. Hence it is not contrary to the constitutional prohibition. *Williams v. Cammack*, 27 Miss. (5 Cushm.) 209, 218, 61 Am. Dec. 508.

### PUBLIC EMPLOYMENT.

The trade of a butcher is a "public employment," within the rule against distraining for rent goods belonging to any person exercising a public trade or employment, to be carried, wrought, or managed in the way of the trade or employment. *Brown v. Shevill*, 2 Adol. & El. 138, 143.

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### PUBLIC ENEMY.

"The phrase 'public enemy' is universally understood to mean some power with whom the government is at open war." It is used in such sense in the rule that a carrier is not liable for a loss occasioned by the act of public enemies, and hence a carrier is liable for a loss occasioned by strikers. *Gulf, C. & S. F. R. Co. v. Levi (Tex.)* 12 S. W. 677.

The term "public enemy" does not mean merely robbers, thieves, and other private depredators, however much they may be deemed in a moral sense at war with society. Tramps, thieves, and robbers who overrun a certain locality are not "public enemies," in the legal sense of these words. *State ex rel. Mississippi County v. Moore*, 74 Mo. 413, 417, 41 Am. Rep. 322.

Public enemies are those whose government is at war with ours, and not mere rioters. *Coggs v. Bernard*, 1 Smith, Lead. Cas. 369, 466.

"Public enemy" does not mean thieves and robbers, but open and armed enemies; those in hostility to the government. *Lewis v. Ludwick*, 46 Tenn. (8 Cold.) 368-372, 98 Am. Dec. 454.

"Public enemy," as used in the statement of the common-law rule that an innkeeper is liable for all injuries happening to a guest save that of act of God and the public enemy, means the forces of a nation engaged in war with the nation of the innkeeper. *Russell v. Fagan*, 8 Atl. 258, 261, 7 *Houst. (Del.)* 389.

"The term 'public enemy,' as applicable to the undertaking of a common carrier, must be construed to mean the enemy of the state or government of which the common carrier is a citizen or member." *Nashville & O. R. Co. v. Estis*, 54 Tenn. (7 Heisk.) 622, 625, 24 Am. Rep. 289.

The liability of a common carrier for the safe delivery of goods is not relieved by showing that they were destroyed by an overwhelming force of United States soldiers under the command of an army officer, this not being destruction by public enemies. *Seligman v. Armijo*, 1 N. M. 459, 464.

In the late Civil War, the troops of the United States were a public enemy, against whose act a common carrier within the Confederate lines did not insure. *Southern Exp. Co. v. Womack*, 48 Tenn. (1 Heisk.) 256, 267.

A riotous mob is not a public enemy, and therefore a common carrier is liable to the consignee for the goods destroyed by the mob. *Missouri Pac. Ry. Co. v. Nevill*, 30 S. W. 425, 426, 60 Ark. 375, 28 L. R. A. 80, 46 Am. St. Rep. 208.



Act Feb. 5, 1841 (Pasch. Dig. 4621), prescribing the period which will bar the right of entry on lands, and declaring that, if "forcible occupation by a public enemy" prevents entry, the time of such disability will not be computed, means such occupation by an armed force from some foreign government with which this country may be at war as would interfere with the regular operation of the government in the part of the country so occupied. It would not include temporary forays by hostile Indians. *League v. Rogan*, 59 Tex. 427-434.

The destruction of whisky by a provost marshal, under the authority of the Confederate States, in 1862, cannot be claimed as the act of a public enemy, by a railroad company situated within the limits of that government and recognizing its control. "The Confederate government at that time was well organized and in full operation, and, so far as its citizens were concerned, it was certainly a government de facto, performing many of the duties and exercising more than the ordinary duties of a government de jure. Both the plaintiff and defendant were within the limits of that government, and recognized its control and received its protection, and neither of them can properly say that anything done by its authority was the act of a public enemy." *Patterson v. North Carolina R. Co.*, 64 N. C. 147, 149.

#### PUBLIC EXHIBITION.

An act fixing a license tax on public performances or exhibitions does not include a skating rink, to which persons are admitted on the payment of a fee, which entitles them to skate as well as watch other persons. *Harris v. Commonwealth*, 81 Va. 240, 243, 59 Am. Rep. 666.

"Public exhibitions of schools" consist of rhetorical and literary exercises by the students. Generally, the exercises are of such character that they may be given in a meeting house without shock to the religious sensibilities of those who worship there. A larger audience is needed for them than for the accommodation of students in the ordinary exercises of the school. They require the use of the house only for a brief time at long intervals, and are unlikely to interfere with the usual religious meetings. *Phillips Exeter Academy v. New Parish in Exeter*, 36 Atl. 548, 549, 68 N. H. 10.

#### PUBLIC FERRY.

A public ferry, says *Abinger, C. B.*, in *Hussey v. Field*, 2 Crompt. M. & R. 432, is a public highway of a special description, and its termini must be in places where the public have rights, as towns or villis, or highways leading to towns or villis. *Broadnax v. Baker*, 94 N. C. 675, 681, 55 Am. Rep. 633;

*Montgomery v. Multnomah Ry. Co.*, 3 Pac. 435, 437, 11 Or. 344.

A public ferry is one open to all, for which a regular fare is established, and the ferryman is a common carrier, bound to take over all who come; and he is bound to keep up and in good order his ferry, and is held strictly liable. *Hudspeth v. Hall*, 36 S. E. 770, 773, 111 Ga. 510.

A public ferry is a franchise, and consists not merely in the building of the ferry and the furnishing of boats, but in the running of them. The right of the public to use them is common, but the running of the ferry is a part of the franchise. The running of the ferry is a part of itself; and so is the running of a railroad a part of itself, and whoever is found running a public railroad is found exercising a function of government. *McGregor v. Erie Ry. Co.*, 35 N. J. Law (6 Vroom) 89, 98.

#### PUBLIC FRANCHISE.

Under *Ballinger's Ann. Codes & St. § 5780*, subd. 1, providing that information in the nature of quo warranto may be instituted when any person unlawfully exercises any public office or franchise within the state, the word "person" includes a corporation, and "public franchise" includes the exercise by a corporation of the right to use a city's streets for gas pipes for lighting purposes. *State v. Seattle Gas & Electric Co.*, 68 Pac. 946, 28 Wash. 483.

#### PUBLIC FUNDS.

The term "public funds" means "taxes, customs, etc., appropriated by the government to the discharge of its obligations." *Ayres v. Lawrence*, 59 N. Y. 192, 198.

"Public funds," within the rule of law which excuses the trustee from liability for the trust fund if invested in "public funds," means government stocks or securities depending for credit and security on the faith, solvency, and stability of the government. It would not include stock of the Bank of Kentucky. *Smith v. Smith*, 30 Ky. (7 J. J. Marsh.) 238, 239.

Lands devised to the church wardens and overseers of a certain town in trust to apply the rents toward educating twenty poor children, and a part thereof yearly towards apprenticing eight of such children, to be chosen by the said church wardens and overseers, is not a "public parochial fund," within 56 Geo. III, c. 139, § 11. *Reg. v. Halesworth*, 3 Barn. & Adol. 717.

#### PUBLIC GAMBLING HOUSE.

Hart. Dig. art. 568, prohibiting the keeping of a "public gambling house," should be

construed to mean those houses which are rendered public by their use as places of public resort. A house may be said to be a public house either in respect to its proprietorship or its occupancy and uses; and hence a room kept as a common resort for persons desiring to play cards for money is a "public gambling house," within the meaning of the statute, notwithstanding that every person that desires is not permitted to have access to it. *Lockhart v. State*, 10 Tex. 275, 276.

The voluntary permission of a single act of gaming in a house or place not kept to be used or occupied for gaming does not constitute the place a "public gambling house," within Act Jan. 17, 1846, relating to gaming. *Buck v. State*, 1 Ohio St. 61, 63.

### PUBLIC GRANT.

A public grant is not only an appropriation of the land, but is itself a perfect title. Officers are appointed, commissioned by the government for the express purpose of conducting and supervising all the preliminary proceedings, from the origin to the consummation of the title; and when these incipient measures are completed, and the grant issued, the law presumes that the government agents have performed their duty, and that the grant is valid. In a word, it is a legal presumption in favor of a patent that there are no defects behind it by which it can be invalidated or avoided. *Brush v. Ware*, 40 U. S. (16 Pet.) 93, 98, 10 L. Ed. 672.

### PUBLIC GROUNDS.

Other public ground, see "Other."

"Public ground," as used in a town plat providing that certain lots were set apart for public uses as public ground, should be construed, in the absence of explanatory evidence, to mean that the lots were set apart for the public square for the use of the town. *Town of Lebanon v. Warren County Com'rs*, 9 Ohio (9 Ham.) 80, 81, 34 Am. Dec. 422.

A dedication of land as "public ground" should be construed to authorize its use as sites for the erection of buildings for the use of the public, such as courthouses, market houses, schoolhouses, and churches; commons for pastures; public pounds for stray animals; even, under some conditions, common dumping grounds, or common landing places for those using a river—and would be such as, under usage and custom, would be deemed to have been fairly in contemplation at the time of laying out and selling tracts in the plan designating a certain tract thereon as "public ground." *Commonwealth v. Connellsville Borough*, 50 Atl. 825, 826, 201 Pa. 154.

Where a dedication by a board of county commissioners expressly donates to the public streets, alleys, market places, and public grounds, as represented on the plat, the fact that the tract designated on the plat as "public square" was not mentioned in the donating clause, but was subsequently mentioned in another clause as being reserved for the purpose of building a courthouse thereon, and that the tract designated as "public ground" was subsequently bounded and described in the acknowledgment, shows that the term "public ground" was not intended to include the tract designated as "public square." *Youngerman v. Polk County*, 81 N. W. 166, 167, 110 Iowa, 731.

Outlying land belonging to a sanitary district, which can be used only for drainage by the inhabitants of the district, is not exempt from taxation as "public grounds used exclusively for public purposes," within the meaning of that term as used in Rev. St. 1893, c. 120, § 2, subd. 9. *Sanitary Dist. of Chicago v. Martin*, 50 N. E. 201, 173 Ill. 243, 64 Am. St. Rep. 110.

### Lands of religious society.

The term "public ground," in 2 Terr. Laws, 577, providing that a recorded plat of a town describing the public grounds, and stating whether they are intended for streets, alleys, commons, or other public uses, shall vest and convey all land intended for public uses, does not include a square of a town, described in the plat as being appropriated to religious denominations. "'Public ground,' in the ordinary sense, is ground in which the general public has a common use; and it would not accord with the common understanding of the language used to say that land devoted to the use of a local religious society or hospital or academy, created for church, hospital, or academical purposes, is public ground, even if the use be considered in a sense public." *Patrick v. Young Men's Christian Ass'n of Kalamazoo*, 79 N. W. 208, 211, 120 Mich. 185.

### Navigable canal.

"Public ground of any kind," as used in the Revised Statutes, authorizing any railroad, if it be necessary to the location of its road, to occupy any public road, street, alley, way, or ground of any kind, and to lay its track to maintain and operate a railroad thereon, should not be construed to include the public navigable canals of the state, so as to authorize the use of the bank of such a canal for the purpose indicated by the statute. *State v. Cincinnati Cent. Ry. Co.*, 37 Ohio St. 157, 175.

### PUBLIC HACKMEN.

"Public hackmen," within the meaning of an ordinance requiring all public hackmen

to be licensed, does not include hackmen given charge by a steamship company of its carriage service, and not taking up passengers except at the private pier of the company. *City of New York v. Hexamer*, 69 N. Y. Supp. 198, 199, 59 App. Div. 4.

## **PUBLIC HIGHWAY.**

See "Highway."

## **PUBLIC HOUSE.**

The term "public house," as used in the Penal Code in relation to gaming, means a house open to the public, either for business, pleasure, religious worship, the gratification of curiosity, or the like. *Cole v. State*, 13 S. W. 859, 28 Tex. App. 536, 19 Am. St. Rep. 856; *Galloway v. State (Tex.)* 26 S. W. 67; *Grant v. State*, 27 S. W. 127, 33 Tex. Cr. R. 527; *State v. Alvey*, 26 Tex. 155, 156. It is generic in its character, and is intended by law to include all houses made public by the occupation carried on in them, as inns, taverns, houses for retailing liquors, or those made public by the resort of numerous persons, or in any other way. *Cole v. State*, 13 S. W. 859, 28 Tex. App. 536, 19 Am. St. Rep. 856. The statute having declared certain houses to be public houses, the court will judicially recognize such a house to be a public place without averment to that effect; but, as to the character of houses other than those specified in the statute, the court will not take judicial cognizance whether they be public or private, and the question is one of fact for the decision of the jury. *Grant v. State*, 27 S. W. 127, 33 Tex. Cr. R. 527.

"The term 'public' may be applied to a house either on account of the proprietorship, as the courthouse, which belongs to the county, or the purposes for which it is used, as a tavern, storehouse for retailing spirituous liquors," etc. As used in Pen Code, art. 563, which prohibits gaming in a "public house," it refers to those of the latter class; that is, taverns, storehouses, houses for retailing spirituous liquors, etc. The fact that a house is public does not necessarily make every room in it public. *Shihagan v. State*, 9 Tex. 430, 431; *State v. Alvey*, 26 Tex. 155, 156.

The term "public house," in a statute prohibiting gaming in public houses, is generic in its character, and is intended by the law to include all houses made public by the occupation carried on in them. An indictment merely charging that the house where the gaming was played was a public house is insufficient, and facts showing it to be a public house must be alleged. *State v. Barns*, 25 Tex. 654, 655.

A house occupied by a keeper of a toll bridge is a "public house," within the statute

against gaming, if the house is used for the occupant's business, but otherwise if it is merely his private residence. *Arnold v. State*, 29 Ala. 48, 50.

## **Bawdyhouse.**

The words "public house" do not, in their ordinary acceptation, mean a bawdy house. *Dodge v. Lacey*, 2 Ind. (2 Cart.) 212, 215.

## **Boarding house.**

"Public house," as used in Act April 17, 1869, excluding from registration, for voting purposes, persons boarding at any hotel, tavern, sailor's boarding house, restaurant, or public house, means a house for the accommodation of all who come lawfully and pay regularly. The term does not include a boarding house which is for the accommodation only of those who are accepted as guests by the proprietor. *Commonwealth v. Cuncannon (Pa.)* 3 Brewst. 344, 347.

## **Gambling house.**

A common gambling house is a public house, so that an indictment alleging playing at cards in a gambling house will not be quashed on the ground that it alleged playing in a public place, while the facts alleged show it to be at a public house. *Lafferty v. State*, 56 S. W. 623, 41 Tex. Cr. R. 606.

## **Jail.**

A jail house is in one sense a public house—that is to say, it is a house which belongs to the public as a body politic; but it is not generally a public house, and will not ordinarily fall within the meaning of the statute. But there may be in a particular jail house an apartment which is in fact public, within the meaning of the statute, because people may resort there for ease or amusement. Whether it constitutes a public place is a question for the jury. *State v. Alvey*, 26 Tex. 155, 156.

## **Office.**

"Public house," as used in Code, § 3243, prohibiting gambling at a public house, should be construed to include a lawyer's office; and where it consists of two rooms, front and back, in each of which professional business is transacted, the two rooms are equally within the statute. *Smith v. State*, 37 Ala. 472, 473.

"Public house," as used in Code, § 3243, prohibiting gaming in a public house, etc., includes a broker's office; and where the front room is used for the transaction of the broker's business, and contains all his books, paper, and money, the back room is equally within the statutory prohibition, though used and occupied as a sleeping room by a member of his family who paid no rent. *Wilson v. State*, 31 Ala. 371, 375.

**Opera house.**

An opera house in which there have been but two performances in the last six months, and which is closed between performances, is not such a public house that a single card game played therein is punishable under Pen. Code, art. 563. *Galloway v. State* (Tex.) 26 S. W. 67.

**Schoolhouse.**

A schoolhouse is a public house, and the fact that at times it is not temporarily occupied as such, or that it may be occupied temporarily for any other than school purposes, does not, when temporarily vacant, or when so occupied for other purposes, make it any less a public house during the time it is actually dedicated to school purposes as such. If the house was being occupied during the week for school purposes, it was none the less a public house on Sunday, whether occupied at all or whether used on that day for religious services. *Cole v. State*, 13 S. W. 859, 28 Tex. App. 536, 19 Am. St. Rep. 856.

**Shop.**

"Public house," as used in Pen. Code, arts. 355, 356, and succeeding sections, relating to gaming, and prohibiting the playing of cards in a public house, etc., does not include a "quirt shop." Hence an indictment charging that the defendant played cards in a quirt shop is insufficient as charging the playing in a public house or place. *Tummins v. State*, 18 Tex. App. 13, 14.

"Public house," as used in Code, § 3243, prohibiting gaming in a public house, etc., includes a building in which the business of a saddle and harness maker is carried on; and where such building consists of two stories, the lower of which is used by the owner for the purpose of carrying on his business, a back room in the second story, accessible only by an external stairway, and used by a journeyman of the owner as a sleeping room, is within the meaning of the term, when it is shown that the room was not rented by the owner to such occupant, but furnished to him under the contract of employment, which bound the owner to board and lodge him. *Bentley v. State*, 32 Ala. 596, 599.

A blacksmith shop used by the owner simply as his own private shop, and which, although 20 feet from a public road, had the door fronting thereon closed at the time of the game, which occurred at night, is not a public house, within Cr. Code, § 4052, prohibiting gaming at such place, where only two persons played the game, and the only other persons present were the owner and a lookeron. *Graham v. State*, 16 South. 934, 935, 105 Ala. 130.

**Store building.**

"Public house," as used in Code, § 3243, prohibiting gaming in a public house, etc.,

includes a storehouse in the country. If it consists of two rooms, one above the other, and the owner controls both, while he uses the lower room as his store, the upper room is also within the meaning of the term, unless it affirmatively appears that it is not used as an appendage to the store, nor in the prosecution of its business, nor in connection with the store for the convenience and accommodation of the owner, employes, etc., but is occupied for some justifiable private purpose entirely disconnected from the business of the store or the convenience of the customers. *Brown v. State*, 27 Ala. 47, 50.

"Public house," as used in Code, § 3243, prohibiting gambling at a public house, should be construed to include a storehouse for selling dry goods, though it consists of two rooms, one of which is used as a bedroom by one of the proprietors of the store, who was an unmarried man, and though no goods were kept or sold there, no accounts settled there, and none of the customers of the store had been seen to use such room for any purpose; for where the storehouse consists of two rooms, both under the control of the same person, the front room being used as a dry goods store, while the other, a shed room, is attached to it and connects with it by a door, it is prima facie an entirety. *Huffman v. State*, 29 Ala. 40, 42.

"Public house," within the meaning of a statute prohibiting gaming in such a place, does not include a room occupied as a sleeping room in a building, although the first story of the building is used as a storeroom, and there is a public hall in the second story used weekly for dances; the room and hall being under the control of different persons. *Skinner v. State*, 6 South. 399, 400, 87 Ala. 105.

**PUBLIC IGNOMINY.**

"Public ignominy," as used in Revision, § 3989, providing that no one shall be required to testify to matters which will render him criminally liable, or expose him to public ignominy, means "public disgrace," "public dishonor." *Brown v. Kingsley*, 38 Iowa, 220, 221.

**PUBLIC IMPROVEMENT.**

See, also, "Internal Improvement."  
As charity, see "Charity."

"Public improvements," when applied to a municipal government, must be taken in a limited sense, as applying to those improvements which are the proper subject of police and municipal regulation, such as gas, almshouses, hospitals, etc., and cannot be extended to subjects foreign to the object of the corporation, and beyond its territorial

limits." *Low v. City of Marysville*, 5 Cal. 214, 215.

"Public improvements," as used in *Laws 1897, c. 418, § 3*, providing for mechanics' liens under contracts for public improvements, means an improvement on any real property belonging to the state or a municipal corporation. *Brace v. City of Gloversville*, 56 N. Y. Supp. 331, 334, 39 App. Div. 25.

"Public improvements," as used in *Gantt's Dig. § 4438*, providing that convicts shall not be worked within the corporate limits of the city of Little Rock except on public improvements and buildings and grounds owned by the state, include and mean all improvements of a public nature, whether state, county, or city. The words should not be construed to mean that convicts could be worked within the corporate limits of such city only upon the grounds, buildings, and improvements which were the property of the state, but the words include the working of the city streets. *Ward v. City of Little Rock*, 41 Ark. 526, 528, 48 Am. Rep. 46.

The location of a county seat within a city, and the erection of the necessary county buildings, are not "public improvements or public works," in aid of which cities are authorized by *Rev. St. 1881, § 3152 (Rev. St. 1894, § 3612)*, to donate money or bonds. *Schneck v. City of Jeffersonville*, 52 N. E. 212, 215, 152 Ind. 204.

#### **Lighting of streets.**

Greater New York Charter, § 413, providing that any public work or improvement within the cognizance or control of any one or more of the departments of the commissioners who constitute the board of public improvements must be authorized and approved by resolution of the board of public improvements, and an ordinance or resolution of the municipal assembly, before its execution, relates to public works in the nature of betterments, and does not refer at all to such a matter as public lighting, which must constantly be provided for from day to day and from month to month in the administration of the affairs of the city. *Blank v. Kearny*, 61 N. Y. Supp. 79, 81, 44 App. Div. 592.

#### **Macadamizing streets.**

"Public improvements," as used in the charter of the city of New Haven, which provides that the expenses of any sewer or other public work or improvement may be assessed on the persons whose property is specially benefited thereby, does not include the macadamizing of a street. The language, as used in connection with the word "sewer," imports a class of distinct public works or improvements other than the mere

repair of highways. *City of New Haven v. Whitney*, 36 Conn. 373, 376.

#### **Public school building.**

The term "public improvement," as used in a mechanic's lien act providing that any person furnishing any material or labor to any contractor for a public improvement shall have a lien on the money, bond, or warrants due or to become due such contractor, includes a public school building erected by a board of education. *Beardsley v. Brown*, 71 Ill. App. 199, 201; *Spalding Lumber Co. v. Brown*, 49 N. E. 725, 727, 171 Ill. 487.

#### **Railroad.**

The common council of a village cannot by its fiat make that a public improvement for which the Legislature itself could not authorize the municipality to expend money or create an indebtedness; and an appropriation of the bonds of the village, which had been voted to be issued for public improvements, to the use of and to aid a railroad, by an ordinance declaring such railroad to be a public improvement, was a misappropriation of such bonds. *Risley v. Village of Howell (U. S.)* 57 Fed. 544, 547.

#### **PUBLIC INDECENCY.**

"Public indecency" has no fixed legal meaning. It is vague and indefinite, and cannot in itself imply a definite offense. The courts have, by a kind of judicial legislation in England and the United States, usually limited the operation of the term to public exhibitions of the person, the publication, sale, or exhibition of obscene books, and prints or the exhibition of a monster—acts which have a direct bearing on public morals and affect the body of society. The term is different from, and more limited in its meaning than, the word "indecency," as commonly understood. *McJunkins v. State*, 10 Ind. 140, 144.

"Public indecency" has no fixed legal meaning. It is vague and indefinite, and cannot in itself imply a definite offense. The acts which constitute it must vary with the different phases of society, depending upon the fastidious, refined, or primitive views of the community in which they happen to be committed. Acts which in one place might be regarded as amounting to public indecency might in another be considered harmless, and ever proper. *Jennings v. State*, 16 Ind. 335, 336.

Open and notorious adultery is a public indecency. *Grisham v. State*, 10 Tenn. (2 Yerg.) 589, 595.

#### **PUBLIC INJURY.**

The opening of an unnecessary highway is a public injury no less than a wrong

to the individuals whose property is immediately affected. It increases needlessly the public expenditure and the burden of taxation. *Montclair Military Academy v. North Jersey St. Ry.*, 47 Atl. 890, 893, 65 N. J. Law, 328.

### PUBLIC INSPECTION.

"Public inspection," as used in Const. 1879, providing that the books of all corporations shall be kept for public inspection, does not mean inspection by any one so desiring from motives of impertinence or idleness and curiosity, with no interest to subserve or protect, it not being contemplated that any and every body should be permitted to pry into affairs of a corporation; but only a shareholder or other person with a laudable object to accomplish, or a real or actual interest upon which to predicate his request for information disclosed by the books, is entitled to access thereto. *State ex rel. Bourdette v. New Orleans Gaslight Co.*, 22 South. 815, 49 La. Ann. 1556 (cited and approved in *State ex rel. Burke v. Citizens' Bank*, 25 South. 318, 319, 51 La. Ann. 426).

By "public inspection," as used in the Constitution in reference to the right of the public to inspect public records, is meant not an inspection of the idle, the impertinent, or the curious, but the inspection by those with a laudable object to accomplish, or a real and actual interest, on which is predicated the request for information disclosed by the books. *Marsh v. Sanders*, 34 South. 752, 754, 110 La. 726 (citing *State ex rel. Bourdette v. New Orleans Gaslight Co.*, 49 La. Ann. 1556, 22 South. 815).

### PUBLIC INSTITUTION.

Seminary as, see "Seminary."

Public institutions are those which are created and exist by law or public authority, while private institutions are those which are created or established by private individuals for their own private purposes. Some public benefits or rights may result from the institutions of private individuals or associations. So, also, some private or individual rights may arise from public institutions. The only sensible distinction between public and private institutions are found in the authority by which, and the purposes for which, they are created and exist. Because, therefore, a corporation may fall under the denomination of private corporations in the artificial distinction between public and private corporations, it is none the less a public or political institution. *Toledo Bank v. Bond*, 1 Ohio St. 622, 642.

### PUBLIC INTEREST.

Property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control. *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77.

### PUBLIC INVENTORY.

Public inventories are those which are accompanied by the solemnities or formalities of the law, and which are made by the recorder of the parish to a notary public duly appointed by the judge. *Civ. Code La.* 1900, art. 1105.

### PUBLIC JOURNAL.

*Laws Utah T. 1884, p. 214*, in providing that no person shall be disqualified as a juror by reason of having formed or expressed an opinion on the matter or cause to be submitted to such juror, founded on a "statement in a public journal," includes the evidence, or what purports to be the evidence, printed in a newspaper. *Hopt v. Utah*, 7 Sup. Ct. 614, 616, 120 U. S. 430, 30 L. Ed. 708.

### PUBLIC LAMP POST.

A contract with the city, providing that plaintiffs were to supply the "public lamp posts" with gas, erected and to be erected for a specified sum per month, etc., should be construed to include posts erected by private individuals and used for the benefit of the public, and not to be restricted to those owned by the city. *Davenport Gaslight & Coke Co. v. City of Davenport*, 13 Iowa, 229, 239.

### PUBLIC LAND.

The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. *Newhall v. Sanger*, 92 U. S. 761, 763, 23 L. Ed. 769; *Doolan v. Carr*, 8 Sup. Ct. 1228, 1235, 125 U. S. 618, 31 L. Ed. 844; *United States v. McLaughlin*, 8 Sup. Ct. 1177, 1190, 127 U. S. 428, 32 L. Ed. 213; *Northern Pac. Ry. Co. v. McCormick* (U. S.) 89 Fed. 659, 661; *Bardon v. Northern Pac. Ry. Co.*, 12 Sup. Ct. 856, 857, 145 U. S. 535, 36 L. Ed. 806; *Rierson v. St. Louis & S. F. Ry. Co.*, 51 Pac. 901, 902, 59 Kan. 32; *Barker v. Harvey*, 21 Sup. Ct. 690, 693, 181 U. S. 481, 45 L. Ed. 963; *Northern Pac. R. Co. v. Hinchman* (U. S.)

53 Fed. 528, 526; *Mann v. Tacoma Land Co.*, 14 Sup. Ct. 820, 822, 153 U. S. 273, 38 L. Ed. 714; *United States v. Elliot*, 26 Pac. 1117, 1118, 7 Utah, 389; *Oregon Short Line R. Co. v. Fisher*, 72 Pac. 931, 933, 26 Utah, 179 (citing *Bardon v. Northern Pac. R. Co.*, 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806); *State v. Kennard*, 56 Neb. 254, 257, 76 N. W. 545, 546. Whenever a tract of land shall have once been legally appropriated for any purpose, from that moment the land thus appropriated becomes severed from the mass of public land, and no subsequent law or proclamation or sale will be construed to embrace it or to operate upon it, although no other reservation was made of it. *United States v. Blendauer* (U. S.) 122 Fed. 703, 708. The words are so used in Act Cong. Feb. 25, 1885, c. 149, § 3, 23 Stat. 322 [U. S. Comp. St. 1901, p. 1525], which provides, in effect, that no person by force or threats shall prevent or obstruct any person from peaceably entering upon, or establishing a settlement or residence on, any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free transit from or through the public lands, and are here used interchangeably with "public lands subject to settlement or entry under the public land laws." *United States v. Elliot*, 26 Pac. 1117, 1118, 7 Utah, 389.

Public lands comprise the general public domain; unappropriated lands; the lands not held back or reserved for any special governmental or public purpose. *United States v. Garretson* (U. S.) 42 Fed. 22, 24.

It is well settled that all land to which any claims or rights of others have attached does not fall within the designation of public land. *Bardon v. Northern Pac. R. Co.*, 145 U. S. 535, 538, 12 Sup. Ct. 856, 36 L. Ed. 806. Land upon which an entry of record, valid on its face, was made under the treaty with the Chippewa Indians, dated September 30, 1854, was thereby appropriated and withdrawn from entry or sale as public land. *Hartmann v. Warren* (U. S.) 70 Fed. 946, 948.

The term "public lands," in a grant of public lands to the public for roads, etc., should be construed as meaning strictly public lands such as are open to entry and settlement, and not those in which the rights of the public have passed, and which have become subject to some individual right of a settler, etc. *Yakima County v. Tullar*, 17 Pac. 885, 886, 3 Wash. T. 393.

The term "public lands," as used in Rev. St. § 2477 [U. S. Comp. St. 1901, p. 1567], granting the right of way for the construction of highways over public lands not reserved for public uses, etc., includes land acquired by the United States under the provisions of the direct tax act of 1863. *Verdier v. Port Royal R. Co.*, 15 S. C. 476, 480.

The terms "public lands" and "state lands" shall be defined and deemed to be synonymous whenever either is used in the chapter relating to the management and disposition of state lands. *Ballinger's Ann. Codes & St. Wash.* 1897, § 2134.

#### **Reserved land.**

Public lands are lands open to settlement or subject to sale by the government. Lands reserved for any purpose by the government cease to be a part of the public lands. *State v. Cumberland Telephone & Telegraph Co.*, 27 South. 795, 796, 52 La. Ann. 1411.

The term "public lands," as used in Act Cong. July 2, 1864, § 3, granting public lands to a railroad, etc., should be construed to mean only such lands as are open to sale or other disposition under general laws, and not to include lands agreed to be set aside as an Indian reservation if the Indians should prefer such lands to their present reservation, and if such lands proved to be better adapted to the wants of the Indians than their present reservation, and which, under the agreement with the Indians, were not to be open for settlement until the decision was made. *Northern Pac. R. Co. v. Hinchman* (U. S.) 53 Fed. 523, 526.

#### **School land.**

Public lands belonging to the United States include the two sections of each township in Washington Territory set aside by an act of Congress of 1853 for school purposes. The setting aside of such sections does not sever them from the public domain, nor destroy their character as public lands. While they are not public lands in the sense that they are open to entry, they are still within the meaning of that term, since the government retains control and dominion over them until the happening of a certain event, and also retains the right, up to a certain time, to annul the act by which such sections were severed, and to throw the lands open as public lands. *Barkley v. United States*, 19 Pac. 36, 37, 3 Wash. T. 522.

The term "public lands," as used in 12 Stat. U. S. 491, giving a right of way to the Union Pacific Railroad Company through public lands of the United States, includes the lands promised in 10 Stat. U. S. 383, creating the territory of Nebraska, to be ceded to the future state of Nebraska as school lands. *Union Pac. R. Co. v. Douglas Co.* (U. S.) 31 Fed. 540.

Act Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524] in providing that all inclosures of any public lands by any persons having no claim or color of title, etc., shall be unlawful, etc., includes school lands of the territory reserved from the public domain and set apart for school purposes. *United States v. Bisel*, 19 Pac. 251, 254, 8 Mont. 20.

Pen. Code, art. 18, declares that if any person who is an officer or clerk in the General Land Office, or a district surveyor, or deputy district surveyor, or county surveyor, or his deputy, shall directly or indirectly be concerned in the purchase of any right, title, or interest in any public land in his own name, or in the name of any other person, he shall be fined not exceeding \$500. Held, that the term "public land" is not limited in its signification to unappropriated public dominion, but also includes what is usually designated as public school land. *Cotulla v. Laxson*, 60 Tex. 443, 444.

#### **Tide land.**

"Public lands," as used in Act Cong. 1872, authorizing the holder of certain scrip to select unoccupied and unappropriated public lands, does not authorize a selection of portions of tide flats in a bay which are covered at ordinary high tide, and uncovered at ordinary low tide, since the premises are water, and not land, as the latter term is used in statutes relating to the public domain. *Baer v. Moran Bros. Co.*, 27 Pac. 470, 471, 2 Wash. St. 608.

The words "public lands" do not include tide lands, as said in *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769. *Mann v. Tacoma Land Co.*, 14 Sup. Ct. 820, 822, 153 U. S. 273, 38 L. Ed. 714.

#### **Unsurveyed granted land.**

Act Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], making inclosures of public lands of the United States without color of title unlawful, does not include land which had been granted by the Northern Pacific Railway Company to the defendant, but the title to which he had been unable to obtain in consequence of the non-survey of the township in which the lands were situated by the United States. The title of the railroad company was a legal one, under a grant from the United States, and defendant held under color of title. The act of 1885 was intended to prevent the inclosure and appropriation of vast tracts of public lands, said to be millions of acres in extent, by associations of wealthy cattle owners, without a shadow of pretense of title, and the term "public lands of the United States" has reference to such tracts. *United States v. Godwin*, 16 Pac. 850, 851, 7 Mont. 402.

The term "public lands," as used in Act Cong. July 2, 1862, as amended and approved April 14, 1864, as extended July 4, 1866, donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts, means all unsurveyed lands, whether the same, or any portion thereof, has been previously granted or not. All lands are public, within the meaning of that word as used in

the act, until the survey is made. This is necessarily so, because until the surveys are made the rights of the grantee to any specific tract of land could not be ascertained. Hence it is that the word "public" is used to distinguish the unsurveyed from the surveyed and segregated lands, where the right of private proprietorship has attached. *Heydenfeldt v. Daney Gold & Silver Min. Co.*, 10 Nev. 290, 311.

The sections of land reserved for use of the state by Act Cong. Feb. 4, 1856, incorporating a certain railroad company, ceased to be a part of the public land when surveyed and delineated on the map of the district surveyor. *Kuechler v. Wright*, 40 Tex. 600.

#### **PUBLIC LANDING.**

A public landing is a piece of ground on the bank or margin of a river, provided for the convenience and common use of all persons in the debarkation of themselves or their goods, but not a place to be permanently incumbered with piles of lumber or other merchandise or goods, any more than a public highway or street, because the benefits and accommodations to the public which were intended to be conferred would be greatly affected, if not wholly destroyed, by any such permanent incumbrance. *Gardiner v. Tisdale*, 2 Wis. 153, 188, 60 Am. Dec. 407.

The words "public landing," as used, designating a space on a plat of a town site, are at least evidence of dedication. *Village of Mankato v. Meagher*, 17 Minn. 265, 277 (Gil. 243, 253).

#### **PUBLIC LAW.**

See "General Public Law."

#### **PUBLIC LEGISLATIVE POWER.**

A city ordinance leasing the city gasworks is not an act of public legislative power, since the gasworks held by the city were held by it as a business corporation. *Bally v. City of Philadelphia*, 39 Atl. 494, 496, 184 Pa. 594, 39 L. R. A. 837, 63 Am. St. Rep. 812.

#### **PUBLIC LIBRARY.**

The term "public library," in 1 Rev. St. 388, § 4, subd. 5, exempting every public library from taxation, includes the library of the American Geographical Society, which is kept by such society free and open to all. So long as the general public continue to have free access to this extensive and valuable library, surely it is practically, and to all intents and purposes, a public library. Under such circumstances, to criticise the library as but an incident to the relator's



purposes would seem to be ungracious. The words "public library" are not technical. They have acquired by judicial decisions no precise legal meaning. They are words of common use, and ought, therefore, as between the public, which is invited to a free enjoyment, and a disinterested society, such as the relator, to be interpreted as they are commonly understood. *People v. Tax and Assessment Commissioner* (N. Y.) 11 Hun, 505, 507.

"Public library," as used in Rev. St. c. 37, § 2, which exempts public libraries, and the land and buildings used in connection therewith, from taxation, does not include a library owned by a corporation, the use of which is limited to the stockholders of the corporation and their immediate families, though any person is entitled to become a member thereof on the payment of a certain sum, since the public, as such, has no interest in the library. *Providence Athenæum v. Tripp*, 9 R. I. 559, 561.

### **PUBLIC LODGING HOUSE.**

Every building in any city of this commonwealth, not licensed as a hotel, inn, or tavern, in which 10 or more persons are lodged for a price, for a single night, of 25 cents or less for each person, shall be deemed a public lodging house, within the meaning of the act relating to lodging houses. P. & L. Dig. Laws Pa. 1897, vol. 3, col. 379, § 1.

### **PUBLIC LOTS.**

"Public lots" as used in a town plat made by a county, wherein certain property was marked as "Public Lots," should be construed to mean that the county had dedicated the land to public uses. *Rutherford v. Taylor*, 38 Mo. 315, 317.

### **PUBLIC MARKET.**

See, also, "Market."

Where a statute requiring grocery and other stores to be closed on Sunday specifically exempted public markets from the operation of the law, the term "public markets" meant those public markets within the limits of which stores would not be kept, like those which were required to be closed beyond those limits, and so the exemption did not include an ordinary grocery store or stall kept within the limits of a public market. *State v. Fernandez*, 2 South. 233, 235, 39 La. Ann. 538.

The live stock market at the Union Stockyards, by reason of its magnitude and its far-reaching influence on the commerce of the country, has not become a public market, and therefore is not impressed with a

public use. Such market, and all those doing business therein, are not brought within the influence of those rules of public policy which apply to and govern public employment, and which it is the business of the courts to administer and enforce. If it be admitted that the magnitude of the business transacted at such market, and its inducement upon the general commerce of the country, are of themselves sufficient to constitute the stockyards a public market, so as to impress upon it a public use, it would probably follow that certain public duties and obligations would thereby be imposed on the stockyards company. It would doubtless be held bound to keep its markets open alike to all who might desire to do business therein, and perhaps to make no discrimination between individuals. But it does not follow that dealers resorting to such market for the purpose of trade shall be subjected to similar rules of public policy. They deal with each other merely on the footing of private parties owing each other no duties except those which the rules of honesty and fair dealing impose. Each would be at liberty to deal or decline to deal with others, precisely as he might see fit. The rules of trade would be no different from what they are in other markets, whether public or private; nor can it be seen how combinations between merchants doing business in such public market, either with a view of increasing or diminishing competition, or of enhancing or diminishing prices, would be subjected to any rules different from those which apply to such combinations, wherever made. The mere fact that the business of a public market has become very large does not give to the courts any power to declare such markets public and impressed with a public use, or to apply to them any rules of public policy peculiar to that class of markets. It may well be doubted whether the term "public market," in the sense in which it is sought to be used, is one which is known to our law. Markets overt, such as exist in England, are unknown here; nor is it usual in this country to grant to private parties the franchise or liberty of keeping or holding a fair or market, as is done in England. *American Live Stock Commission Co. v. Chicago Live Stock Exch.*, 32 N. E. 274, 281, 143 Ill. 210, 18 L. R. A. 190, 36 Am. St. Rep. 385.

### **PUBLIC MEASURE.**

Other public measures, see "Other."

The phrase "public measure," as used in the Australian ballot law of 1891, does not apply to an election to determine the question of establishing a township high school, and such election must be held in accordance with the statutes regulating school elections. *People v. Cowden*, 43 N. E. 788, 789, 160 Ill. 557.

**PUBLIC MILL.**

Act Neb. 1873, provides that all mills for grinding grain, and which shall grind for toll, shall be deemed public mills, for the purposes of the act, which subjects such mills to certain established rates of toll, etc. *Blair v. Cumming Co.*, 4 Sup. Ct. 449, 453, 111 U. S. 363, 28 L. Ed. 457.

Every gristmill that has ground or shall at any time grind for toll shall be a public mill. *Shannon's Code Tenn.* 1896, § 3435.

Every water grist mill, steam mill, or wind-mill, that shall grind for toll, shall be a public mill. *Code N. C.* 1883, § 1846.

All gristmills which grind for toll for any person are public mills, within the meaning of the article relating to mills and millers. *Pol. Code Ga.* 1895, § 1633.

Public mills are defined by statute to be "all gristmills which grind for toll, and all water gristmills built on any water course by authority of any statute or order of any court" (*Rev. St.* 1889, § 7024). *McIntosh v. Rankin*, 134 Mo. 340, 347, 35 S. W. 995, 997.

**PUBLIC MINISTER.**

Consuls as, see "Consul."

The term "public minister," as used in Act U. S. 1790, making it an offense for any one to arrest a public minister, includes an attaché to a foreign legation. *United States v. Benner* (U. S.) 24 Fed. Cas. 1084, 1088.

**PUBLIC MONEY.**

"Public moneys," as used in Const. art. 3, § 20, forbidding the appropriation of public moneys for local or private purposes without the two-thirds vote of the Legislature, are the public moneys of the state, as contradistinguished from public revenues levied for local purposes by towns, cities, and villages under state authority, or moneys which, by a long course of legislation, as in the case of excise moneys, have been treated as standing in the same situation. *People v. Murray*, 44 N. E. 146, 148, 149 N. Y. 367, 32 L. R. A. 344.

A bond given by a bank which had been designated by the board of county commissioners as a county depository, under section 1, c. 189, Sess. Laws 1889, referred to said act in its preamble. The bond departed from the statutory language, in that the sureties were bound that the bank would promptly pay to the county, on the check of the treasurer, all county funds, instead of public money, as named in the statute. Held, that the words "public money" and the expression "county funds" were synonymous terms.

*Myers v. Kiowa County Com'rs*, 56 Pac. 11, 12, 60 Kan. 189.

In an extradition treaty wherein embezzlement of public moneys is one of the crimes for which reciprocal extradition is stipulated, "public moneys" do not include the funds of a private corporation. *Blandford v. State*, 10 Tex. App. 627.

"Public money," as used in the Constitution, prohibiting the giving of public money to any association or private undertaking, should be construed to include a license fee required to be paid by the owner of a dog to a humane society for its own use. Pecuniary penalties for offenses not being imposed under either taxing or licensing power of the state would not probably fall within the constitutional restrictions as to public money. *Fox v. Mohawk & H. R. Humane Soc.*, 59 N. E. 353, 355, 165 N. Y. 517, 51 L. R. A. 681, 80 Am. St. Rep. 767.

"Public money," in the statutes of the United States, ordinarily means the money of the federal government received from the public revenues or intrusted to its fiscal officers, wherever it may be. It does not include the money of states, counties, cities, and towns, although, with reference to those governments and municipalities, such funds, in other connections, would be deemed public moneys. Nor does it include money in the hands of the marshals, clerks, and other officers of courts, held by them to await the judgment of the court in relation to the ownership thereof. Such money constitutes trust funds held for individual litigants, and not for the public as represented by the government. *Branch v. United States* (U. S.) 12 Ct. Cl. 281, 289.

The term "public money," within Act Cong. March 3, 1835, c. 303, entitled "An act making certain additional appropriations for the Delaware breakwater," and providing that no officer of the army shall receive any per cent. or additional pay, extra allowance, or compensation, in any form whatsoever, on account of the disbursing any public money appropriated by law during the present session for fortifications, etc., or for any other service or duty whatsoever, unless authorized by law, includes the money appropriated for the payment of the Cherokee Indians upon their removal and cession of the lands. *Minis v. United States*, 40 U. S. (15 Pet.) 423, 448, 10 L. Ed. 791.

Where a treaty provides for extradition of persons charged with the embezzlement of public moneys, the use of the term "public moneys" in the treaty obviously excludes the right to demand extradition for the embezzlement of private funds. In *re Reiner* (U. S.) 122 Fed. 109, 110.

The phrase "public moneys," as used in the definition of embezzlement, includes all

bonds and evidence of indebtedness, and all moneys belonging to the state, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by state, county, district, city, or town officers in their official capacity. Pen. Code Cal. 1903, § 426; Pen. Code Idaho 1901, § 4787; Rev. St. Utah 1898, § 4318.

All moneys which shall come into the hands of any officer of the state, or of any officer of any county, or of any township, school district, highway, district, city, or village, or of any municipal or public corporation within the state, pursuant to any provision of law authorizing such officer to receive the same, shall be denominated "public moneys," within the meaning of the act to provide for the safe-keeping of public moneys. Comp. Laws Mich. 1897, § 1197.

### **PUBLIC NAVIGABLE WATER.**

See "Navigable."

### **PUBLIC NECESSITY.**

With reference to public matters and legislative usage, "necessity" means great or urgent public convenience. *Commonwealth v. Gilligan*, 46 Atl. 124, 195 Pa. 504.

We often speak of public necessity merely as a conducive motive of legislative action, and, so used, it simply indicates that the Legislature thought the action, on the whole, to be wise; but, when the contemplated action depends for its validity upon a legislative finding of public necessity, the phrase has an important meaning, although necessarily a somewhat indeterminate one. Such legislative finding in many cases lies wholly in discretion. Public necessity, in this sense, is that urgent, immediate public need arising from existing conditions, which, in the judgment of the Legislature, justifies a disturbance of private rights that otherwise might be legally exempted from such interference. The term is therefore a relative one. It determines in each case that may arise the relation of the duty implied in the broad grant of legislative power, to promote by appropriate action the interests of the commonwealth to the limitations of that power established for the protection of private rights. Ordinarily this is wholly a question of public policy, to be determined by the Legislature. Sometimes, however, the necessity is one which does not affect the whole body politic the same way, but may or may not exist in different localities for reasons peculiar to each. In *re Shelton St. Ry. Co.*, 38 Atl. 362, 363, 69 Conn. 626.

Shreveport City Charter, § 17, authorizing the city council, when it deems it for the public interest, to provide for the con-

struction of a city hall, markets, and other "structures of public necessity and utility," cannot be construed to authorize the purchase of land by the city, to be given away to a private corporation, on which it was to erect structures for its own use. Structures of public necessity and utility would include houses for fire engines, waterworks, gasworks, houses for public schools, or to be owned by a city, and in which all the citizens should have an interest. *Lewis v. Shreveport* (U. S.) 15 Fed. Cas. 494, 496.

### **In eminent domain.**

The public necessity which warrants the condemnation of private property often means public convenience and advantage. Though telephones are of very recent invention, and reach the very limited few, their use is held to be a public necessity; in other words, public convenience and advantage—sufficiently so, at least, to justify the exercise of the sovereign power of eminent domain. Natural gas, though limited to localities small in area, is held also to be a public necessity, and therefore to justify the exercise of this extraordinary power. *Oury v. Goodwin* (Ariz.) 26 Pac. 376, 382.

Const. art. 18, § 2, providing that, when private property is taken for the benefit or use of the public, the necessity for using such property, and the just compensation to be made therefor, shall be ascertained by a jury, does not mean that it is indispensable or imperative, but only that it is convenient and useful; and if the improvement is useful, and a convenience and a benefit to the public sufficient to warrant the expense of making it, it may be found a necessity. To be a public necessity, the improvement must be a convenience, and a benefit to the public of sufficient importance to warrant the public in incurring the expense in making it. *Commissioners of Parks and Boulevards v. Moesta*, 51 N. W. 903, 904, 91 Mich. 149.

Acts 1883, No. 124, § 8, providing that the jury shall determine the necessity for taking private property for the use or benefit of the public for a proposed improvement, and, in case they find such necessity exists, they shall award compensation to the owner, requires that the benefit which the public will derive from the proposed improvement will equal the cost of the same; also it must be a present public necessity, and with regard to such public necessity the public must be interested. Every part of the public is interested in every part of the city. Anything that tends to beautify, adorn, and make more desirable as a place of residence or a place of business, one part of the city, adds to the value of the property in every other part, and is a benefit to the city generally. Every part of the city is interested in beautifying and adorning every other part. The benefit to the public must be so great

that it can afford to pay the entire expense of opening a park, and that the benefit to the public will more than pay for the cost and expense of opening it, and the inconvenience attending it, to constitute a public necessity. The public must also be so much benefited that it can afford to pay the damages. *City of Detroit v. Beecher*, 42 N. W. 986, 990, 75 Mich. 454, 4 L. R. A. 813.

#### PUBLIC NEWSPAPER.

See, also, "Newspaper."

Rev. St. c. 77, § 14, providing that sheriff's sales of real estate shall be published in a public newspaper printed and published in the county of the proposed sales, should be construed to include a weekly publication devoted to the interests of business, corporations, commerce, and finance, published by a corporation. *Maass v. Hess*, 29 N. E. 887, 140 Ill. 576.

A secular weekly newspaper, of 16 pages, of 12½ inches in length and 10 inches in width, containing reports of decisions and digest of cases, as well as news of a general nature, and having a large and general circulation amongst lawyers and laymen, is a public newspaper, within the meaning of Rev. St. c. 77, § 14, requiring notices of execution sales to be printed in a public newspaper in the county where such sales shall be made. *Pentzel v. Squire*, 43 N. E. 1064, 1065, 161 Ill. 346, 52 Am. St. Rep. 373.

#### PUBLIC NOTICE.

The charter of a mutual fire insurance company required that the managers of the company, when they made an assessment, should publish the same, and that the members should, within 60 days after such publication, pay their assessments. It also required that public notice of a certain clause of the charter be given when advertising an assessment made. A notice in proper form was published about seven times in nine different newspapers, covering the territory in which the company's policies were issued, and two of the newspapers were published within two miles of the building insured. There were also handbills posted in the neighborhoods where there were policies. The court, in holding these notices sufficient, said: "It will be seen that the notice to be given is to be a public notice, and it is described in the act as advertising an assessment. We think it quite plain that notice by advertisement in a newspaper is the kind of notice required by the charter to be given. The notice was to be public, which is distinguished from private, and in so far the provisions of the law were complied with. Not actual notice, but notice by publication, is the kind of notice directed by the

law." *Pennsylvania Training School v. Independent Mut. Fire Ins. Co.*, 127 Pa. 559, 18 Atl. 392.

In laws relating to probate courts and proceedings, the words "public notice" denote notices published three weeks successively in a newspaper published in the county, or, if none, in the state paper. Rev. St. Me. 1833, p. 534, c. 63, § 38.

#### PUBLIC OR COMMON NUISANCE.

At common law a "public nuisance" signifies anything that worketh hurt, inconvenience, or damage to the King's subjects. *Kinney v. Koopman*, 22 South. 593, 594, 116 Ala. 310, 67 Am. St. Rep. 119 (citing 3 Bl. Comm. 216).

Blackstone says common nuisances are a species of offense against the public order and economical regimen of the state, being either the doing of a thing to the annoyance of all the King's subjects, or the neglecting to do a thing, which the common good requires; and any legal interference with the rights of the citizens of the commonwealth to pass and repass on a public highway, whether by failing to repair it, or by obstructing it or permitting it to be obstructed, is a public nuisance. *City of Paris v. Commonwealth*, 4 Ky. Law Rep. 597, 600.

"A common nuisance is that which worketh hurt to the citizens at large. It may be such from its noxious qualities, as when it corrupts the air, as a brewhouse, a gas-house, etc. It may become such from its location, as gates across, or logs, rubbish, etc., in, the highway. \* \* \* So is anything impeding the free passage of the public without necessity, or any unauthorized obstruction, to the annoyance of the public." *Burnham v. Hotchkiss*, 14 Conn. 311, 317.

Common or public nuisances are offenses "against the public order or economical regimen of the state, being either the doing of a thing to the annoyance of the King's subjects, or the neglecting to do a thing which the common good requires." *People v. Toynbee* (N. Y.) 20 Barb. 168, 200 (citing 4 Bl. Comm. 166); *State v. City of Mobile* (Ala.) 5 Port. 219, 311, 30 Am. Dec. 564; *State v. Godwinsville & P. Macadamized Road Co.*, 10 Atl. 666, 668, 49 N. J. Law (20 Vroom) 266, 60 Am. Rep. 611.

A nuisance is said to be public when it affects the surrounding community generally, and impairs the rights of neighboring residents as members of the public, and private when it especially injures individuals (*Abb. Law Dict. tit. "Nuisance"*). *Chesbrough v. Commissioners of Putnam and Paulding Counties*, 37 Ohio St. 508, 516.

A public nuisance, at common law, signifies anything that worketh hurt, inconven-

ience, or damage to the King's subjects. *Ferguson v. City of Selma*, 43 Ala. 398, 400 (citing 1 Russ. Cr. 317, marg.; 3 Bl. Comm. 216, marg.; 2 Bouv. Law Dict. 248; 2 Burrill, Law Dict. 248; 1 Chit. Gen. Prac. 31, 383, 41, 413, 569, marg.).

Nuisances are of two kinds—public or common nuisances, which affect the public, and are a nuisance to all citizens, and private nuisances, which may be defined as anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. The difference between public or common nuisances and private nuisances is plain and palpable; the first being an injury done which affects the whole community, and therefore is not actionable; the second, an injury to the property privileges or health of individuals of that community, and is actionable. *Lansing v. Smith* (N. Y.) 4 Wend. 9, 30, 21 Am. Dec. 89.

A public or common nuisance is such an inconvenience or troublesome offense as annoys the whole community in general, and not merely some particular person. *Venzle v. Dwinel*, 50 Me. 479, 481 (citing 4 Bl. Comm. 166, 167); *United States v. Debs* (U. S.) 64 Fed. 724, 740; *Doolittle v. Broome County Sup'rs* (N. Y.) 16 How. Prac. 512, 517; *Village of Cardington v. Fredericks' Adm'r*, 21 N. E. 766, 767, 46 Ohio St. 442.

Anything not warranted by law which annoys and disturbs one in the use of his property, rendering its ordinary use or occupation physically uncomfortable to him, is a "nuisance." If the annoyance is such as to materially interfere with the ordinary comfort of human existence, it is a nuisance; and, if the annoyance is one that is common to the public generally, then it is a public nuisance. The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence. The pollution of a stream, therefore, through the use of the same by a city for sewerage purposes, rendering the water unfit for domestic purposes and the watering of cattle, and causing the emission of noxious odors, is a public nuisance. *Nolan v. City of New Britain*, 38 Atl. 703, 706, 69 Conn. 668.

A crib or pier erected in the waters of the harbor of New York is a public nuisance, unless the person erecting it is authorized to build such a structure at that place by some power competent to confer such authority. *Woolrych* says: "An obstruction in a public river is a nuisance, such as the erection of a wharf so as to narrow the river, and at the common law any encroachment upon a public stream was considered to be purpresture; that is to say, the making of that several and private which ought to be common to

many." *People v. Vanderbilt* (N. Y.) 25 How. Prac. 139, 140 (citing *Woolr. Waters*, Law Lib. [4th Series] vol. 53, pp. 192, 195).

*Wood* says: "Nuisances are either public or private. Public nuisances, strictly, are such as result from the violation of public rights, and, producing no special injury to one more than another of the people, may be said to have a common effect, and to produce a common damage. Of this class are those intangible injuries that result from the immoral, indecent, and unlawful acts of parties, that become nuisances by reason of their deleterious influences upon the morals or well-being of society." 1 *Wood, Nuis.* (3d Ed.) § 14. There are two kinds of public nuisances: One is that class of aggravated wrongs or injuries which affect the morality of mankind, and are in derogation of public morals and decency, and, being *malum in se*, are nuisances, irrespective of their location and results. The other is that class of acts, exercise of occupations or trades, and use of property which become nuisances by reason of their location or surroundings. To constitute a nuisance in the latter class, the act or thing complained of must be in a public place, or so extensive in its consequences as to have a common effect upon many, as distinguished from a few. Where it is in a city or town where many are congregated and have a right to be, and produces material annoyance, inconvenience, discomfort, or injury to the residents in the vicinity, it is a public nuisance of the latter class. It is said in *Wood on Nuisances*: "Many kinds of business that would be regarded as a nuisance upon a street that is densely populated and much traveled, or that is occupied for business purposes of such a character as naturally make it what is called a 'thoroughfare,' would not be such upon a less populous street, or one that is not so much used by the public. \* \* \* Thus, a blacksmith shop would not for a moment be tolerated upon a principal street of a city, in the vicinity of costly buildings and fashionable business places, except it were kept up and maintained in a way so as to produce no possible annoyance or injury; but, from the needfulness of the business, it is tolerated upon streets in less important parts of the city, and the smoke and cinders arising therefrom, as well as the noisy reverberations from the heavy strokes of the sledge hammers on its numerous anvils in the prosecution of the business, is permitted, even without the aid of special ordinances." Section 21. It is now well settled that "loud, disagreeable noise, alone, unaccompanied with smoke, noxious vapors, or noisome smells, may create a nuisance, and be the subject of an action at law for damages, in equity for an injunction, or of an indictment as a public offense." *Id.* § 611. "Any indecent exposure of one's person in a public place, in the presence of several persons, is

a public nuisance, \* \* \* because it shocks the moral sensibilities, outrages decency, and is offensive to those feeling of chastity that people of ordinary respectability entertain." *Id.* 57. So, for the same reason, the exhibition in public of obscene pictures, prints, books, or devices is a common nuisance. *Id.* §§ 65, 68.

Under Sand. & H. Dig. §§ 5132, 5145, 5147, which invest municipal corporations with power to prevent annoyance within their limits, to abate nuisances, and to enact ordinances to carry into effect such power, and "to improve the morals, order, comfort, and convenience of their inhabitants," a town may enact an ordinance prohibiting the keeping of a jackass within its limits, in hearing distance of its populace, and declaring such keeping to be a nuisance. *Ex parte Foote*, 65 S. W. 706-708, 70 Ark. 12, 91 Am. St. Rep. 63.

The words "public nuisance," as used in connection with the law of waters and water courses, signifies an injury to the public rights of navigation, fishing, and such, and a mere purpresture is not a public nuisance. *Hicks v. Smith*, 85 N. W. 512, 514, 109 Wis. 532.

A common gaming house is a public nuisance, because of the necessary injury to the morals of the community resulting from such an establishment. If an innkeeper permits his guests to be annoyed by disorder, he is subject to be indicted as for a nuisance. *State v. Mathews*, 19 N. C. 424-426.

A common gaming house, kept for lucre and gain, and holding allurements to all who are disposed to game, and kept for that purpose, is a common nuisance at common law. *United States v. Dixon* (U. S.) 25 Fed. Cas. 872, 875.

A public nuisance is one that invades the public. *State v. Commissioners of Crossroads for Charleston Neck* (S. C.) 3 Hill, 149, 152.

A "common nuisance" is that which affects the people, and is a violation of a public right, either by direct encroachment, or by doing some act which tends to a common injury, or by the omitting of that which the common good requires. *Bohan v. Port Jervis Gaslight Co.*, 25 N. E. 246, 122 N. Y. 18, 9 L. R. A. 711.

If a nuisance is one that is common to the public generally, it is a public nuisance. *Nolan v. City of New Britain*, 38 Atl. 703, 706, 69 Conn. 668.

Common or public nuisances are offenses against the public order or economical regimen of the state, being either the doing of a thing to the annoyance of the King's subjects, or the neglecting to do a thing which the common good requires. *People v. Toyn-*

*bee* (N. Y.) 20 Barb. 168, 200 (citing 4 Bl. Comm. 166); *State v. City of Mobile* (Ala.) 5 Port. 279, 311, 30 Am. Dec. 564; *State v. Godwinsville & P. Macadamized Road Co.*, 10 Atl. 666, 668, 49 N. J. Law (20 Vroom) 266, 60 Am. Rep. 611.

It is otherwise defined as a violation of a public right, either by a direct encroachment upon public rights of property, or by doing some act which tends to a common injury, or by omitting to do some act which the common good requires, and which it is the duty of a person to do, and the omission to do which results injuriously to the public. *United States v. Debs* (U. S.) 64 Fed. 724, 740.

A public nuisance consists, among other things, in unlawfully doing an act, or omitting to perform a duty, which act or omission in any manner renders a considerable number of persons insecure in life. *Pitcher v. Lennon*, 38 N. Y. Supp. 1007, 1008, 16 Misc. Rep. 609.

Nuisances are public when they violate public rights and produce a common injury—when they injure or annoy that portion of the public which necessarily comes in contact with them. *Kelley v. City of New York*, 27 N. Y. Supp. 164, 166, 6 Misc. Rep. 516.

A public nuisance is an infringement of a public right. *Central Crosstown R. Co. v. Metropolitan St. Ry. Co.*, 40 N. Y. Supp. 1095, 1096, 17 Misc. Rep. 716.

A public nuisance affects the community at large, or some considerable portion of it, such as the inhabitants of a town, and the person therein offending is liable to a criminal prosecution. *Hundley v. Harrison*, 28 South. 294, 123 Ala. 292; *Baltzger v. Carolina Midland Ry. Co.*, 32 S. E. 358, 360, 54 S. C. 242, 71 Am. St. Rep. 789.

A nuisance is public when it affects the rights enjoyed by the citizens as part of the public, as the right of navigating a river or traveling on a public highway—rights to which every citizen is entitled. *King v. Morris & E. R. Co.*, 18 N. J. Eq. (3 C. E. Green) 397, 399.

A public nuisance becomes also a private nuisance as to the person who is specially injured thereby in the enjoyment of his lands. *Kavanagh v. Barber*, 30 N. E. 235, 131 N. Y. 211, 15 L. R. A. 689; *Ackerman v. True*, 67 N. E. 629, 630, 175 N. Y. 353.

Nuisances are of two kinds: Common or public and private. 5 Bac. Abr. 146. The first class is defined to be such a structure or troublesome offense as annoys a whole community in general, and not merely some particular person. 1 Hawk. P. C. 197; 4 Bl. Comm. 166, 167. It is said to be diffi-

cult to define what degree of annoyance is necessary to constitute a nuisance. In relation to trades, it seems that, when a trade renders enjoyment of life or property uncomfortable, it becomes a nuisance, for the reason that the neighborhood have a right to have pure and fresh air. *Rex v. White*, 1 Burr. 333. For a common or public nuisance, the usual remedy at law is by indictment. *Harvey v. Dewoody*, 18 Ark. 252, 258 (citing 3 Bl. Comm. c. 13).

A common nuisance is one which affects the people at large, and is an offense against the state, but an action may be brought in his own name by any one who suffers damage peculiar in kind or degree, beyond what is common to him and to others. *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 807, 12 S. E. 1085, 1086, 12 L. R. A. 53.

Pen. Code, § 385, defines a "public nuisance" as a crime against the order and economy of the state, which consists in unlawfully doing an act, etc., which "first, annoys, injures, or endangers the comfort, repose, health, or safety of any considerable number of persons; or, \* \* \* third, unlawfully interferes with, obstructs, or tends to obstruct or render dangerous for passage \* \* \* a public \* \* \* street or railway; or fourth, in any way renders a considerable number of persons insecure in life or the use of property." *People v. Metropolitan Traction Co.*, 50 N. Y. Supp. 1117, 1121.

Comp. Laws 1888, § 4566, declares: "A public nuisance \* \* \* consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either (1) annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons; \* \* \* (4) in any way renders three or more persons insecure in life or the use of property." The befouling of the waters of a canal, from which a number of persons—more than three—obtain water for irrigation, culinary, or other domestic purposes, so that it is unfit for use, constitutes a public nuisance, under this section. *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 52 Pac. 168, 175, 16 Utah, 246, 40 L. R. A. 851, 67 Am. St. Rep. 607.

A public and disorderly liquor and store house in a town, in and about which dissolute persons are permitted to remain by day and night, drinking, tippling, carousing, swearing, hallooing, etc., is a public nuisance. *State v. Bertheol* (Ind.) 6 Blackf. 474, 39 Am. Dec. 442.

A wooden building, though erected contrary to law, is not per se a public nuisance, but it may become such by the manner in which it is used or allowed to be used. *Fields v. Stokley*, 99 Pa. 306, 309, 44 Am. Rep. 109.

Pen. Code, § 385, declares that a public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing an act or omitting to perform a duty, which act or omission annoys, injures, or endangers the comfort, repose, health, or safety of any considerable number of persons. *People v. Pelton*, 14 N. Y. Cr. R. 64, 65, 55 N. Y. Supp. 815.

A public exhibition of any kind that tends to the corruption of morals, or to a disturbance of the peace, or of the general good order or welfare of society, is a public nuisance. Under this head are included all puppet shows, legerdemain, and obscene pictures, and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and dissolute members of society. Wood on Nuisances. That a prize fight is an exhibition of the character here described, and consequently a public nuisance, there can be no doubt; and, if so, the use of a theater for prize fighting is such a nuisance. *Commonwealth v. McGovern* (Ky.) 75 S. W. 261, 266.

Impediments and obstructions placed in highways and navigable streams are nuisances per se, because they interrupt the passage, and thereby annoy others. Trades and manufactures of certain kinds become nuisances from the places when and the manner in which they are conducted. Animals, such as dogs, swine, etc., are not nuisances until they become offensive by being suffered to run at large, or kept in the vicinity of men's habitations. So an accumulation of vegetables and fruits in process of decay, the flesh and offal of animals, gunpowder, drains and sewers in cities and populous places, may or may not become public nuisances by their localities and other attendant circumstances. The true test is that the thing, trade, or business is in some way detrimental to the public, for the elementary writers say, "Common nuisances are such inconvenient or troublesome offenses as annoy the whole community in general, and not some particular person." *People v. Toynbee* (N. Y.) 20 Barb. 168, 200.

A gaming house is a common nuisance at common law, and, as such, indictable. The offense was the causing and procuring many persons to resort to such a house for the purpose of gaming, and for the defendant's profit, either upon the game itself or the incidental sale of oysters or other things. Such a house is an encouragement to idleness, cheating, and other corrupt practices, and tends to produce public disorder by congregating many people, and to draw the young and unwary from the paths of virtue. It is also a nuisance if it hold out inducements and attractions to bring together persons in such numbers or so often as to make

it injurious to the public and dangerous to the neighborhood, by drawing the sober and industrious into habits of idleness and vice, and corrupting the young and unwary. But it must be of such a character as to amount to a nuisance, or it is not an indictable offense, for a private person may allow gaming in his house without being guilty of a nuisance. *State v. Layman* (Del.) 5 Har. 510, 511.

Laws 1887, c. 77, § 1, defines as a common nuisance, among other things, any building, etc., that is used for the illegal sale or keeping of spirituous or malt liquors, wine, or cider. *State v. Marston*, 15 Atl. 222, 64 N. H. 603.

Rev. St. c. 17, § 1, declaring that all places used for the illegal sale or keeping of intoxicating liquors are common nuisances, meant whenever they should habitually or customarily be appropriated for, or converted to the purpose of, the illegal sale of such liquors; and the sale of a glass of liquor in a dwelling house on two different occasions was not sufficient to make the house a common nuisance. The word "common" strongly indicates that such construction would be erroneous. *State v. Stanley*, 24 Atl. 983, 984, 84 Me. 555.

Keeping 50 barrels of common powder in a certain house, near a dwelling house and near a certain public street, does not, irrespective of the manner of keeping the same (i. e., negligently and improvidently), constitute a common nuisance. *People v. Sands* (N. Y.) 1 Johns. 78, 79, 3 Am. Dec. 296.

In order to constitute a public nuisance, in the meaning of the law, it is not always necessary that the acts charged should have been habitual or periodical. Where a single act produces a continuing result, the offense may be complete without a recurrence of the act. *Commonwealth v. McGovern* (Ky.) 75 S. W. 261, 267.

A public nuisance must be occasioned by acts done in violation of law. A work which is allowed by law cannot be a nuisance. Whether the construction of a railroad in a street in a city would operate beneficially or injuriously to the public right of way, and whether it would prove a public benefit or a public nuisance, are questions to be determined by the Legislature and the city council. If they err in judgment, and the work prove an obstruction to the street, and a public inconvenience and injury, it is not punishable as a nuisance, if constructed as prescribed by the charter. *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. (2 C. E. Green) 75, 77, 86 Am. Dec. 252.

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of per-

sons, although the extent of the annoyance or damage inflicted upon individuals may be unequal. Civ. Code Cal. 1903, § 3480; Civ. Code Idaho, 1901, § 2965; Rev. Codes N. D. 1899, §§ 5057, 5058; Civ. Code S. D. 1903, §§ 2394, 2395; Rev. St. Okl. 1903, § 3718; Civ. Code Mont. 1895, § 4551; Ballinger's Ann. Codes & St. Wash. 1897, §§ 3084, 3087.

A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing an act, or omitting to perform a duty, which act or omission (1) annoys, injures, or endangers the comfort, repose, health, or safety of any considerable number of persons; or (2) offends public decency; or (3) unlawfully interferes with, obstructs, or tends to obstruct or render dangerous for passage, a lake, or a navigable river, bay, stream, canal, or basin, or a stream, creek, or other body of water which has been dredged or cleared at public expense, or a public park, square, street, or highway; or (4) in any way renders a considerable number of persons insecure in life or the use of property. Pen. Code N. Y. 1903, § 385.

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a public nuisance. Pen. Code Cal. 1903, § 370.

#### Number of persons affected.

A public nuisance is a nuisance which annoys such part of the public as necessarily come in contact with it. *Kissel v. Lewis*, 59 N. E. 478, 481, 156 Ind. 233; *Jones v. City of Chanute*, 65 Pac. 243, 244, 63 Kan. 243.

A nuisance, to be a public nuisance, must be in a public place, or where the public frequently congregate, or where members of the public are likely to come within the range of its influence, for, if the act or use of property be in a remote and unfrequented locality, it will not, unless *malum in se*, be a public nuisance. A nuisance which affects a place where the public has a legal right to go, and where the members thereof congregate, or where they are likely to come within its influence, is a public nuisance. *City of Burlington v. Stockwell*, 47 Pac. 988, 989, 5 Kan. App. 569.

It is often difficult to tell whether a nuisance is so general in its character (that is, affects a sufficient number of persons) as to justify its characterization as a "pub-



lie nuisance." In such cases, how many persons shall be called the "public"? Of course, in one sense, the public is everybody, but manifestly that is not the sense in which the word is used in the law relating to nuisances. In that law, by the words "the public" are meant those who reside in definite municipal boundaries, entitled to the protection of the local laws, and to be represented by the local officers, and yet cases of nuisance affecting all the people of the local municipality will rarely occur. The words "the public" must therefore have even a narrower signification, and be inclusive of even a less number. *Jones v. City of Chanute*, 65 Pac. 243, 244, 63 Kan. 243.

A public nuisance does not necessarily mean one affecting the government or the whole community of the state. Very few nuisances are thus extended in their effects. It is public if it affects the surrounding community generally, or the people of some local neighborhood. A nuisance affecting the inhabitants of a village is a public nuisance. *Village of Pine City v. Munch*, 44 N. W. 197, 42 Minn. 342, 6 L. R. A. 763.

A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence. The test as to whether a nuisance is a public nuisance or not is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. *Nolan v. City of New Britain*, 38 Atl. 703, 706, 69 Conn. 668; *Baltzeger v. Carolina Midland Ry. Co.*, 32 S. E. 358, 360, 54 S. C. 242, 71 Am. St. Rep. 789.

It is not so much a question whether a large number of persons happen to be annoyed by the act, as to whether the act itself was such, and in such a place, as that the natural effect thereof should be to annoy or offend all who come within its sphere. In the case of *Soltau v. De Held*, 2 Sim. (N. S.) 133, the Vice Chancellor says: "To constitute a public nuisance, the thing must be such as in its nature or its consequences is a nuisance or an injury or a danger to all persons who come within the sphere of its operations, though it may be so in a greater degree to some than to others." *Baltzeger v. Carolina Midland Ry. Co.*, 32 S. E. 358, 360, 54 S. C. 242, 71 Am. St. Rep. 789.

#### **Obstruction or encroachment on highway.**

The term "public nuisance" includes an encroachment on a highway. *Baldwin v. Trimble*, 37 Atl. 176, 178, 85 Md. 396, 36 L. R. A. 489.

It is a settled law in Indiana that a house erected by defendant on premises leased to him, which encroaches on the public street, is a public nuisance. *City of Valparaiso v. Bozarth*, 55 N. E. 439, 153 Ind. 536, 47 L. R. A. 487.

A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance. A purpresture is not necessarily a public nuisance, as it may exist without putting the public to any inconvenience whatever. Such might be the case where a part of a common highway is inclosed, providing that the appropriation is confined to a part never used for the purpose to which a highway is devoted. *Attorney General v. Ewart Booming Co.*, 34 Mich. 462, 473.

Any permanent or habitual obstruction of a public street is a nuisance, though room be left to pass—any use of a public street incompatible with the public use. An awning erected in a city street, covering the sidewalk for 110 feet, the roof constructed of light iron, its lowest point 10 feet from the ground, and supported by iron columns 3½ inches in diameter, 12 feet apart, along the inside of the curbstone, was a nuisance. *Hoey v. Gilroy*, 14 N. Y. Supp. 159, 161.

By the express provisions of Pen. Code, § 385, the unlawful obstruction of a street or highway is a public nuisance. *Tinker v. New York, O. & W. Ry. Co.*, 51 N. E. 1031, 1032, 157 N. Y. 312.

An encroachment upon a highway is not in all cases a public nuisance, such as will justify its removal by any individual. *Anderson v. Young*, 21 N. Y. Supp. 172, 174, 66 Hun, 240.

#### **Private nuisance distinguished.**

See "Private Nuisance."

### **PUBLIC OFFENSE.**

A public offense is an act committed in violation of a public law. The acts done or omitted to be done have the vital elements of a crime. Time, place, and circumstances are usually mere incidents descriptive of the offense. *Ford v. State*, 35 N. E. 34, 35, 7 Ind. App. 567.

The term "public offense," as used in Gen. St. 1878, c. 105, § 11, authorizing any peace officer to arrest without a warrant for a public offense committed or attempted in his presence, means a breach of the laws formulated for the protection of the public, as distinguished from an infringement of mere private rights—a punishable violation of law. The word public was not intended to express the idea of a distinction between offenses made such by common law or by general statutes, and those defined by a law having but a limited territorial operation. The term includes all such violations of municipal ordinances as are punishable by fine or imprisonment. *State v. Cantieny*, 24 N. W. 458, 462, 34 Minn. 1.

Gen. St. 1889, art. 1, c. 82, gives the definition of public offense, and the division—

thereof: "Public offenses are divided into felonies and misdemeanors. A felony is an offense punishable by death or confinement at hard labor in the penitentiary. All other public offenses are misdemeanors." State v. Alphin, 42 Pac. 55, 57, 2 Kan. App. 28.

The term "public offense," in this territory, has the same meaning as the word "crime," and they may be used interchangeably. They are defined to mean an act committed or omitted in violation of the law forbidding or commanding it (Pen. Code, par. 15). West v. Territory (Ariz.) 36 Pac. 207, 208.

The term "public offense," within the meaning of Pen. Code, § 15, which provides that a public offense is an act committed in violation of a law commanding or forbidding it, and to which is annexed a fine, properly defines Act April 1, 1878, § 9, providing that every person who shall evade or attempt to evade the payment of his fare for traveling on any railroad shall be fined. Dyer v. Placer County, 27 Pac. 197, 90 Cal. 276.

A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1) Death; (2) imprisonment; (3) fine; (4) removal from office; or (5) disqualification to hold and enjoy any office of honor, trust, or profit in this state. Pen. Code Cal. 1903, § 15.

A crime or public offense is an act or omission forbidden by law, to which is annexed, on conviction: (1) Death; (2) imprisonment; (3) fine; (4) removal from office; (5) disqualification to hold or enjoy any office of honor, trust, or profit under the territory. Comp. Laws Nev. 1900, § 3986.

A public offense is an act or omission forbidden by law. Acts or omissions to which a pecuniary penalty is attached, recoverable by action by a person for his own use, or for the use, in whole or in part, of the state, or of a county or corporation, are not public offenses. Cr. Code Ala. 1896, § 4651.

A public offense is any act or omission for which the laws of the state prescribe a punishment. Gen. St. Kan. 1901, § 5442.

## PUBLIC OFFICE.

See "Office."

## PUBLIC OFFICER.

See "Officer."

Other public officer, see "Other."

## PUBLIC OR PRIVATE WORKS.

The term "public or private works" means any mine, railroad, or railroad yard,

telegraph company, the work or construction of any sewer, bridge, tunnel, the roadbed of any railroad, any building or other structure, by the authorities of any city, town, or municipality, except in so far as the regulation thereof is now conferred upon the board of railroad and warehouse commissioners. Gen. St. Minn. 1894, § 2264.

## PUBLIC PARK.

A "public park," in the popularly accepted meaning of the present time, may be comprehensively defined as a public pleasure ground. The definitions by the lexicographers do not vary much from this. No doubt the idea of open air and space, with the land kept in grass and trees, as if approximately in the state of nature, still inheres in the general understanding of the word, but it is no longer the dominating thought, as it formerly was. The idea of a public park near a city, as a place of resort for recreation and amusement, necessarily banishes the idea of a home for wild beasts of the chase, even in a modified state of nature. Public parks are recognized as the natural place for walks, drives, a wheel or with horse and carriage, boating, skating, and also as the appropriate location for monuments and statues, either to historic heroes or to pure art, fountains, flowers, music stands, and other agencies of enjoyment of the eye and ear. Laird v. City of Pittsburg, 54 Atl. 324, 325, 205 Pa. 1, 61 L. R. A. 332.

In the idea of a "public park" is comprehended more than a use, either occasional or limited by years, or susceptible of co-existence with a private right capable of concurrent exercise. The words suggest more than an open extensive area of land to be passed over or but temporarily occupied by the public, and on which any private person may still do acts of ownership. To create a public park an extensive area is needed; but the area must be improved, and in various processes, alternative and subversive of natural formation, must much money be absorbed and many years must go by before it is complete. And so costly, so extensive, so peculiar in character, and so undisturbed by interference, must be these processes and the results of them as that there is need of permanency and exclusiveness of public possession and control as against the exercise of any private right therein. Of itself the power to take lands for a public park, unless limited by the terms in which it is given, would to a large degree carry with it the right to acquire the largest title in the lands taken. Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 240, 6 Am. Rep. 70.

A "public park" is not only a public use, but throughout the states of this Union it is held to be a local improvement, conferring such benefits in the way of increased value to the land in the benefit district within

which it is situated as to justify special assessments against private property to pay the compensation for the land condemned for such park. *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860, 863.

### PUBLIC PEACE.

The term "public peace," as used in a New York statute entitled "An act to preserve the public peace and order on Sunday," etc., means that quiet, order, and freedom from agitation or disturbance which is guaranteed by the laws, and is practically synonymous with the word "order" as used in the title of the act, which signifies "proper state or condition," or "established or settled mode of proceeding." *Neuendorff v. Duryea* (N. Y.) 6 Daly, 276, 280.

"Public peace," as used in a statute pointing out the penalties to be imposed for breaches of the public peace, means "that invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted." *State v. Benedict*, 11 Vt. 236, 239, 34 Am. Dec. 688.

Causing a report to be spread that a certain person is dead, and having a church bell rung and tolled, is not a disturbance of the "public peace," within Vermont statutes defining the ordinary modes of committing a breach of the public peace by tumultuous and offensive carriage, threatening, quarreling, challenging, assaulting, beating, or striking. *State v. Riggs*, 22 Vt. 321, 323.

### PUBLIC PLACE.

A public place is a place where the public has a right to go and be. *State v. Welch*, 88 Ind. 308, 310.

The term "public," as applied to place, is not an absolute, but a relative term, and is used in contradistinction to the term "private." *State v. Sowers*, 52 Ind. 311, 312; *State v. Waggoner*, Id. 481; *Cahoon v. Coe*, 57 N. H. 556, 595 (cited and approved in *Terriory v. Lennon*, 22 Pac. 495, 9 Mont. 1).

"Public place," as used in Rev. Code, § 3620, prohibiting gaming in a "public place," etc., means any house to which all who wish can go, night or day, and indulge in gaming. *Smith v. State*, 52 Ala. 384, 388.

A public place does not mean a place devoted solely to the uses of the public, but it means a place which is in point of fact public, as distinguished from private—a place that is visited by many persons, and usually accessible to the neighboring public. A place may be public during some hours of the day, and private during other hours. *Gomprecht v. State*, 37 S. W. 734, 735, 36

*Tex. Cr. R. 434; Parker v. State*, 26 Tex. 204, 207.

In a prosecution for disturbing a public assemblage, an instruction was given that a public place is any place at which people assemble, or to which people commonly resort for the purposes of business, amusement, recreation, or other lawful purpose. *Young v. State* (Tex.) 44 S. W. 507.

"Public place," as used in Rev. St. c. 196, requiring notice of sale of property to be posted up at two of the most public places in the town in which the property is situated, means, in towns and places where no post office, tavern, house of public worship, or other place usually regarded as a public place exists; but such places, as in comparison with other places in the same town, are the places where the inhabitants and others most frequently meet or resort or have occasion to be, so that a notice posted there would for that reason be likely to meet public view and attract observation. The tavern, retail store, house of worship, or other place usually regarded as public are considered such because applied to purposes which make them places of public resort, and they thereby become most open to public observation. In new and thinly settled towns and places there may be neither post office, church, tavern, or store, and the schoolhouse or mechanic's shop may be the places of most public resort, and may be properly regarded as the most public places. And the same remark may, under proper circumstances, apply to the bridge, or the guideboard, or the box by the roadside where newspapers are left for subscribers, and to posts and buildings erected by public authority for posting notices. *Russell v. Dyer*, 40 N. H. 173, 187.

Any "place" may be made "public" by a temporary assemblage (*Bish. St. Crimes*, 298); and this is especially so when the assemblage is gathered to witness an exhibition for hire. An indecent exhibition made by six women for money to five men present and paying therefor made the room where it occurred a public place, within the statute punishing an indecent exposure in a public place, although it was in a room in a house of prostitution, and not open to the general public. *People v. Bixby* (N. Y.) 67 Barb. 221, 222.

The term "public place," in the statute prohibiting gaming at a public place, is not to be construed as meaning a place which is always public, as a place may be public at some times and private at others, and a private place becomes public by being put to public use. *White v. State*, 45 S. W. 702, 39 Tex. Cr. R. 269.

Every place is a public place which is for the time made public by the assemblage

of people, whether by the allurements of gaming or otherwise. *Campbell v. State*, 17 Ala. 369, 371.

A public place, within the meaning of the provision punishing affrays and disturbances of the peace in a public place, is any public road, street, or alley of a town or city, or any inn, tavern, store, grocery, or workshop, or place at which people are assembled, or to which people commonly resort, for purposes of business, amusement, recreation, or other lawful purpose. *Pen. Code Tex.* 1895, art. 335.

"Public place" is a relative term, and the manifest object in requiring the posting of a notice in a public place is to attract attention to it; and, if it is posted at a place where it would be likely to attract the public attention, so that its contents may become known to the community, such a place should be considered a public place. So bulletin boards in the courthouse or city hall and at the corner of two public streets in a city are public places, within the meaning of the provision of a city charter requiring notices of letting of street improvement contracts to be posted in public places. *Roach v. City of Eugene*, 23 Or. 376, 384, 31 Pac. 825.

*Gen. St.* p. 362, § 4, requires goods levied on and sold on an execution to be advertised and sold at some public place. Held, that a "public place" means where the advertisement would be likely to attract attention, and a barn, dwelling house, shed, or even a rock or tree, may be a public place. *Austin v. Soule*, 36 Vt. 645, 649.

The fighting of two persons in the presence of seven others constitutes an affray. The seven other persons make the place a "public place," within the meaning of that term as used in the definition of an affray. *State v. Fritz*, 45 S. E. 957, 958, 133 N. C. 725.

#### **As in view of public.**

A place so near and so open that persons traveling the highway can see card or dice playing thereat is abstractly and per se a public place. *Lee v. State* (Ala.) 33 South. 894, 895; *Franklin v. State*, 8 South. 678, 679, 91 Ala. 23; *Henderson v. State*, 59 Ala. 89, 91; *White v. State*, 45 S. W. 702, 39 Tex. Cr. R. 269.

The words "public place," as used in a statute declaring that goods distrained for payment of taxes shall be posted for sale in a public place, mean a place where the advertisement would be likely to attract general attention, so that its contents might reasonably be expected to become a matter of public notoriety. A barn, dwelling house, shed, or even a rock or tree, if answering

this condition, may be a public place. *Alger v. Curry*, 40 Vt. 437, 446; *Austin v. Soule*, 36 Vt. 645, 649.

#### **Barn or stable.**

A barn 200 yards distant from a tavern house, and in a separate inclosure, though on the same plantation, and 60 or 70 yards in the rear of another barn, in which spirits are sold by the tavern keeper, is a public place, within the meaning of the act to prevent unlawful gaming in a public place. *Farmer v. Commonwealth* (Va.) 8 Leigh, 741.

A loft of a livery stable is not per se a public place, within the statute prohibiting gaming in a public place. *Fossett v. State*, 16 Tex. App. 375.

Whether the term "public place," in the statute prohibiting card playing in certain enumerated places, or other public place, includes a livery stable, is a question for the jury, as livery stables are not among the enumerated public places. A livery stable may become a public place, according to its use as a business place, or as a public resort for the transaction of business. *Sisk v. State*, 34 S. W. 277, 35 Tex. Cr. R. 462.

#### **Blacksmith shop.**

The term "public place," in the statute prohibiting card playing at certain designated places, and other public places, does not necessarily include livery barns, and, in a prosecution for card playing in a livery barn, which is alleged to be a public place, the facts showing such barn to be a public place must be set forth. *Metzer v. State*, 19 S. W. 254, 31 Tex. Cr. R. 11.

Under 2 Rev. St. 1876, p. 466, providing, "every person . . . who shall, in any public place, make any uncovered and indecent exposure of his or their person," etc., shall be fined, a blacksmith shop is not necessarily a public place. Such shop may be kept and used for doing the work of the owner or occupier only, and not that of the public. In that event, it could not be regarded as a public place, any more than a private house or barn of an individual. *Lorimer v. State*, 76 Ind. 495, 496.

#### **Camp ground.**

A religious association's camp-meeting ground, consisting of some 60 acres of land within the city limits, then open to the common and unoccupied, is a public place, within an ordinance authorizing the proper officers, on finding stock at large in any public place, to seize and impound them. *O'Mally v. McGinn*, 10 N. W. 515, 518, 53 Wis. 360.

#### **Cemetery.**

See "Cemetery."

**Church or theater.**

"Public place," as used in the phrase "public place, streets, or roads," does not include theaters or churches. *Cavan v. City of Brooklyn*, 5 N. Y. Supp. 758, 760.

A meeting house is not usually a public place, but it is ordinarily and prima facie to be regarded as a public place for posting notices. *Scammon v. Scammon*, 28 N. H. (7 Fost.) 419, 428.

"Public place," within the meaning of the statute prohibiting card playing at a public place, is not shown by an allegation of card playing at or near a church, as a church may be a public place at one time, and not at another time, but it must be alleged that it was a public place at the time of the playing. *Bishop v. Commonwealth (Va.)* 13 Grat. 785, 787.

**City or town square.**

"Public place," as used in a deed of trust requiring notice of sale to be put up in a public place in a town or city, should be construed to include the sides of the public square in such town or city. *Carter v. Abshire*, 48 Mo. 300, 302.

"Public place," as used in Pen. Code, art. 379, prohibiting the playing of cards in any street, highway, or other public place, would include a square in a town or city; and any place might be a public place where the general public resort, either for the purpose of pleasure, religious worship, or the gratification of curiosity. So we take it that some secluded spot in the woods or elsewhere might become a public place, if used discriminately by a number of persons for the purpose of gaming. But a secluded place, not an outhouse, though resorted to a number of times for the purpose of gaming by a few persons, and not open to the sporting fraternity generally, would not be a public place, though an outhouse resorted to for the purpose of gaming would become a public place, though resorted to only by a select few. *Crutcher v. State*, 45 S. W. 594, 595, 39 Tex. Cr. R. 233.

**Closet.**

"Public place," as used in an indictment charging indecent exposure of person in a public place, does not include a urinal with divisions for the use of the public, and situated in an open market. *Reg. v. Orchard*, 20 Eng. Law & Eq. 598.

A privy used by the pupils of the school of a country schoolhouse, and attached to the premises, is not, during the period of vacation, while the main building is not used for the purposes of the school, a public place where people resort, within the meaning of Code, § 3243, relating to playing cards in a

public place. *McDaniel v. State*, 35 Ala. 390, 391.

**Clubroom.**

The term "public place," within the meaning of a statute prohibiting card playing in a public place, includes a clubroom in a hotel. *Goldstein v. State (Tex.)* 35 S. W. 289.

Judicial notice will not be taken that the term "public place," in the statute prohibiting gaming in certain designated places, and other public places, does not include the rooms of a commercial club, to which only the club members and invited visitors are admitted, except when the club has under discussion some question affecting public interest. *Grant v. State*, 27 S. W. 127, 33 Tex. Cr. R. 527.

**Common gambling house.**

A common gambling house is a public place, within the meaning of the statute against gaming. *Rice v. State*, 10 Tex. 545; *Lafferty v. State*, 56 S. W. 623, 624, 41 Tex. Cr. R. 606.

The term "public place," within the statute prohibiting card playing in certain designated places and other public places, includes a house not occupied as a dwelling house or a business house, if it be a place where people commonly resort for gambling or other purposes. *Wheelock v. State*, 15 Tex. 257, 259.

**Depot.**

"Public place" means a place where the public has a right to go and be, and a notice posted in a railway depot will be deemed to have been posted in a public place, within the requirement of Comp. St. div. 5, § 1809. *Territory v. Lannon*, 22 Pac. 495, 496, 9 Mont. 1.

The term "public place," used in reference to the immunity of a railroad from fencing its tracks at public places, includes a railroad station. *Stewart v. Pennsylvania Co.*, 28 N. E. 211, 212, 2 Ind. App. 142, 50 Am. St. Rep. 231.

It is held that a space of 80 rods on each side of a depot which was formerly a flag station, and which transacted a very small amount of business, is not a public place, within the meaning of the statute authorizing railroad companies to leave unfenced a public place contiguous to depots, and necessary for transaction of business. *Iowa Cent. R. Co. v. Gushee*, 49 Ill. App. 609, 611.

**Inclosed lot.**

An inclosed lot, situated 30 yards distant from the streets of a county town, but visible from the street, is a public place, within the common-law definition of an "afray." *Carwile v. State*, 35 Ala. 392, 394.

**Ferryboat.**

"Public place," as used in Code, § 4207, prohibiting playing at a game of cards in a public place, should be construed to include a ferryboat while fastened in the middle of a navigable river at a ferry regularly licensed, though no passengers were carried on that day. Though a navigable stream is not a highway, it may become a public place by force of circumstances. *Dickey v. State*, 68 Ala. 508, 509.

**Field or woods.**

A field surrounded by a forest, and situated one mile from any highway or other public place, does not lose its private character, and become a public place, by the casual presence of three persons, within the meaning of the statute providing for the punishment of those engaging in an affray at a public place. *Taylor v. State*, 22 Ala. 15, 16.

The term "public place," within the meaning of statutes prohibiting card playing in a public place, does not include a secluded place on top of a mountain in a dense thicket, in an inclosed pasture, 150 yards from the nearest road, and near no house, and where there has been no previous playing. *Gerrells v. State* (Tex.) 26 S. W. 394.

A hollow more than 100 yards from a house where spirituous liquors are retailed, and which cannot be seen from the public road, and from which such road could not be seen, nor the place where the liquor was sold, is not a public place, within the meaning of Clay's Dig. p. 432, § 8, prohibiting card playing in a public place. *Smith v. State*, 23 Ala. 39, 41.

"Public place," as used in the act prohibiting gaming in a public place, etc., does not include a ravine, thickly surrounded with brush and briers, 200 yards from a public shooting match held on the land of a private person. *Commonwealth v. Vandine* (Va.) 6 Grat. 689, 690.

A deep hollow in some woods, about 400 yards from a store, and out of sight of any road, into which eight people went on a public day, when there was a large assembly of persons at the storehouse, in the country, for the purpose of playing cards, is not a public place, within the meaning of the statute prohibiting the playing of cards at a public place. The mere fact of the persons being in such a place did not make such a retired and secluded spot a public place. A place, to be public, must be so in one of two ways; that is, it must be of a public nature—public per se—like the street or highway, or made public at the time by force of circumstances. *Bythwood v. State*, 20 Ala. 47, 49.

"Public place," as used in a statute prohibiting cockfighting in a public place, may

include a place in thick woods, half a mile from any public highway or other place ordinarily regarded as public, if a large number of persons meet at such place for the purpose of engaging in the prohibited sport. *Finnem v. State*, 22 South. 593, 115 Ala. 106.

**Highway, road, or street.**

"Public places," as used in the phrase "public places, theaters, or churches," does not include streets or roads. *Cavan v. City of Brooklyn*, 5 N. Y. Supp. 758, 760.

A highway is not necessarily a public place, within the meaning of a statute providing for the punishment of those engaging in an affray in a public place. There may be, by the growth of timber or underbrush, a part of the highway perfectly concealed from public view, and as private as anything in the commonwealth. *State v. Weekly*, 29 Ind. 206, 207. So, also, under statute relating to notorious lewdness. *Williams v. State*, 64 Ind. 553, 555, 31 Am. Rep. 135.

A public place, as used in Acts 1875, § 11, providing for the punishment of any person found in a public place in a state of intoxication, is a place where all persons are entitled to be. A public street, highway, and sidewalk is a public place, within the meaning of the statute. *State v. Waggoner*, 52 Ind. 481, 482; *State v. Moriarty*, 74 Ind. 103, 105.

The term "public place," in Rev. St. c. 113, § 9, which enacts that any person found drunk in any street, alley, or other public place shall be punished therefor, only applies to the streets, alleys, or other public places in the compact part of the city or village, and not to the common highways of the country. *State v. Stevens*, 36 N. H. 59, 63.

"Public place," as used in a statute prohibiting gaming at any tavern, inn, etc., or any public house or highway, or any other public place, etc., should be construed to include a neighborhood road, where the playing took place near an assemblage of persons, some of whom were looking on at the playing, and others passing about at the time. *Mills v. State*, 20 Ala. 86, 88.

The term "public place," in a statute prohibiting gaming at any public house, or on any highway, or at any other public place, though broad enough in itself to include a highway, cannot be used in an indictment to describe a highway as highway is specifically mentioned in the act. *Bush v. State*, 18 Ala. 415.

A notice of a school meeting in a quiet, rural district, posted on a board six feet long and ten inches wide, fastened in or against the roadside wall, facing the road at the south end of the district, is posted in a "safe and public place," within the re-

quirement of Pub. St. c. 52, § 5. *Seabury v. Howland*, 8 Atl. 341, 343, 15 R. I. 446.

"Public place," as used in Rev. Laws, § 1549, requiring the posting of the notice of the sale of farm stock to be posted at a public place, should be construed to include the premises where attached, if on a public road, and the notice may be posted on the fence, near the buildings. *Goss v. Cardell*, 53 Vt. 447, 450.

#### **Infirmary.**

An infirmary kept by a physician is a public place, within the statute against gaming in public places. *Flake v. State*, 19 Ala. 551.

#### **Inn or tavern.**

An inn and a post office are *prima facie* public places, within the meaning of a statute requiring notice of a tax sale to be posted at public places. *Holitt v. Burnham*, 61 N. H. 620, 632. But see *Ramsay v. Hommell*, 31 N. W. 271, 272, 68 Wis. 12.

The term "public place," in the gambling act, prohibiting gambling in an ordinary race field or other public place, applies to tavern. *Wortham v. Commonwealth (Va.)* 5 Rand. 669, 675.

The term "public place," within the meaning of the statute prohibiting certain games at any ordinary race field or other public place, includes an eating house. *Neal v. Commonwealth (Va.)* 22 Grat. 917, 918.

#### **Jury room.**

A grand jury room, while the grand jury is in session, is a public place, within Pen. Code, art. 144a, providing for a fine against a person found intoxicated in any public place. *Murchison v. State*, 5 S. W. 508, 24 Tex. App. 8.

A public place, within the meaning of the statute prohibiting card playing in a public place, includes a jury room forming part of a courthouse, even though it is occupied and appropriated by a particular person as a sleeping apartment, unless such occupancy is by permission derived from the county court. *Wilcox v. State*, 26 Tex. 145, 146.

#### **Navigable water.**

"Public place," within the meaning of the law of nuisances, which authorized an indictment for committing a nuisance in a public place, includes a public highway or a navigable river, and hence the pollution of a navigable river which is a public highway is indictable. *State v. Wabash Paper Co.*, 51 N. E. 949, 951, 21 Ind. App. 167.

#### **Office.**

The term "public place," in the gaming law, cannot be construed to include a law-

yer's office, occupied as a sleeping apartment, the doors of which were locked and the curtains drawn over the windows in the nighttime; the playing which took place therein being by permission of the person occupying the room as a sleeping apartment. *Burdine v. State*, 25 Ala. 60, 63.

A lawyer's office is a public house, within the meaning of that term as used in Code, § 3243, prohibiting gambling in a public house; and where such office consists of two rooms, front and back, connected by a door, in each of which professional business is transacted, the two rooms are equally within the meaning of the words "public house." *Smith v. State*, 37 Ala. 472, 473.

A lawyer's office may be a public place during the usual hours of business, and private during the evening and night. A lawyer's office may also, and, in times like the present, many doubtless are, very private and quiet and undisturbed places at all hours. Whether a place is a public place or not, in contemplation of the statute on the subject of gaming, is a question of fact, or a mixed question of law and fact, and is always proper to be submitted to the jury under the instructions of the court. *Parker v. State*, 26 Tex. 204, 207.

A physician's office is not a public place, within the statute against gaming in a public place, when the playing is at night, with closed doors and curtained windows, and the person occupying it as a sleeping room being in the habit of inviting his friends to come to his room for the purpose of playing, though the room adjoins a merchant's counting room, with a door communicating between them. *Sherrod v. State*, 25 Ala. 78, 79.

The term "public place," in a statute prohibiting card playing in public places, includes the office of a manufacturer of medicine, to which the public has access at all times. *Williams v. State (Tex.)* 34 S. W. 271.

#### **Omnibus.**

An omnibus is a public place, so as to make a nuisance committed therein by exposing one's person to more than one person a public nuisance. *Reg. v. Watson*, 20 Eng. Law & Eq. 599, 600; *Reg. v. Holmes*, Id. 597.

#### **Post office.**

A post office is *prima facie* a public place, within the meaning of a statute requiring notice of a tax sale to be posted at public places. *Holitt v. Burnham*, 61 N. H. 620, 632.

The requirement of posting notice of a tax sale at four public places in the county is not satisfied by posting notices in the offices of the county treasurer and two hotels and in the post office of a village, for, while the

three public places named, outside of the treasurer's office, may have been public places so far as the village was concerned, they were not necessarily public places so far as the people were concerned, within the meaning of the statute. *Ramsay v. Hommel*, 31 N. W. 271, 272, 68 Wis. 12.

#### Private dwelling.

The assemblage of eight or ten persons by invitation at a private house or room, to which the public have not the right to go, for the purpose of playing cards or participating in social amusements, does not constitute such house or room a public place, within a statute prohibiting the playing of cards at a public place. A private house or a bedroom, at which even a dozen or more are assembled by invitation, does not lose its character of privacy, and become thereby a public place. *Coleman v. State*, 20 Ala. 51, 53.

"Public place," as used in a statute forbidding gambling in a public place, does not necessarily mean a place which is public in the ordinary acceptation of the word; but any house to which all may go, day or night, and indulge in gaming, is a public place, within the meaning of the statute. A dwelling house or private room is within the statutory prohibition if it is open to those who would resort thither to gratify their passion for gaming, and frequently the greater the air of secrecy which is given the place, the more effectual is the deception. *Prima facie* a dwelling house is a private place, but, where the evidence tends to show that it is used for other than private purposes, and as a resort to those who would indulge in gaming, it is a public place. *Nickols v. State*, 20 South. 564, 565, 111 Ala. 58.

The term "public place," in Pen. Code, art. 355, making it criminal to play with cards at any house for retailing spirituous liquor, or any other public house or place, does not include a private house, even though there is habitual card playing, not otherwise unlawful, conducted in such house. *Miller v. State*, 34 S. W. 959, 960, 35 Tex. Cr. R. 650.

"Public place," as used in Act March 17, 1875, p. 55, § 11, making it penal to be found in a state of intoxication in a public place, cannot be construed to include the private house of a gentleman, at which he gives or holds a social party. It is not, in any sense of society or government, understood to be a public place. A public place is one where all persons have a right to go, while a social party given by a gentleman is a place where only those invited have a right to go or be present. *State v. Sowers*, 52 Ind. 311, 312; *State v. Tinch*, 51 N. E. 943, 944, 21 Ind. App. 142.

"Public place," as used in Comp. St. 128-131, requiring the posting of the advertisement of notice of sale of land for taxes in

some public place in the town or place where the lands to be sold are situated, in the absence of any place more public, should be construed to include a dwelling house. The term "public place," as used in the statute, is relative. What might be a public place in a crowded and populous city, and what would be a public place in a small town, sparsely inhabited, are entirely different questions. *Cahoon v. Coe*, 57 N. H. 556, 559.

#### Railway carriage.

A railway carriage, during its passage in traveling from one place to another on the line of railway, is not an open and public place, within 5 Geo. IV, c. 83, § 4, relating to gaming in public places. In re *Freestone*, 36 Eng. Law & Eq. 532, 534.

#### Room.

A room in a hotel, set apart and occupied by a guest, is not a public place, within a statute authorizing a conviction for drunkenness in a public place. *Bordeaux v. State*, 19 S. W. 603, 604, 31 Tex. Cr. R. 37. But a room in an inn, provided for the accommodation of guests, which was engaged temporarily for the purpose of private gaming, and not for a guest's habitation or abode, was not a private room, but a part of the public place. *Comer v. State*, 10 S. W. 106, 107, 26 Tex. App. 509.

Under the direct provisions of Pen. Code, art. 356, any room attached to a public house, and commonly used for gaming, is a public place, within a statute prohibiting gaming in a public place; but a private room of an inn or tavern is not within the meaning of "public place," unless such room is commonly used for gaming. *Weiss v. State*, 16 Tex. App. 431, 432.

A room in an outhouse within an inclosure of a tavern lot, which had one time been used in connection with the tavern, and the room over which is still so used, having been rented by a third person, and held, used, and controlled by him independent of the proprietor of the tavern, though the occupier boarded at the tavern, and the servants belonging to it attended to the room, is not a public place, within Code, c. 198, § 4, p. 743, prohibiting gaming in a public place. *Purcell v. Commonwealth (Va.)* 14 Grat. 679, 680.

A public place, within the meaning of the statute prohibiting gambling in a public place, does not apply to rooms in the upper part of a leased building, by reason of the fact that the lower part of the building is occupied by another lessee as a grocery store. *Holtzclaw v. State*, 26 Tex. 682.

A room in a building adjoining and connected with a hotel or tavern, which is closed against outsiders, is not a public place,



within the meaning of the gaming laws. *State v. Brast*, 7 S. E. 11, 12, 31 W. Va. 380.

An allegation in an indictment under a statute prohibiting gaming in a public place, charging that a game was played in a public place, to wit, in a room back of the Gilt Edge Saloon, is insufficient to show gaming in a public place, but it is necessary to allege the facts showing that the gaming was in a public place. *Jackson v. State*, 16 Tex. App. 373, 374.

A back room occupied by the register in chancery as a bedroom, adjoining the front room, which was his office, and communicating with it by a public door, is not a public place, within a statute providing for the punishment of any one playing at any game of cards at a public place; the house being surrounded in the rear by a high fence, and the playing having taken place at night, when the doors were locked and the windows closed, and the persons present—about eight in number—having come by invitation from the occupier of the room, who entered through a back door, and not through the public office. A room in which every one having business has a right to enter, such as the register's office, is a public place, but his bedroom, where no one had a right to enter unless invited by the owner, is not a public place. *Roquemore v. State*, 19 Ala. 528, 531.

The words "public place, to wit, a beer saloon," do not properly describe a room over the saloon, not shown to have any connection with the saloon in its business or public capacity; and therefore such a room, in an indictment for playing cards, is not properly described by such phrase. *O'Brien v. State*, 10 Tex. App. 544, 545.

#### Saloon.

The term "public place," within the meaning of the statute forbidding card playing at a public place, includes a house for retailing spirituous liquors. *Borchers v. State*, 21 S. W. 192, 31 Tex. Cr. R. 517.

#### Schoolhouse.

A schoolhouse is a public place, within the meaning of Rev. St. c. 76, requiring the notice of the time and place of sale of an equity of redemption to be posted in a public place. *Wilson v. Bucknam*, 71 Me. 545, 547.

#### Shop.

Under Clay's Dig. 432, § 8, providing for the punishment of any person playing at cards at any public place or in any outhouse where people resort, "public place" should be construed to include a shoemaker's shop, into and out of which many passed during the gaming, though five or six were not admitted. *Campbell v. State*, 17 Ala. 369, 371.

As used in a statute providing that before lands are sold for taxes an advertisement shall be posted up in some public place in the town or place where the lands lie, "public place" cannot be construed to include a shoemaker's shop. The general understanding of the community is that houses of public worship, inns, and perhaps, in some places, shops where goods are retailed, are public places. *Tidd v. Smith*, 3 N. H. 178, 179.

"Public place," as used in the Criminal Code, prohibiting gaming in public places, does not include a private blacksmith shop, 20 feet from a public road, and having the door closed. *Graham v. State*, 16 South. 934, 935, 105 Ala. 130.

A statute requiring notices of a sale of real estate to be posted in a public place means a place where the notice is likely to give information to those interested, and who may probably become bidders at the sale. A "public place" is a relative term. What is a public place for one purpose is not for another. A blacksmith's shop in the country, or a tree at the intersection of public roads, would be a public place, within the contemplation of the statute, if in the vicinity of the lands, but it would clearly be an abuse of discretion thus to advertise town lots in a place 20 miles distant. *Cummins v. Little*, 16 N. J. Eq. (1 C. E. Green) 48, 53.

#### Steamboat.

A steamboat employed in carrying passengers and freight is a "public place," within the meaning of a statute providing for the punishment of any person playing any game of cards or dice at a public place. *Coleman v. State*, 13 Ala. 602, 603.

#### Store.

"Public place," as used in 1 Rev. Code, c. 147, p. 563, § 5, forbidding the unlawful playing of cards at a public place, may include a storehouse at which goods are vended. It is a public place so long as it is kept open for the purpose of selling goods, but when the business of the day is ended, the storehouse bona fide shut up, and the doors closed, it ceases prima facie to be a public place, and, in the absence of other proof, is not to be regarded as a public, but a private, place. When reopened it again becomes a public place in point of fact and legal contemplation. Even when the doors are closed and all sales have ceased, the business of the day being ended, it may still be a public place. The storehouse in the night, after the business of the store is ended and the doors shut, in the absence of other proof as to its character, does not continue in that state of things to be a public place, merely because it was a storehouse, open to the public, in the daytime. *Windsor v. Commonwealth*

(Va.) 4 Leigh, 680, 681; Commonwealth v. Peazle (Va.) 8 Grat. 585, 587.

## PUBLIC POLICY.

Synonymous with policy of the law, see "Policy of Law."

By "public policy" is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the "policy of the law," or "public policy in relation to the administration of law." Egerton v. Earl Brownlow, 4 H. L. Cas. 1, 235; Fearnley v. De Malinville, 39 Pac. 73, 75, 5 Colo. App. 441; Dean v. Clark, 30 N. Y. Supp. 45, 48, 80 Hun, 80; Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co., 37 Atl. 609, 610, 60 N. J. Law, 246, 44 L. R. A. 213; Boston & A. R. Co. v. Mercantile Trust & Deposit Co. (Md.) 34 Atl. 778, 785, 38 L. R. A. 97; People v. Chicago Gas Trust Co., 22 N. E. 798, 799, 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319; McNamara v. Gargett, 36 N. W. 218, 221, 68 Mich. 454, 13 Am. St. Rep. 355; Union Cent. Life Ins. Co. v. Champlin, 65 Pac. 836, 837, 11 Okl. 184, 55 L. R. A. 109; Robson v. Hamilton, 69 Pac. 651, 653, 41 Or. 239.

By "public policy" is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the "policy of the law," or "public policy in relation to the administration of the law." Disbrow v. Cass County Sup'rs, 93 N. W. 585, 586, 119 Iowa, 538 (citing Greenh. Pub. Pol. 2).

Public policy is but the manifest will of the state. Jacoway v. Denton, 25 Ark. 625, 634.

Public policy is a variable quality, but it is only variable in so far as the habits, capacities and opportunities of the public have become more varied and complex, and the principles to be applied have always remained unchanged and unchangeable. It is not the interest of the parties alone which is to be considered the true test, but in each particular case, under the facts, the judicial inquiry is, will the enforcement of the condition be inimical to the public interests? Wakefield v. Van Tassel, 66 N. E. 830, 831, 202 Ill. 41, 95 Am. St. Rep. 207.

"Public policy" is a term of vague and uncertain meaning, which it pertains to the lawmaking power to define, and courts are apt to encroach on the domain of that branch of government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law. An agreement be-

tween purchasers of stock in a corporation, binding them to keep control of the corporation from passing to persons other than themselves, and the shares for five years to be voted in one block, the vote to be determined by ballot between them, does not contravene public policy. Smith v. San Francisco & N. P. R. Co., 47 Pac. 582, 589, 115 Cal. 584, 35 L. R. A. 309, 56 Am. St. Rep. 119.

The general rule of law is stated to be that whatever tends to injustice or oppression, restraint of liberty and natural or legal right, or to the obstruction of justice, or to the violation of a statute, and whatever is against good morals, when made the subject of a contract, is against public policy and void. Tarbell v. Rutland R. Co., 51 Atl. 6, 7, 73 Vt. 347, 56 L. R. A. 656, 87 Am. St. Rep. 734.

Precisely what "public policy," is in any given case, may frequently be a matter of contention, and its application a subject of dispute. The strict meaning of the expression has never been defined by the courts, but has been left loose and free of definition in the same manner as "fraud." This rule, however, may be safely laid down: That whenever any contract conflicts with the morals of the times, and contravenes any established interest of society, it is void, as being against public policy. Pueblo & A. V. R. Co. v. Taylor, 6 Colo. 1, 8, 45 Am. Rep. 512 (citing Story, Cont. § 546); McNamara v. Gargett, 36 N. W. 218, 221, 68 Mich. 454, 13 Am. St. Rep. 355.

Public policy is variable; the very reverse of that which is the policy of the public at one time may become public policy at another; hence no fixed rule can be given by which to determine what is public policy. The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 20 Sup. Ct. 33, 37, 175 U. S. 91, 44 L. Ed. 84; Griswold v. Illinois Cent. Ry. Co., 57 N. W. 843, 844, 90 Iowa, 265, 24 L. R. A. 647.

Public policy is the principle under which freedom of contract or private dealing is restricted by law for the good of the community. People's Bank v. Dalton, 37 Pac. 807, 808, 2 Okl. 476 (citing Black Law Dict.).

"Whenever any contract conflicts with the morals of the time and contravenes any established interest of society, it is void as being against public policy." Kitchen v. Greenabaum, 61 Mo. 110, 111.

Public policy in the administration of the law by the court is essentially different from what may be public policy in the view of the Legislature. With the Legislature it may be, and often is, nothing more than ex-

pediency. The public policy which dictates the enactment of a law is determined by the wisdom of the Legislature. *Enders v. Enders*, 30 Atl. 129, 164 Pa. 266, 27 L. R. A. 56, 44 Am. St. Rep. 598.

In determining whether a contract is contrary to public policy, the nature of the subject-matter determines the source from which such question is to be solved. There is a public policy of the nation applicable to all matters wherein the people at large are interested, including those committed to the control of the national government, and co-extensive with the boundaries of the Union, and also a state public policy adapted to the circumstances of the locality embraced within the boundaries of the state, and applicable to all matters within state control. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.* (U. S.) 62 Fed. 904, 906.

Judicial tribunals hold themselves bound to the observance of rules of extreme caution when invoked to declare a transaction void on grounds of public policy, and prejudice to the public interest must clearly appear before a court would be warranted in pronouncing a transaction void on this account. It is said that the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt. *Smith v. Du Bose*, 3 S. E. 309, 314, 78 Ga. 413, 6 Am. St. Rep. 260.

**As governed by constitution, laws, or judicial decisions.**

"The term 'public policy' is frequently used in a very vague, loose, or inaccurate sense. The courts have often found it necessary to define its judicial meaning, and have held that a state can have no public policy except what is to be found in its Constitution and laws. \* \* \* Therefore, when we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, statutes, or judicial records." *People v. Hawkins*, 51 N. E. 257, 260, 157 N. Y. 1, 42 L. R. A. 490, 68 Am. St. Rep. 736.

The public policy of a state or nation must be determined by its constitution, laws, and judicial decisions, not by the varying opinion of laymen, lawyers, or judges as to the demands or interests of the public. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co.* (U. S.) 70 Fed. 201, 202, 17 C. C. A. 62, 30 L. R. A. 193; *United States v. Trans-Missouri Freight Ass'n* (U. S.) 58 Fed. 58, 59, 7 C. C. A. 15, 24 L. R. A. 73.

The term "public policy," as it is popularly used and defined, makes it an unknown and variable quantity, much too indefinite and uncertain to be made the foundation of

a judgment. The only authentic and admissible evidence of the public policy of a state on any given subject is its Constitution, laws, and judicial decisions. The public policy of a state of which courts take notice, and to which they give effect, must be deduced from these sources. *Swann v. Swann* (U. S.) 21 Fed. 299, 301.

"Perhaps the most concise and satisfactory definition of the term is that 'public policy' is a policy which must be established either by law, by courts, or by general consent." *In re Lampson's Will*, 53 N. Y. Supp. 531, 532, 33 App. Div. 49.

In determining the question what is the public policy of a state and what is contrary to it the court cannot look at general considerations of the supposed public interests and policy of a state beyond what its constitution and laws and judicial decisions make known. The court is not at liberty to travel out of the record in order to ascertain what is against public policy of a state. *Vidal v. Girard's Ex'rs*, 43 U. S. (2 How.) 127, 197, 11 L. Ed. 205.

Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union, when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law, or general jurisprudence of national application, are governed by the law of the state as expressed in its own Constitution and statutes, or declared by its highest court. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 20 Sup. Ct. 33, 37, 175 U. S. 91, 44 L. Ed. 84

**PUBLIC POND.**

In Maine, ponds containing more than 10 acres are public. *Brastow v. Rockport Ice Co.*, 77 Me. 100, 103.

Bodies of water containing more than 10 acres of land, which prior to the year 1647 had not been appropriated to private persons, but were used by the colonists in common for public use, are public ponds. These ponds were by ordinance made public, and the public was entitled to free access thereto for fishing, boating, fowling, bathing, skating, taking water for domestic and agricultural purposes, cutting and taking ice, etc. *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 170, 171.

**PUBLIC POSITION.**

Laws 1884, p. 231, provides that an honorably discharged soldier holding a public office or position in any city, whose term of office is not fixed by law, and who receives a salary from the city, may not be removed except for good cause shown after hearing.

Held, that a clerk in the city treasurer's office is a person holding a "public position," within the meaning of the statute. *MacDonald v. City of Newark*, 26 Atl. 82, 83, 55 N. J. Law (26 Vroom) 267.

### **PUBLIC PRINTING.**

By "public printing" is meant that which is directly ordered by the Legislature or performed for the agents of the state government authorized to procure it to be done. *Ellis v. State*, 4 Ind. 1, 5.

### **PUBLIC PROPERTY.**

Land, when used by the proprietor of private schools so as to enable him to cheaply supply the table, cannot be claimed to be "public property," within the Constitution, exempting public property used for public purposes from taxation, for to give it such a character it is believed that the ownership should be in the state or some of its municipal subdivisions, and it may be that its use would have to be not only under their control, but for a purpose for which the state or said municipal subdivision is authorized to use property, held by them for the benefit of the public. *St. Edwards' College v. Morris*, 17 S. W. 512, 82 Tex. 1.

"Public property," within the meaning of that clause of the Constitution authorizing the General Assembly to exempt from taxation all public property, embraces only such property as is owned by the state or some political division thereof, and title to which is vested directly in the state or one of its subordinate political divisions, or in some person holding exclusively for the benefit of the state or a subordinate public corporation. *Board of Trustees of Gate City Guard v. City of Atlanta*, 39 S. E. 394, 113 Ga. 883.

Const. art. 9, § 3, declares that public property used exclusively for any public purpose shall, by general laws, be exempted from taxation. Held, that such property does not embrace real property owned and leased by a private party who receives and retains all revenues, although, under contract with the owners, the authorities of a municipality have ordained that the property shall be a public market place, and it is exclusively used for that purpose; the authorities of the municipality also regulating the business to the extent necessary for the public welfare. *State v. Cooley*, 64 N. W. 379, 380, 62 Minn. 183, 29 L. R. A. 777.

Const. § 170, provides that public property used for public purposes shall be exempt from taxation. "Public property" here means such property as is necessarily used for governmental purposes. In *City of Covington v. Commonwealth*, 39 S. W. 836, 107 Ky. 680, the court said: "Property used by a city for public or governmental purposes is exempt, while that adopted for conven-

ience of the citizens individually or collectively is subject to taxation." *City of Owensboro v. Commonwealth*, 49 S. W. 320, 322, 105 Ky. 344, 44 L. R. A. 202.

In discussing the question of whether or not property held by a municipal corporation is private property or public property, the court says: "In one sense the property was private property—that is, property owned by the corporation for the public use of the inhabitants of the city. The inhabitants of a city, who are in fact the incorporators under a charter creating a municipality, are a portion of that general public which constitute a state; and they are also that particular public which constitute a municipality. The municipality may hold property in which all the inhabitants of a state or of a county may be said to have an interest in some respect, but not as owners or proprietors; and it may also hold property in which the inhabitants of the municipality alone may properly be said to have an interest. Both classes of property are public—the one, as to the people of the whole state or county; the other, more particularly, as to the inhabitants of the municipality. It is only in this sense that the words 'public' and 'private' can with propriety be applied to such property, when held by a municipality. Although the property held for the municipality is in fact public, as common to all the inhabitants of a city, it nevertheless may justly be said to be private property, as being such property as is exempt from being taken or applied to any other public use by the state, or by authority of the state, without compensation being made." *Coyle v. McIntire* (Del.) 30 Atl. 728, 733, 7 Houst. 44, 40 Am. St. Rep. 109.

### **PUBLIC PROSECUTOR.**

A public prosecutor is a quasi judicial officer retained by the public for the prosecution of persons accused of crime. *Wight v. Rindskopf*, 43 Wis. 344, 354.

### **PUBLIC PROSTITUTION.**

A house kept for the purposes of selling beer, cigars, etc., and for a variety theater, is not a house kept for the purpose of "public prostitution," within the meaning of a statute declaring a house kept for such purpose to be a disorderly house, though women are employed in such legitimate business of the house who bear the general reputation of being common prostitutes. *Johnson v. State*, 13 S. W. 1005, 1006, 28 Tex. App. 562.

### **PUBLIC PURPOSE.**

Any public purpose, see "Any."  
Other public purposes, see "Other."

The term "public purposes," as employed in a statute to denote the object for which

taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is merely a term of classification to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest, or liberality. *People v. Salem Township Board*, 20 Mich. 452, 485, 4 Am. Rep. 400.

As used in Const. § 170, providing that public property used for public purposes shall be exempt from taxation, the words "for public purposes" should be construed to mean "for governmental purposes." *City of Owensboro v. Commonwealth*, 49 S. W. 320, 322, 105 Ky. 344, 44 L. R. A. 202 (citing *City of Covington v. Commonwealth*, 39 S. W. 836, 107 Ky. 680); *City of Covington v. Kentucky*, 19 Sup. Ct. 383, 385, 173 U. S. 231, 43 L. Ed. 679.

As the terms are used in reference to taxation, what is for the "public good," and what are "public purposes," and what does constitute a "public purpose," are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of their representatives. *Walker v. City of Cincinnati*, 21 Ohio St. 14, 42, 8 Am. Rep. 24 (citing *Cooley*, Const. Lim. pp. 128, 129).

Though the line which distinguishes the public purpose for which taxes may be assessed from the private use for which they may not be assessed is not always easy to discern, yet it is the duty of the courts, where the case falls clearly within the latter class, to interpose, when properly called on, for the protection of the rights of the citizen, and aid to prevent his private property from being unlawfully appropriated to the use of others. In deciding whether, in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, the courts must be governed mainly by the course and usage of the government, the objects for which taxes have been by long usage levied, what objects and purposes have been considered necessary for the support and for the proper use of the government, whether state or municipal. *Citizens' Savings & Loan Ass'n v. Topeka*, 87 U. S. (20 Wall.) 655, 664, 22 L. Ed. 455.

"Public purposes," as used in Pub. St. c. 28, § 13, providing that city councils may ap-

propriate money for armories, holiday celebrations, and other public purposes, does not authorize a city to appropriate money to defray the expenses of a committee to represent it at a convention of American municipalities, the purpose apparently being to educate the committee generally with reference to all questions pertaining to a municipal administration, which is not confined to ascertainment of facts for the information of the board of aldermen, actually pending before the board. *Waters v. Bonvouloir*, 52 N. E. 500, 501, 172 Mass. 286.

Where improvement bonds are given for a public work capable of assessment against private property, the assessments made for it are assessments for a public purpose, and the tax, when paid, is paid for a public purpose, though the money paid may go to reimburse a private party, by reason of the fact that he has advanced the money temporarily to meet such purpose. *Schintgen v. City of La Crosse*, 94 N. W. 84, 87, 117 Wis. 158.

#### Boarding house.

The conversion of a private dwelling into a public boarding house is using it for a "public or objectionable purpose," within the meaning of a lease providing that the lessor had a right to insist that the house should be occupied as a residence and used strictly as a private dwelling, and not for any public or objectionable purpose. *Gannett v. Albree*, 103 Mass. 372, 374.

#### Fire department and parks.

The fire department and public parks are used for public and governmental purposes, and are exempt from taxation. *City of Louisville v. Commonwealth*, 62 Ky. (1 Duv.) 295.

#### Improvement of streets.

Tanks erected on the streets of a city to supply water for street sprinkling are for a public purpose. *Savage v. City of Salem*, 31 Pac. 832, 833, 23 Or. 381, 24 L. R. A. 787, 37 Am. St. Rep. 638.

The term "public purpose," in a city charter authorizing a city to borrow money for any public purpose, whenever in the opinion of the council it shall be expedient so to do, characterizes a plank road which leads from, extends to, or passes through the limits of corporation, and therefore the corporation may aid a private corporation in constructing such a road. *Mitchell v. Burlington*, 71 U. S. (4 Wall.) 270, 273, 18 L. Ed. 350; *Larned v. Burlington*, 71 U. S. (4 Wall.) 275, 276, 18 L. Ed. 353.

#### Irrigation.

"Public purposes," as used in a constitution authorizing taxation for public purposes, etc., includes the organization and government of irrigation districts. *Turlock*

*Irr. Dist. v. Williams*, 18 Pac. 379, 380, 76 Cal. 360.

#### **Manufactory.**

The term "public purpose," within the meaning of the rule that taxation must be for public purposes, does not include the purpose of a manufacturing plant owned by private citizens. *Central Branch Union Pac. R. Co. v. Smith*, 23 Kan. 745, 751; *Commercial Nat. Bank v. Iola* (U. S.) 6 Fed. Cas. 221, 223; *Kissell v. Village of Columbus Grove*, 11 Ohio Dec. 501, 505.

A statute which authorizes a town to issue its bonds in aid of the establishment of manufactories or other enterprises, as may be done to develop and improve the municipality, is void, because the tax necessary to pay the bonds, if collected, amounts to a transfer of the property of individuals to aid in the projects of gain and progress of others, and not for a public purpose; for no line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. *Citizens' Savings & Loan Ass'n v. Topeka*, 87 U. S. (20 Wall.) 655, 664, 22 L. Ed. 455. See, also, *Weismer v. Village of Douglas*, 64 N. Y. 91, 99, 21 Am. Rep. 586; *Sutherland-Innes Co. v. Village of Evart* (U. S.) 86 Fed. 597, 30 C. C. A. 305.

The term "public purposes," in the rule that property may be taken for public purposes by the exercise of the right of eminent domain, does not characterize a use which will only tend incidentally to benefit the public by affording accommodations for business, commerce, or manufactories, so long as the property is to remain under private ownership and control, and no right of use or management is conferred upon the public. In *re Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y. 42, 48.

#### **Railroad.**

Power to borrow money for "any public purpose" authorizes a municipal corporation to borrow money to aid a railroad company making its road as a way for public travel and transportation. *Rogers v. Burlington*, 70 U. S. (3 Wall.) 654, 657, 18 L. Ed. 79.

The term "public purposes," as used in a law authorizing a municipal corporation to purchase land for street, park, or other public purposes, does not include a right of way for railroad purposes. *Strahan v. Town of Malvern*, 42 N. W. 369, 370, 77 Iowa, 454.

Since it is law in Missouri that aid by the issuance of municipal bonds can be constitutionally given to railroad companies, it would seem to follow that they might also be issued to secure the erection of the rail-

road and machine shops, and that such purpose would be a "public purpose" in such a sense as to justify compulsory taxation to pay the debt. *Jarrott v. Moberly* (U. S.) 13 Fed. Cas. 366, 367.

Courts cannot say that a statute authorizing a city to borrow money, etc., for building a railroad to be owned by it, is not for a public purpose. *Walker v. City of Cincinnati*, 21 Ohio St. 14, 42, 8 Am. Rep. 24.

The term "public purpose," when employed to designate objects for which taxes may be imposed, has no relation to the urgency of the public need, nor to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the objects for which, according to settled usage, the state is to provide, from those which, by the like usage, are left to private inclination, interest, or liberality. It creates a broad and manifest distinction between public works and private enterprises; between the public conveniences which it is the business of the government to provide, and those which private interest and enterprise are expected to provide whenever the demand is sufficient. The construction of a railroad, which is to be owned and controlled by individuals or by a private corporation, is not a "public" but a "private," purpose, within the meaning of these terms as employed in the law of taxation. *People v. Salem Tp. Board*, 1 Mich. N. P. xxxvi, xl.

#### **Street sprinkling.**

The sprinkling of city streets, being necessary to preserve the public health and comfort, is a "public purpose"; and hence an ordinance levying a tax for street sprinkling purposes is not unconstitutional, under Const. § 171, providing that taxes shall be levied and collected for public purposes only. *Maydwell v. City of Louisville*, 76 S. W. 1091, 63 L. R. A. 655.

#### **Water supply.**

The land, houses, and water pipes occupied by a city with its waterworks is not occupied exclusively for a public purpose, so as to exempt it from taxation, where the city is authorized to and does make terms with particular classes of customers to supply them with water, like an ordinary water company. *Burgess of Manchester v. Manchester Tp.*, 17 Q. B. 859, 868.

A waterworks system belonging to a city was not exempt, under Const. Ky. § 170, exempting property used for public purposes. *City of Covington v. Kentucky*, 19 Sup. Ct. 383, 385, 175 U. S. 231, 43 L. Ed. 679.

#### **PUBLIC QUARTERS.**

"Public quarters," under section 1480 of the army regulations, providing that officers

on duty without troops, at stations where there are no "public quarters," are entitled to commutation therefor, are any suitable quarters provided by the government for the use of an officer, though not expressly built for army officers. And an officer assigned to duty as an Indian agent, and furnished a suitable building on the reservation for his quarters, without charge, is not entitled to receive commutation for quarters. *United States v. Dempsey* (U. S.) 104 Fed. 197, 198.

#### **PUBLIC QUASI CORPORATION.**

"Public quasi corporations" possess only a portion of the powers, duties, and liabilities of corporations. As an instance of the latter class may be mentioned counties, townships, overseers of the poor, school districts, and road districts. *Duval County v. Charleston Lumber & Mfg. Co.* (Fla.) 33 South. 531, 532, 60 L. R. A. 549 (citing *Beach on Public Corporations*, vol. 1, § 3).

#### **PUBLIC RANCH.**

"Public ranch," as used in Gen. St. 1833, § 1035, which provides that the owner of any public ranch who uses stock left with him to be ranched or fed shall forfeit to the owner all ranch or stable fees, can only be taken to apply to those who keep stables or ranches for general use, and take whatever stock may be offered, and by whomsoever it may be offered, so long as the parties are unobjectionable and willing to pay. *Harper v. Lockhart*, 48 Pac. 901, 902, 9 Colo. App. 430.

#### **PUBLIC RECORD.**

As property, see "Property."

A record is not a public one unless it can be inspected by any person interested. *Keefe v. Donnell*, 42 Atl. 345, 348, 92 Me. 151.

Under Ky. St. § 3728, giving a lien for improvements to an unsuccessful occupying claimant the foundation of whose claim is a public record, it is held that the term "public record" applies only to a claim derived or alleged to be derived from the commonwealth. *Wintersmith v. Price* (Ky.) 66 S. W. 2, 3.

A writing filed in a public office making charges against a public officer is not always a public record to which any citizen may have access at pleasure. To declare such to be the law would be to say that any communication attacking the character of a public officer being received by the board of directors to which he is amenable would thereby become a public record, and be open to the idle curiosity of all persons. Such a paper, in the absence of a positive statute making it a part of a public record, could not be

declared a part thereof. *Colnon v. Orr*, 11 Pac. 814, 815, 71 Cal. 43.

A marriage license docket is a public record in the sense that it is open to the public to inspect and copy therefrom. In re *Marriage License Docket*, 4 Pa. Dist. R. 162, 163.

In construing statutes the words "public records" shall, unless a contrary intention clearly appears, mean any written or printed book or paper, any map or plan of the commonwealth or of any county, city, or town which is the property thereof, and in or on which any entry has been made or is required to be made by law, or which an officer or an employé of the commonwealth or of a county, city, or town has received or is required to receive for filing, and any book, paper, record, or copy mentioned in the following sections. *Rev. Laws Mass.* 1902, p. 441, c. 35, § 5.

#### **PUBLIC REPRESENTATION.**

The expression "public representation," as used in Act 1856, conferring on the author or proprietor of a copyrighted dramatic composition designed or suited for public representation the sole right to act, perform, and represent the same on a stage or public place, means the public representing of such composition in dialogue and action by persons who represent it as real by performing or going through with the various parts or characters assigned to them. *Daly v. Palmer* (U. S.) 6 Fed. Cas. 1132, 1133.

#### **PUBLIC RESORT.**

The words "place of public resort" in a statute prohibiting the sale of cider in connection with a victualing house, tavern, grocery, shop, cellar, or other place of public resort, means a place resorted to by the public for the purchase of cider. The fact that it is not drunk at the place it is obtained would not probably be regarded as controlling if it appears that those who want it can and will be supplied at such place. The act is not intended to prohibit the sale of cider as an article of commerce, but only in certain places. And whether a place is a place of public resort must depend upon the evidence which gives character to the place. *Shaw v. Carpenter*, 54 Vt. 155, 161, 41 Am. Rep. 837.

A private house and garden where a sale by public auction takes place is for the time a "place of public resort" within 5 Geo. IV, c. 83, § 4, relating to the punishment of a suspected person or reputed thief who frequents a place of public resort with intent to commit a felony. The place need not be a place of resort all the year round. *Sewell v. Taylor*, C. B. (N. S.) 160, 162.

"Place of public resort," as used in Rev. Laws, § 3800, cl. 6, providing that "no person shall sell or furnish cider or fermented liquor at or in any victualing house, tavern, grocery, shop, cellar, or any other place of public resort," includes a dwelling house transformed into a place of resort for the public, where cider only is sold, in the sense in which the public are impliedly invited and accommodated in the places specified by name in the statute, and resort to with the same freedom. It is sufficient if the kind of entertainment made the dwelling house or any place that is thus specified by name public. It means a place actually frequented, and with the same freedom that men resort to a victualing house, tavern, or grocery. The fact that it was clider only that constituted the draw would not prevent it being a public resort, and no particular number of customers could be the test. *State v. Spaulding*, 17 Atl. 844, 847, 61 Vt. 505.

"A place of resort," within the meaning of the Texas statutes which operate to prohibit gaming at places of resort, is a place where people are in the habit of going for gaming or other purposes. *Lynn v. State*, 11 S. W. 640, 27 Tex. App. 590.

"Public resort," as used in Rev. St. 1874, c. 43, § 2, providing that a person not having a license to keep a dramshop, who shall sell intoxicating liquor in any quantity to be drunk upon the premises or in or upon any adjacent room, building, yard, premises, or place of public resort, shall be punished, etc., means a place frequented as ale houses or the resort of the idle and dissolute. Webster gives as definitions of the word "resort," "act of visiting, assembly, meeting, concourse, frequent assembly"; and hence a street or alley adjoining a brewery where beer was sold, not used as a driveway, where from six to twelve persons were in the habit daily of congregating for the purpose of drinking beer for amusement and conversation, was a place of public resort within the meaning of the statute. *Bandalow v. People*, 90 Ill. 218, 220.

## PUBLIC RIGHT.

Acts 1884, c. 133, empowering the court to enforce orders of the railroad commissioners "affecting public right," includes an order requiring the construction of a farm crossing by a railroad. *State v. Chicago, M. & St. P. Ry. Co.*, 53 N. W. 253, 255, 86 Iowa, 304.

## PUBLIC ROAD.

A public road is a way through the state, or from town to town. *Singleton v. Commissioners of Roads* (S. C.) 2 Nott & McCl. 526, 527.

6 Wds. & P.—GO

"Public roads are such as are open to the public, and are under control of governmental instrumentalities, as counties, townships, road districts, and local subdivisions of a similar character. Such roads are set apart by the public, and are maintainable at the public expense." *Shelby County Com'rs v. Castetter*, 33 N. E. 986, 987, 7 Ind. App. 309 (quoting Elliott, Roads & S. p. 5).

It is held in Texas that a public road is one so made by order of the commissioners' court. *Missouri Pac. R. R. v. Lee*, 7 S. W. 857, 858, 70 Tex. 496.

The term "public roads" in the proviso of Rev. St. art. 4360, giving the commissioners' courts of the several counties the power to lay out and open public roads and to discontinue or alter any roads whenever it shall be deemed expedient, provided that no public road shall be altered or changed for the purpose of shortening its distance from the point of beginning to the point of destination, is to be construed to mean public roads laid out and established according to law prior to the enactment of the statute. *Morriss v. Cassady*, 15 S. W. 102, 104, 78 Tex. 515.

"Public road" and "highway" are usually understood to mean the same thing, and include all ways which of right are common to the whole people. *Abbott v. City of Duluth* (U. S.) 104 Fed. 833, 837.

A public road is a way established and adopted by the proper authority for the use of the public, and over which every person has a right to pass, and to use for all purposes of travel or transportation to which it is adopted and devoted. *Cincinnati R. Co. v. Commonwealth*, 80 Ky. 137, 138.

Public roads are those which are made use of as highways which are generally furnished and kept up by the owners of estates adjacent to them. *Civ. Code La.* 1900, art. 705.

All public roads and highways within the state which have been open and in use as such, and included in a road district in the town in which the same are respectively situated, during twenty years next preceding the time when this article shall take effect, are hereby declared to be public roads or highways, and confirmed and established as such, whether the same have been lawfully laid out, established, and opened or not. Every road laid out by the proper authorities, as provided for in this chapter, from which no appeal has been taken within the time limited for taking such appeal, is hereby declared a public highway to all intents and purposes, and all persons having refused or neglected to take appeal, as provided for in this chapter, shall forever be debarred from further redress. *Rev. Codes N. D.* 1899, §§ 1050, 1051.



All roads within the state shall be public highways which have been or may be declared by law to be national, state, territorial, or county roads. All roads that have been designated or marked as highways on government maps or plats in the record of any land office of the United States within this state, and which have been publicly used as traveled highways, and which have not been closed or vacated by order of the board of county commissioners of the county wherein the same are located, are declared to be public highways until the same are closed or vacated by order of the board of county commissioners of the county wherein the same are located. Rev. St. Wyo. 1899, § 1906.

In all townships in the state outside the limits of incorporated cities, villages, or towns the congressional section lines shall be considered public roads, to be opened to a width of two rods on each side of such section lines, where the same have not already been opened upon the order of the board having jurisdiction, etc. Rev. Codes N. D. 1899, § 1052.

#### **As established by dedication and user.**

A road becomes public by reason of a dedication of the right of passage to the public by the owner of the soil, and of an acceptance of the right by the public or the parish. *Rex v. Mellor*, 1 Barn. & Adol. 32, 35.

A way which is dedicated to the public and used by the public is a public road, even if it was never worked by the county. *Hill v. Hoffman* (Tenn.) 58 S. W. 929, 932; *Burkitt v. Battel*, 59 S. W. (Tenn.) 429, 432.

Under Rev. St. 1879, § 4231, prescribing the duties of railway companies at public crossings as to giving signals, etc., it is held that roads made public by dedication, and actually used as public roads, are to be regarded as public roads within the meaning of the statutes equally with public roads established by statutory proceedings. *Missouri Pac. R. Co. v. Lee*, 7 S. W. 857, 858, 70 Tex. 496.

The use of the expression "public road" as a boundary in the description in a deed, where the question involved is whether that boundary was intended to be a mere paper street as laid down on a plat, or an actual highway, known as such, and not by any name appearing on the plat, is construed to mean the latter rather than the former. *Purkiss v. Benson*, 28 Mich. 538, 541.

#### **Fee of land included.**

A public road is that of which even the soil is public. It is not in a public road as in a private one, the soil of which does not belong to the public, while we have only the right of walking and driving over it. *Mor-*

*gan v. Livingston* (La.) 6 Mart. (O. S.) 19, 120.

A deed contained this exception: "Saving and excepting from the premises hereby conveyed all or such part as has been taken for a public road or roads." Held, that the words "public road" should be construed to mean the land covered by a public highway, and not simply the public easement therein, and that hence, under the exception, the fee of the land so covered by the public road remained in the grantor. *Munn v. Worrall*, 53 N. Y. 44, 47, 13 Am. Rep. 470.

#### **As applicable to part.**

The words "public road," as used in a statute providing for the appointment of surveyors when ten or more persons, being freeholders, shall think any public road which has been or shall be laid out unnecessary, apply to any part that may be considered unnecessary. Such part unnecessary is the public road referred to. Nothing is more common than to speak of any part of a highway as the public highway or the public road. *Newell v. Bassett*, 33 N. J. Law (4 Vroom) 26, 27.

#### **Private way.**

Byroad as, see "Byroad."

The term "public roads" is frequently used in this country to designate private ways, and they are so designated in the California statutes. The expression has been criticised as inapt, and as tending to mislead (*Sherman v. Bulck*, 32 Cal. 241, 91 Am. Dec. 577), but it is nevertheless used to designate private ways. *Kripp v. Curtis*, 11 Pac. 879, 71 Cal. 62.

#### **Public bridge.**

Public bridges are parts of public roads within Gen. St. c. 67, § 16, requiring contracts for the construction of roads to be let to the lowest competent bidder; and hence such provision applies to the letting of all contracts for the erecting of public bridges. *People v. Buffalo County Com'rs*, 4 Neb. 150, 158.

#### **Street or alley.**

Laws Minn. 1860, c. 12, § 1, granting to telegraph companies the right to use public roads and highways in the state for the purpose of erecting poles thereon, gives the right to use streets, avenues, and alleys in cities or villages, as well as rural highways. *Abbott v. City of Duluth* (U. S.) 104 Fed. 833, 837.

The charter of a railroad company giving the company power to construct its track across or along any public road without obstructing such road, should not be construed to include streets and alleys of a city. *Ten-*

nessee & A. R. Co. v. Adams, 40 Tenn. (3 Head) 596, 598.

The term "public roads," as used in the statute giving telegraph companies a right of way along public roads in the state, was construed in *Abbott v. City of Duluth* (U. S.) 104 Fed. 833, to include the streets and alleys of cities and villages as well as rural highways. This construction was followed in *Northwestern Telephone Exch. Co. v. City of Minneapolis*, 86 N. W. 69, 81 Minn. 140, 53 L. R. A. 175, and *Chamberlin v. Iowa Telephone Co.*, 93 N. W. 596, 119 Iowa, 619, in which it was held that the term "public highways" in a similar statute included the streets of the city. Whatever may be the usage in other jurisdictions, we think it may be safe to say that in Nebraska the term "public road" is commonly understood and recognized to apply exclusively to rural highways. It is thus understood and used by the people of the state generally, and was so used in U. S. Comp St. 1901, c. 89a, § 14, giving telegraph companies a right of way along the public roads. *Nebraska Telephone Co. v. Western Independent Long Distance Telephone Co.* (Neb.) 95 N. W. 18, 19.

## PUBLIC SCHOOL.

See, also, "Common School"; "Free Public Schools."

Other public schools, see "Other."

A "public school" is hereby defined to be a school that derives its support entirely or in part from moneys raised by a general state, county, or district tax. *Mills' Ann. St. Colo.* 1891, § 4041; *Cook v. School Dist. No. 12*, 21 Pac. 496, 497, 12 Colo. 453.

"Public schools," as these words are used in the Constitution and laws of Massachusetts, are not limited to schools of the lowest grade. The words "public schools" are synonymous with "common schools" in the broadest sense as used in the constitutional amendment. Amend. 18, providing that all moneys raised by taxation in cities for the support of public schools and all moneys which may be apportioned by the state for the support of common schools shall be applied to and expended in no other schools than those which are conducted according to law, etc. *Jenkins v. Inhabitants of Andover*, 103 Mass. 94, 97.

"Public schools," as the term is used in Pub. Laws, c. 533, exempting free public schools from taxation, means "the schools which are established, maintained, and regulated under the statute law of the state." *St. Joseph's Church v. Assessors of Taxes of Providence*, 12 R. I. 19, 20, 34 Am. Rep. 597.

The "public free school system" contemplated by the Constitution does not include a free school specially incorporated to carry

out a will under the exclusive management of its trustees. *Hall's Free School Trustees v. Horne*, 80 Va. 470, 473.

## Academy or college.

"Public schools," as used in Const. Amend. art. 18, providing that all moneys raised by taxation in towns and cities for the support of public schools shall be applied to and expended on no other schools than those which are conducted according to law under the order and superintendence of the authorities of the town or city in which the money is to be expended, cannot be construed as applying to the higher seminaries of learning, such as incorporated academies and colleges. "These, in a certain broad and comprehensive sense, are public institutions, because they are controlled by corporations, and are usually open to all persons who are willing to comply with the terms of admission and tuition. But the broad line of distinction between these and the public schools is that the latter are supported by general taxation; that they are open to all free of expense; and that they are under the immediate control and superintendence of agents appointed by the voters of each town and city." *Merrick v. Inhabitants of Amherst*, 94 Mass. (12 Allen) 500, 508.

## Normal school.

In a statute providing that the board of education in each city shall select "the best scholar from each academy and each public school of their respective counties or cities as candidates for the university scholarship," by the words "public schools" the Legislature intended common schools only, and normal schools were not included. It is true that in an enlarged sense normal schools are public schools, inasmuch as any citizen of the state possessing the requisite qualifications and being selected as provided by law may be admitted to them. In the same sense colleges are public schools, but clearly they are not embraced in the act. The object of normal schools is to give instruction in the art of teaching. The distinction between them and the common schools is marked. They have been defined by the Court of Appeals as follows: "These normal schools differ materially from the common schools to which the Constitution refers. They are not intended for the education of the children of the inhabitants of the districts where they are located, but for the training of teachers for all the common schools. They are not open to all, but only to such as may be selected at times and in the manner prescribed by the superintendent of public instruction. Each part of the state is entitled to its due representation. Applicants for admission are required to possess certain qualifications, which must be tested by the preliminary examinations." *Gordon v. Cornes*, 47 N. Y. 608, 616; *People v. Crissey* (N. Y.) 45 Hun, 19, 21.

The term "public schools," as used in a deed conveying land to the inhabitants of a town for the establishment of a public school, does not include a state normal school, applicants for admission to which are required to sign a declaration of intention to teach in the public schools of the state. *Board of Regents for Normal School Dist. No. 3 v. Painter*, 14 S. W. 938, 940, 102 Mo. 464, 10 L. R. A. 493.

#### **PUBLIC SCHOOL HOUSE.**

"Public schoolhouse," as used in Const. art. 2, § 2, authorizing the General Assembly to exempt from taxation public schoolhouses, means such as belong to the public, and are designed for schools established and conducted under public authority. *Gerke v. Purcell*, 25 Ohio St. 229, 242.

Rev. St. c. 120, § 2, exempting from taxation all public schoolhouses refers to schoolhouses owned by the state, or a school district, or boards of education organized under the school laws of the state, and does not include a private school. *People v. Ryan*, 27 N. E. 1095, 138 Ill. 263.

#### **PUBLIC SEAL.**

"By a public seal we legally understand an impression made of some device by means of a piece of metal or other hard substance kept and used by public authority." *Kirksey v. Bates* (Ala.) 7 Port. 529, 534, 81 Am. Dec. 722.

A public seal in this state is a stamp or impression made upon wax, wafer, paper, or any other like substance, upon which a visible and permanent impression can be made. *Ann. Codes & St. Or.* 1901, § 764.

A public seal in this state is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official document, upon the paper, or upon any substance attached to the paper which is capable of receiving a visible impression. *Rev. St. Utah* 1898, § 3398; *Code Civ. Proc. Cal.* 1903, § 1931.

#### **PUBLIC SECURITY.**

The term as used in the legislation of Congress and in its popular acceptation has a fixed and determinate meaning. It is simply a certificate or instrument issued by the proper officer under the authority of law, evidencing the pecuniary indebtedness or liability of the government to the holder. It is sometimes used in the sense of any paper emanating from the government creating on the part of the government an obligation to perform an act and a corresponding right on behalf of an individual. *United States v. Irwin* (U. S.) 26 Fed. Cas. 544, 546.

The words "public stocks and securities" in Pub. St. c. 11, § 4, providing that personal property for the purposes of taxation shall include "public stocks and securities," mean stocks and securities issued by public corporations, and do not include railroad bonds which are more properly classified as debts due. *Hale v. Hampshire County Com'rs*, 137 Mass. 111, 113. It should be construed to include bonds issued under special legislative authority by a state or city for aiding in the construction of railroads. *Hall v. Middlesex County Com'rs*, 92 Mass. (10 Allen) 100, 101.

#### **PUBLIC SEMINARY.**

A bequest for "a public seminary" means either a public seminary, or the seminary of the testator's county, or any which his executors or a court of equity should select. *Curling's Adm'rs v. Curling's Heirs*, 38 Ky. (8 Dana) 38.

#### **PUBLIC SENTIMENT.**

"A public sentiment on a moral question is but another name for public opinion or harmony of thought—*idem sentira*." *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 565.

#### **PUBLIC SERVANT.**

There are two classes of public servants—officers, or those whose functions appertain to the administration of government; and employes, or those whose employment is merely contracted. *Moll v. Sbisa*, 25 South. 141, 51 La. Ann. 290.

The term "public servants" is commonly used, and properly so, to include county officials, who, in a political sense, are considered as the agents of the people in managing and conducting the business of the county. *State v. King*, 57 N. E. 535, 537, 154 Ind. 621.

#### **PUBLIC SERVICE.**

The furnishing of a courtroom to a county is a "public service" within *Rev. St.* 1898, § 4549, prohibiting a county officer from being peculiarly interested in any contract with the county in relation to any public service. *Quayle v. Bayfield County*, 89 N. W. 892, 895, 114 Wis. 108.

"The good and welfare of this commonwealth, for which reasonable orders, laws, statutes, and ordinances may be made, by force of which private rights of property may be affected, is a much broader and less specific ground of exercise of power than public use and public service. The former expresses the ultimate purpose or result sought to be obtained by all forms of legislative power over property. The latter implies a direct relation between the primary object of appropriation and the public enjoyment. The

circumstance may be such that the use or service intended to be secured will practically affect only a small portion of the inhabitants or lands of the commonwealth. The essential point is that it affects them as a community, and not merely as individuals." The rebuilding by private property owners in a city of buildings destroyed by general fires is not a public use or public service for which the city may issue bonds. *Lowell v. City of Boston*, 111 Mass. 454, 470, 15 Am. Rep. 89.

### PUBLIC SEWER.

Bouvier defines "public" to mean the whole body politic, or all the citizens of the state; the inhabitants of a particular place. The Century Dictionary gives it: "Open to all the people." Bearing these definitions in mind, we have no difficulty in understanding what the framers of the Kansas City charter meant by the term "public sewer." It is a sewer open and available to the whole city, and not limited to any particular part. If a sewer is available as a means of drainage to an area less than the whole city, especially if it is reserved for the drainage of an area less than the whole, even if it were possible to drain the whole into it, it is not a public sewer. *South Highland Land & Improvement Co. v. Kansas City*, 72 S. W. 944, 947, 172 Mo. 523.

"Public sewers," as used in a city charter providing for a sewer system, are defined to be those heretofore constructed or acquired under authority of an ordinance, and paid for wholly out of the general revenue. *Prior v. Buehler & Cooney Const. Co.*, 71 S. W. 205, 170 Mo. 439.

The fact that the construction of a sewer is for sanitary purposes does not make it a "public sewer," within a city charter providing for the payment of the cost of public sewers by appropriation out of the public revenue. *Heman v. Allen*, 57 S. W. 559, 560, 156 Mo. 534.

### PUBLIC SQUARE.

See "Reserved Public Square."  
As highway, see "Highway."

Dillon, in his work on Municipal Corporations, § 509, says: "The uses and purposes of a public square are in some respects different from those of a public highway. Thus a street or highway cannot be inclosed by the public authorities, but a public square or common in a town or city, where the dedication is general, and without special limitation, may be inclosed, notwithstanding it has remained open many years, and been improved and ornamented for recreation and health; but the place must, for the purpose of dedication, remain free and common to the use of all." *Guttery v. Glenn*, 66 N. E. 305,

308, 201 Ill. 275 (citing *Lee v. Town of Mount Station*, 118 Ill. 304, 8 N. E. 759).

The term "public square" has acquired a legal meaning, and courts adopt that meaning in all cases where the term is not shown by the language with which it is associated to have a different meaning. The public square of a county is property of a public nature, held for governmental or public purposes. *Lowe v. Howard County Com'rs*, 94 Ind. 553.

In ordinary acceptation the words "public square" would be understood to mean the plat of ground devoted to public purposes, and not the territory of the streets adjoining the sides of the public square. *De Witt County v. City of Clinton*, 62 N. E. 780, 781, 194 Ill. 521.

In *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95, Justice Rogers, in defining the uses of "public squares," said: "In this state there are few ancient towns in which squares do not form part of the plan. They are generally located at the intersection of the streets, and are intended as sites for the erection of buildings for the use of the public, such as courthouses, market houses, school-houses, and churches. Sometimes they are designed for ornaments, and at others they are intended for the promotion of the health of the inhabitants by admitting a free circulation of air. The squares as well as the streets, and for the same reason, are placed under the superintendence of the local authorities, who have full power to regulate them so as more effectually to answer the purpose for which they have been dedicated. *Mahon v. Norton*, 34 Atl. 660, 661, 175 Pa. 279.

The words "public square," as used on a plat of an addition to a city, should be construed as an unrestricted dedication of the part designated "public square" to public use. *Rhodes v. Town of Brightwood*, 43 N. E. 942, 943, 145 Ind. 21; *Baker v. Johnston*, 21 Mich. 319, 340.

It is held that the words "public square" have a definite legal meaning, and when written or printed on the plat of a town designed for a county seat mean that the land so designated has been set apart as the site of a courthouse. *City of Logansport v. Dunn*, 8 Ind. 378, 382.

"Public square," in its popular import, and as used in the statutes, relates almost exclusively to grounds occupied by the courthouse and owned by the county; but where a plat was filed on which a lot was marked "public square" the owner will not be deemed to have donated such lot to the county. *Westfall v. Hunt*, 8 Ind. 174, 177.

The term "public square" is commonly and not inaptly applied to land belonging to

a county on which the courthouse is erected, and so much of it as is used for the moving about of the people constitutes and is a highway. *State v. Eastman*, 13 S. E. 1019, 1020, 109 N. C. 785.

The phrase "public square" written on the draft of the town indicated an intention to dedicate to the public. *Commonwealth v. Rush*, 14 Pa. (2 Harris) 186, 189.

#### **PUBLIC STREAM.**

See "Public Waters."

#### **PUBLIC SWEARING.**

An indictment for public swearing must allege that the swearing was in the presence of citizens, and in their hearing. Public swearing is a nuisance at common law, but, to be indictable, it must be in a public place, and an annoyance to the public. It is the publicity of the offense, and the place in which it is committed, that make it punishable as a common nuisance. *Commonwealth v. Linn*, 27 Atl. 843, 844, 158 Pa. 22, 22 L. R. A. 353.

#### **PUBLIC TAX.**

"Public taxes, rates, and assessments" are those which are levied for some public or general use or purpose in which the person assessed has no direct, immediate, and peculiar interest. Those charges and impositions which are laid directly upon the property in a circumscribed locality to effect some work or political convenience beneficial to the property especially assessed for the expense of it are not public, but are local and private. *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506, 509.

By a charter of a town certain lands were forever exempted from "public taxes"; that is to say "so long and while the income and profits shall be actually applied by said president, trustees, and their secretaries to the purposes of said college and school. Held, that the term "public taxes," as there used, was used with reference to taxes pertaining to the public revenue as contradistinguished from local municipal taxes, such as town, parish, district, and village taxes assessed upon and to be expended for the use and immediate benefit of the particular municipality; that the word "public," as applied to taxation, should be construed in a more comprehensive sense according to the subject to which it is applied; and that if it had been the intention to exempt the property from all taxation, it would not have been necessary for the legislative authority to have used the word "public" at all, and hence its use should be restricted to such taxes as were not for the benefit of the municipality or town. *Morgan v. Cree*, 46 Vt.

773, 783, 14 Am. Rep. 640. See, also, *Shoalwater v. Armstrong*, 28 Tenn. (9 Humph.) 217, 222.

The term "public tax," as used in Act June 13, 1836, § 9, providing that a settlement may be gained in any poor district by the payment of any public taxes, is not confined to state taxes, but a settlement may be gained by a payment of road taxes. *Huston Tp. Poor Dist. v. Benezette Tp. Poor Dist.*, 19 Atl. 1060, 1061, 135 Pa. 393.

#### **PUBLIC THINGS.**

See "Things Public."

#### **PUBLIC THOROUGHFARE.**

The words "public thoroughfares," as used in Greater New York Charter, § 417, providing that ordinances for the lighting of public thoroughfares must be adopted or prepared by the board of public improvements, etc., mean streets, avenues, and buildings. *Blank v. Kearney*, 59 N. Y. Supp. 645, 646, 28 Misc. Rep. 383.

#### **PUBLIC TRIAL.**

The word "public" is employed in opposition to "secret," as used in Const. art. 1, § 13, guarantying to every person accused of crime a public trial. *People v. Swafford*, 3 Pac. 809, 810, 65 Cal. 223.

The meaning of the term "public trial," as used in Cr. Code, § 8, subd. 1, providing that a person accused of crime shall be entitled to a speedy and a public trial, depends upon the circumstances of each particular case. "In a time of political or local excitement, if the trial judge permitted the courtroom to be packed exclusively with men opposed to the defendant on trial, the trial would not be public in fairness to the defendant. Every seat and all the standing room might be occupied, but the character of the spectators present, and the friendliness to the accused of those who failed to gain admittance, perhaps through the connivance of the court, are to be considered in deciding whether the rights of the defendant have been trampled upon. The exclusion of a dozen school girls or boys of no particular predilection for the defendant on trial can work no harm to him. The statute is for his benefit, and such an expulsion does not harm or aid him. It is apparent, therefore, that while the defendant is entitled to a public trial, good morals or the exigencies of the situation may make that a relative term, without injury to the defendant, and without infringement upon the sanctity of the rights granted to him; that such discretion is vested in the presiding judge, and the test is whether or not it has been abused." *People v. Hall*, 64 N. Y. Supp. 433, 436, 51 App. Div. 57.

**PUBLIC TRUST.**

The term "office" and "public trust" in the Constitution are nearly synonymous; at least the term "public trust" is included in the more comprehensive term "office." The terms have relation only to those persons and duties that are of a public nature. *Ex parte Yale*, 24 Cal. 241, 244, 85 Am. Dec. 62.

The expression "public trust," as used in Cr. Code, § 121, providing that if any person elected or appointed to any office of "public trust," etc., appears to include every agency in which the public, reposing special confidence in particular persons, appoints them for the performance of some duty or service, and hence the language would include every public officer. *Conley v. State*, 64 N. W. 708, 710, 46 Neb. 187.

**Attorney.**

The term "office or public trust," as employed in the Constitution, requiring an oath to be taken by persons occupying an "office or public trust," "has no legal or technical meaning distinct from its ordinary signification. An office is a public charge or employment, and the term seems to apprehend every charge or employment in which the public are interested. The words 'public trust,' still more comprehensive, appear to include every agency in which the public repose special confidence in particular persons, and appoint them for the performance of some duty or service." An attorney or counselor at law holds an office or public trust within the meaning of the terms as used in the Constitution. *In re Wood* (N. Y.) *Hopk.* Ch. 6, 7.

An attorney is not a person holding an office of public trust, within the meaning of that phrase of Const. art. 2, § 3, providing that a single oath shall be taken by a public officer, and no other oath required. *Cohen v. Wright*, 22 Cal. 293, 307.

The term "public trust or office" in the clause of the Constitution providing that neither the chancellor, nor justice of the Supreme Court, nor any circuit judge, shall hold any other office or public trust, includes an attorney or counselor. *Seymour v. Ellison* (N. Y.) 2 Cow. 13, 29.

**Election officer.**

The term "public trust," as used in the Constitution, providing that other than the official oath no oath, declaration, or test shall be required as a qualification for any office or public trust, includes registration commissioners of elections, together with the functions of any district registers, clerks, and inspectors. *Attorney General v. Detroit Common Council*, 24 N. W. 887, 889, 58 Mich. 213, 55 Am. Rep. 675.

**Juryman.**

The phrase "place of public trust or emolument" in a statute prohibiting polyga-

mists from holding any place of public trust or emolument, etc., does not include the position of a juryman. *People v. Hopt*, 4 Pac. 250, 256, 3 Utah, 396.

**PUBLIC TRUSTS.**

"Public"—or, as they are frequently termed "charitable"—trusts are those created for the benefit of an unascertained, uncertain, and sometimes fluctuating body of individuals, in which the *cestuis que trustent* may be a portion or class of a public community; as, for example, the poor or the children of a particular town or parish. *Doyle v. Whalen*, 32 Atl. 1022, 1025, 87 Me. 414, 31 L. R. A. 118; *Brooks v. City of Belfast*, 38 Atl. 222, 226, 90 Me. 318.

**PUBLIC TURNPIKE.**

A "public turnpike" is a way which the public has a right to use. *In re Opinion of Justices*, 33 Atl. 1076, 1099, 66 N. H. 629.

**PUBLIC USE.**

Other public use, see "Other."

Comp. St. p. 109, § 251, provides that each county shall have power to purchase and hold for the public use of the county lands lying within its own limits. Held, that the phrase "public use" means that actual use, occupation, and possession of real estate rendered necessary for the proper discharge of the administrative or other functions of the county through its appropriate officers. *Williams v. Lash*, 8 Minn. 496, 505 (Gil. 441).

When private property is affected by the public interest, it ceases to be *juris privati* only. Property becomes clothed with the public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control. *Munn v. Illinois*, 94 U. S. 113, 126, 24 L. Ed. 77.

There may be a dedication of water in a fountain for a limited purpose, but there cannot be a dedication to a limited part of the public, and where a water tank was open for anybody's cattle to drink on market day from 10 o'clock until 5, or for anybody's horses traveling along the road, it was a public use, and valid to such limited extent. *Hildreth v. Adamson*, 8 O. B. (N. S.) 587, 594.

A "public use" must be for the general public, or some portion of it, and not a use

by or for particular individuals or for the benefit of certain estates. *McQuillen v. Hatton*, 42 Ohio St. 202. The use and benefit must be in common, not to particular individuals or estates. *Coster v. Tide Water Co.*, 18 N. J. Eq. (3 O. E. Green) 68. The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not. *Hildreth v. Montecito Creek Water Co.*, 72 Pac. 395, 398, 139 Cal. 22.

In platting the city of Philadelphia there were several large squares on the plat, and on each was marked, "Eight Acres for Public Use." A contention arose as to the effect of this dedication, and the Supreme Court held that when property is dedicated or transferred to public use the use is indefinite, and may vary according to circumstances. The public being not able themselves to manage or attend to it, the care and employment must devolve on some legal authority and body corporate as its guardian, who are in the first instance to determine what use of it, from time to time, is best calculated for the public interest, subject, as charitable uses are, to the control of the laws and the courts in case of any abuse or misapplication thereof. The city has no right to these squares, so as to be able to sell them, or employ them in a way different from the object for which they were designed, but may allow them to remain unimproved or unoccupied, while buildings are too remote to render it proper. They may afterwards permit them to be used as depositories of public property, hay scales, for a powder magazine, and, finally, when a close population surrounds them, for recreation and ornament. *Commonwealth v. Alburger* (Pa.) 1 Whart. 469, 473.

The use of a safe made by one man for himself and kept by him in his counting room or cellar is a private, and not a public, use. *Adams v. Edwards* (U. S.) 1 Fed. Cas. 112, 116.

A public use, whether for all men or a class, is not one confined to privileged persons. The smallest street is public, for all men have an equal right to travel on it; but a way used by thousands, which may be shut against a stranger, is private. *Troutman v. De Boissiere Odd Fellows Orphans' Home & Industrial School*, 71 Pac. 286, 292, 293, 66 Kan. 1.

#### **Educational purposes.**

A building removed by a city and afterwards fitted up as a schoolhouse and engine house is a building devoted to a public use, within the meaning of Gen. St. c. 161, § 2,

punishing the malicious burning of a building erected for public use. *Commonwealth v. Horrigan*, 84 Mass. (2 Allen) 159.

When a college or academy is incorporated wholly for the purposes of general education, and is so operated without any capital stock or purpose of profit, and tuition is charged only for its maintenance, then it is devoted to "public use." It is private only in a technical sense. Every donation to it, not devoted to extension or improvement, would naturally enable it to extend its beneficial use to the public with less charge, until in time it may become free. Its operation all the time is for the public weal, without personal advantage or profit to the corporators, except as they share with the whole public in the general advantage by promotion of education and good morals; and the property of such a college or academy is exempt from taxation under a statute exempting "real and personal estate granted, sequestered, or used for public, pious, or charitable uses." *Willard v. Pike*, 9 Atl. 907, 915, 59 Vt. 202.

The term "public use" in a statute exempting lands sequestered to public, pious, and charitable uses is applicable to a conveyance of land for the use of a public college. *Middlebury College v. Cheney*, 1 Vt. 336, 351.

#### **Rebuilding of private property.**

Public uses, within the meaning of the rule that taxation is only authorized for the raising of money for public uses, does not include the reconstruction of the buildings of a city belonging to private owners which have been destroyed by fire. "To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals either in respect to property or business, although it may result incidentally in the advancement of the public welfare, is in its essential character a private, and not a public, object." *Feldman v. Charleston City Council*, 23 S. C. 57, 62, 55 Am. Rep. 6.

The rebuilding by private property owners in a city of buildings destroyed by general fires is not a public use or public service for which the city may issue bonds. *Lowell v. City of Boston*, 111 Mass. 454, 470, 15 Am. Rep. 39.

#### **Transportation.**

Taxation by a municipality for the construction of a subway which shall be leased to a street car company and used for the carriage of such passengers as pay the regular fare is taxation for a public use. *Prince v. Crocker*, 44 N. E. 446, 448, 166 Mass. 347, 32 L. R. A. 610.

**PUBLIC USE (In Eminent Domain).**

A public use arises when the sovereign power is essential to an enterprise, and for that reason therein exercised. *Bound v. South Carolina R. Co.* (U. S.) 50 Fed. 312, 815.

Whatever is beneficially employed for the community is a public use. *Aldridge v. Tuscumbia, C. & D. R. Co.* (Ala.) 2 Stew. & P. 199, 203, 23 Am. Dec. 307.

Public use implies a possession, occupation, and enjoyment of land by the public at large or by public agencies. *In re Rhode Island Suburban Ry. Co.*, 48 Atl. 591, 593, 22 R. I. 457, 52 L. R. A. 879.

Property is devoted to public use when, and only when, the use is one which the public in its organized capacity, to wit, the state, has a right to create and maintain, and therefore one which all the public has a right to demand and share in. The use is public because the public may create it, and the individual creating it is doing thereby and pro tanto the work of the state. *Mr. Justice Brewer dissenting. Budd v. New York*, 12 Sup. Ct. 468, 478, 143 U. S. 517, 36 L. Ed. 247.

If the use for which property is taken be to satisfy a great public want or public exigency, it is a public use. *Gilmer v. Lime Point*, 18 Cal. 229, 238.

A "public use," as such phrase is used in the law of eminent domain, means one which concerns the whole community. *Keller v. City of Corpus Christi*, 50 Tex. 614, 629, 32 Am. Rep. 613.

By "public use," as that term is employed with reference to the exercise of the right of eminent domain, is meant for the use of many, or where the public is interested. *Seely v. Sebastian*, 4 Or. 25, 29.

The public use which justifies the condemnation of property has received no definition which can be used as a certain criterion to determine when the power may be exercised. To know what is a public use which authorizes the exercise of the power of eminent domain, we must have recourse to cases, rather than to definitions; to uses that have been held to be public. There are certain uses about which there is no controversy. Property taken for state houses, for court-houses, for school houses, for public roads, and the like, which pass under the immediate control of the public authorities, are cases of clear and direct public uses. Property taken for railroads, canals, and the like have also been conceded to be taken for public uses. *Oury v. Goodwin* (Ariz.) 26 Pac. 376, 378.

"Under the Roman law things for public use were divided into two kinds only: First. Those destined for the common use

of mankind, and which every one might freely use; such as rivers, seas, the banks of rivers, and the sea port. These things were destined by nature for public use. Second. Those things which public policy deemed necessary and appropriate in spiritual or temporal affairs. In the last-mentioned class were embraced the streets, highways, market places, the places where courts of justice were held, colleges, town houses, and other public places." *Commercial Bank of New Orleans v. City of New Orleans*, 17 La. Ann. 190, 197.

What is a public use within the meaning of eminent domain statutes may depend somewhat on the nature and wants of the community for the time being. The right to take for a public use is not limited to the actual use and occupation of the property of the state, for private property is taken in many instances where the state, in its sovereign capacity, does not and cannot occupy. It is not limited to public political corporations, for the right of private corporations to take private property for a variety of purposes such as canals and railroads, is undisputed. *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. (Sart.) 694, 695, 23 Am. Dec. 756.

To constitute a public use: First. The general public must have a definite and fixed use of the property to be condemned; a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested; a public use, which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the Legislature. Second. This public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience. Third. It must be impossible, or very difficult at least, to secure the same public use and purpose otherwise than by authorizing the condemnation of private property. *Varner v. Martin*, 21 W. Va. 534. In *Gilmer v. Lime Point*, 18 Cal. 229, a public use is defined to be a use which concerns the whole community, as distinguished from a particular individual. The use which the public is to have in such property must be fixed and definite. It will not suffice if the general prosperity of the community is promoted by the taking of property from the owner and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use. In other words, the use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred on the public. *Fallsburg Power & Mfg. Co. v. Alexander* (Va.) 43 S. E. 194, 197, 61 L. R. A. 129.



Public use means the same as use by the public. Whether a use is public or not may be determined by the fact that, where the use is public, a trust attaches to the subject condemned for the benefit of the public. *Zircle v. Southern Ry. Co. (Va.)* 45 S. E. 802, 803.

The existence of the power to take private property for public use by right of eminent domain excludes the idea that it may be taken for private use, or under semblance of public use, and immediately or ultimately conveyed and appropriated to private uses. *Dunham v. Williams (N. Y.)* 36 Barb. 136.

The power of eminent domain is conferred on citizens only when some existing public need is to be supplied or some present public advantage to be gained, but not with a view to contingent results, dependent upon the success of a projected speculation. *Appeal of Edgewood R. Co.,* 79 Pa. St. (29 P. F. Smith) 257.

Land cannot be taken by right of eminent domain because the public will be incidentally benefited by the use to which private parties will put the land, so long as the public has no right of control; and a statute authorizing such taking of land for the construction of an artificial basin, to be used as a dock, is unconstitutional. *In re Eureka Basin Warehouse & Mfg. Co.,* 96 N. Y. 42, 48.

#### **Benefit or good of public.**

A historical research discloses the meaning of the term "public use" to be one of constant growth. As society advances, its demands upon the individual increase, and each demand is a new use to which the resources of the individual may be devoted. Says Tiedeman in his work on State and Federal Control of Persons and Property (pages 692-694): "The ever-increasing complications of modern civilization have compelled an application of the right of eminent domain to other than public or governmental uses, and the meaning of the term 'public' was broadened from time to time in order to cover these new applications of the right, until now the term is synonymous with 'public good.' \* \* \* There is nothing in our Constitution which requires a taking for a public use. We have, as the sole authority for the requirement, the judicial opinion that it is unrepugnant to take private property for any but a public use; but we claim that the courts, at least in later years, meant thereby that private property cannot be taken except to promote some public good, when they require it to be a taking for a public use." In *People v. Township Board of Salem*, 20 Mich. 452, 4 Am. Rep. 400, the court said: "If we examine the subject critically, we shall find that the most important consideration in the case of

eminent domain is the necessity of accomplishing some public good which is otherwise impracticable; and we shall also find that the law does not so much regard the means as an end." In accord with the later quotation are the words of Chief Justice Marshall in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 421, 4 L. Ed. 579: "Let the end be legitimate, let it be within the scope of the Constitution; and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." In *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221, it was contended that the term "public use" should be distinguished from the term "public benefit," and that by "public use" was meant the possession, occupation, and direct enjoyment by the public. The court says: "It seems that such a limitation on the intent of this important clause would be entirely different from its accepted interpretation, and would be as unfortunate as novel. One of the most common meanings of the word 'use,' as defined by Webster, is 'usefulness,' 'utility,' 'advantage,' 'productive of benefit.' 'Public use' may therefore well mean 'public usefulness, utility, or advantage,' or what is productive of general benefit; so that an appropriation of private property by the state under its right of eminent domain, for purposes of great advantage to the community, is a taking for public use. Such, it is believed, is the construction which has uniformly been put upon the language by courts, legislatures, and legal authorities." *Tuttle v. Moore*, 64 S. W. 585, 590, 3 Ind. T. 712; *Pocantico Waterworks Co. v. Bird*, 29 N. E. 246, 248, 130 N. Y. 249.

"What constitutes a public use or purpose has, so far as we are able to find, never been defined in the sense of furnishing a rule applicable to all times and cases. It is a subject which does not admit of definition, as the defined limits of to-day might not answer for the changed conditions of to-morrow. From the nature of the case, there can be no precise line. The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The sole dependence must be on the personal wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong controlled, by the dispassionate judgment of the courts." *Olmstead v. Camp*, 33 Conn. 532, 551, 89 Am. Dec. 221. Public benefit or utility has been held sufficient. *Aldridge v. Tusculum Co. & D. R. Co. (Ala.)* 2 Stew. & P. 199, 203, 23 Am. Dec. 307; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444. In *Pennsylvania* it was said that the public convenience was sufficient to uphold the authority. *City of Pittsburgh v. Scott*, 1 Pa. (1 Barr) 809, 814; *Talbot v. Hudson*, 82 Mass.

(16 Gray) 417; *In re Tuthill*, 55 N. Y. Supp. 657, 662, 36 App. Div. 492.

Public use, public purpose, and public policy are much the same in import, and just as public policy is legislative policy in the main, so public use and public purpose are largely dependent on different policies, though varying from time to time with the accession of power of political parties, differing from each other as to the system of measures best adapted to promote the interests of the state. *Stockton & V. R. Co. v. Common Council of City of Stockton*, 41 Cal. 147, 168.

The term "public use" in a constitutional provision prohibiting the taking of private property for public use except for compensation, covers a use of property by private persons for manufacturing purposes, where the interests involved are large and public benefits, and advantages will result therefrom by stimulating the growth of towns and cities, thus adding to the material prosperity of the state. *Amoskeng Mfg. Co. v. Head*, 56 N. H. 386, 399.

In construing the meaning of the words "public use," as contained in the constitution of this state, held, that any appropriation of private property, under the right of eminent domain, for any purpose of great public benefit, interest, or advantage to the community, is a taking for a public use. The object must not only be of great public benefit, and for the paramount interests of the community, but the necessity must exist for the exercise of the right of eminent domain. *Dayton Gold & Silver Min. Co. v. Seawell*, 11 Nev. 394, 400.

#### **Convenience, necessity or welfare of public.**

In speaking of what constitutes a "public use," as the term is used in the law of eminent domain, Mr. Justice Cooley, in his *Constitutional Limitations*, 532, says: "The reason of the case and the settled practice of free government must be our guide in determining what is or is not to be regarded a public use, and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provisions for them otherwise, is alike proper, useful, and needful for the government to provide." *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147, 152; *Appeal of Rees* (Pa.) 12 Atl. 427, 430.

The term "public use" is flexible, and cannot be confined to the public use known at the time of forming the Constitution. All improvements that may be made, if useful to the public, may be encouraged by the ex-

ercise of eminent domain. Any use of anything which will satisfy a reasonable public demand for facilities, for travel, for transmission of intelligence or of commodities, would be a public use. *American Telegraph & Telephone Co. v. Smith*, 18 Atl. 910, 914, 71 Md. 535, 7 L. R. A. 200; *Trenton & N. B. Turnpike Co. v. American & European Commercial News Co.*, 43 N. J. Law (14 Vroom) 381, 385 (citing *Concord R. R. v. Greely*, 17 N. H. 47; *New Orleans, M. & T. R. Co. v. Southern & A. Telegraph Co.*, 53 Ala. 211; *Stewart v. Great Northern Ry. Co.*, 65 Minn. 515, 517, 68 N. W. 208, 33 L. R. A. 427).

"The question of public use is one difficult to determine, but it may be assumed as sound that, wherever the taking is a public necessity, as in the case of highways, or is for the welfare of the people, it is taken for public use; or, as is said in *Edgewood R. Co.'s Appeal*, '79 Pa. (29 P. F. Smith) 269, the commonwealth transfers to her citizens her power of eminent domain only when some existing public need is to be supplied, or some present public advantage to be gained." *Appeal of Rees* (Pa.) 12 Atl. 427, 430.

#### **Duty to or right in public.**

It is doubtless true that, in order to make the use public, a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended. *Pocantico Waterworks Co. v. Bird*, 29 N. E. 246, 248, 130 N. Y. 249; *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 64 N. W. 343, 346, 45 Neb. 884, 29 L. R. A. 853, 50 Am. St. Rep. 585. It is true that, in order to make the use public, a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended. *Witcher v. Holland Water-Works Co.*, 20 N. Y. Supp. 560, 562, 66 Hun, 619.

The term "public use" as used in referring to the right of eminent domain to take private property for public use, does not mean that every use from which the public may incidentally and temporarily derive an advantage or benefit or convenience during the pleasure of the owner of the property, and from which they may be excluded at the mere caprice of the owner, is a public use. The test whether a use is public or not is whether a public trust is imposed on the property; whether the public has a legal right to the use, which cannot be again denied or withdrawn at the pleasure of the owner. The question is whether the public have a right to the use. The general public must have a definite and fixed use of the property, a use independent of the will of the private person or corporation in whom the title is vested, a public use which cannot be defeated by the private owner, but which is guarded and controlled by the law. Twelfth

*St. Market Co. v. Philadelphia & R. T. R. Co.*, 21 Atl. 989, 990, 142 Pa. 580.

In considering an application by a coal company to condemn a right of way for a tramway leading from its coal works to connect with a railroad company, the court defined the term "public use," as follows: "The expression 'public use,' *ex vi termini*, implies an interest or right of some kind in the public, and, as the public can have no existence separate and apart from the people of which it consists, it follows that this interest or right, whatever it is, belongs to and is vested in the people. This being so, it is the duty of the state to see that it is properly protected. Without attempting, as we might if the question were an original one, to determine the nature and extent of this interest or right, we have no hesitancy in saying that, if the use is a continuing one, as it is in all cases where property is taken for the purposes of a public ferry, railway, or the like, the right or interest of the public is coextensive with the use to which it is annexed, and that it is not within the power of those exercising the franchise to deprive the people of the benefits resulting therefrom. Persons or corporations condemning property for such purposes assume certain obligations and duties to the public, which they cannot disregard without forfeiting their franchise, and otherwise rendering themselves liable. In all such cases, the character of the business proposed to be done, and the manner of doing it, must be looked to in determining whether the use will be a public or private one. If, from the nature of the business, and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, it may safely be concluded the use is private, and not public. It is also believed to be generally, if not universally, true that benefits resulting from a public use capable of individual appropriation are open to all alike upon the same terms and conditions." *Sholl v. German Coal Co.*, 10 N. E. 199, 201, 118 Ill. 427, 59 Am. Rep. 379.

Where land is taken for its use by a railroad corporation having the right to exercise the power of eminent domain, the question whether the use is public or private depends upon the right of the public to use the road and to require the corporation to transport freight or passengers over the same, and not upon the amount of business. *Kettle River R. Co. v. Eastern Ry. Co.*, 43 N. W. 469, 470, 41 Minn. 461, 6 L. R. A. 111.

#### **Extent of public benefited.**

The phrase "public use," in the law of eminent domain, does not necessarily mean that the improvement should directly benefit the people of the whole state, but the direct public benefit contemplated may be confined to a particular community. *Bloomfield & R.*

*Natural Gaslight Co. v. Richardson*, 63 Barb. 437, 448; *Stamford Water Co. v. Stanley* (N. Y.) 39 Hun, 424, 426; *Inhabitants of Wayland v. Middlesex County Com'rs*, 70 Mass. (4 Gray) 500, 501.

The public use required need not be the use or benefit of the whole public or state or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use or benefit must be common, not to particular individuals or estates. If the use is of so much benefit or advantage to the community, either directly or indirectly, that it cannot be said to be wholly private in its effect and operation, it must then be deemed public. *Mangan v. Texas Transp. Co.*, 44 S. W. 998, 1001, 18 Tex. Civ. App. 478 (citing 1 Wood, Ry. Law, § 226).

The term "public use" means a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals. It is not necessary, however, that each and every individual member of society should have the same degree of interest in this use, or be personally or directly affected by it, in order to make it public. Citing *Gilmer v. Lime Point*, 18 Cal. 229, 251; *Riche v. Bar Harbor Water Co.*, 28 Alb. Law J. 498; *O'Relley v. Kankakee Valley Draining Co.*, 32 Ind. 185. So that a highway which benefits directly only the occupants of three farms presents a question of fact as to whether it is for a public use or not. In re *Town of Whitestown*, 53 N. Y. S. 397, 398, 24 Misc. Rep. 150.

It has never been deemed essential that the entire community, or any considerable portion of it, shall directly enjoy or participate in an improvement or enterprise in order to constitute a "public use," within the meaning of those words as used in the constitutional provision relative to the condemnation of private property. In re *Madera Irr. Dist.*, 28 Pac. 272, 274, 675, 92 Cal. 296, 323, 27 Am. St. Rep. 106, 14 L. R. A. 755.

"In order that a use may be regarded as public, it is not necessary that the whole community or any large portion of it participate therein, and the fact that some individuals may be specially benefited above others affected by it will not deprive it of its public character"—said in construing a statute relating to the construction of drains. *Ross v. Davis*, 97 Ind. 79, 83.

The term "public use," as used in connection with the right of eminent domain, is not easily defined. It implies the use of many, or by the public, but it may be limited to the inhabitants of a small or restricted locality, but must be in common, and not for a particular individual. It has consequently been held that railroads, canals, turnpikes, ferries, sewers, gas and water companies, are for a public use. *Pocantico Waterworks*

*Co. v. Bird*, 29 N. E. 246, 248, 130 N. Y. 249; *Olmstead v. Proprietors of Morris Aqueduct*, 46 N. J. Law (17 Vroom) 495, 499; *Inhabitants of Wayland v. Middlesex County Com'rs*, 70 Mass. (4 Gray) 500, 501; *St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659; *In re New Rochelle Water Co. (N. Y.)* 46 Hun, 525, 526; *Stamford Water Co. v. Stanley (N. Y.)* 39 Hun, 424, 426; *Witcher v. Holland Waterworks*, 20 N. Y. Supp. 560, 562, 66 Hun, 619; *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 64 N. W. 343, 346, 45 Neb. 884, 50 L. R. A. 853, 50 Am. St. Rep. 585.

In determining whether the use is public, it has never been deemed essential that the entire community or any considerable portion of it should directly enjoy or participate in the benefits to be derived from the purpose for which the property is appropriated. It is enough if the taking tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor. Such results indirectly contribute to the general welfare and prosperity of the whole community. *Talbot v. Hudson*, 82 Mass. (16 Gray.) 417, 425.

The power to exercise the right of eminent domain may be conferred upon a corporation acting in its own interests and for purposes of private gain. But in order to constitute a "public use" within the meaning of the Constitution, it is not necessary that the improvement should directly benefit the people of the whole state. The direct public benefit contemplated may be confined to a particular community. And the Legislature is, in any case, the sole judge of what constitutes a private use. *Bloomfield & R. Natural Gaslight Co. v. Richardson*, 63 Barb. 437, 448.

To constitute a public use that will justify taking of private property under the Constitution, it is not essential that all portions of the community should derive equal benefit from the purpose for which the property is taken. It may be taken though only portions of the community are thereby benefited. *Allen v. Inhabitants of Jay*, 60 Me. 124, 140, 11 Am. Rep. 185.

The public use of a railroad or railroad track is one to which all the people have a right, though the number who require the use may be small. *Chicago, B. & N. R. Co. v. Porter*, 46 N. W. 75, 76, 43 Minn. 527 (citing *Kettle River R. Co. v. Eastern Ry. Co.*, 43 N. W. 461, 469, 41 Minn. 469, 6 L. R. A. 111).

The essential feature of a public use is that it is not confined to privileged individ-

uals, but is open to the indefinite public. It is this indefinite or unrestricted quality that gives it its public character. The smallest street in the smallest village is a public highway, and none the less so because the vast majority of the citizens of the state will never derive any benefit from it. *White v. Smith*, 42 Atl. 125, 126, 189 Pa. 222, 43 L. R. A. 498.

The term "public use," under Const. art. 1, § 16, prohibiting the taking of private property for public use except for compensation, includes the taking of property for the use of a local school. In this case the taking was resisted on the notion that the property used was local and limited, and not for the public generally, and the court quotes *Poland, J.*, in *Williams v. School Dist. No. 6*, 33 Vt. 271, as saying that: "Every public use is to some extent local, and benefits a particular section more than others. Railroads and canals, the most extensive of our public works, do so in some degree. Burying grounds, aqueducts, mills, and many highways are as purely local as these, and no person can derive benefit from them except by becoming a resident in their vicinity. In the same way these may be for the benefit of any citizen, but the use in the present case, that of a public school-house, has a more enlarged and liberal view. It is a benefit and advantage to the whole country that all the children should be educated, and thus, by means of educating the childrer in a single district, benefits the whole." *Township Board of Education v. Hackmann*, 48 Mo. 243, 245.

The supplying of water to a tract of land, though of many thousand acres in extent, if occupied by an individual proprietor, would be for his private benefit, and not a "public use"; yet the same tract of land might be so subdivided and held in individual proprietorship as to render the supply of water to it a public, instead of a private, use. The same tract of land may constitute a farming neighborhood, and yet be so limited in the elements which make it a neighborhood that the supply of water to it would not constitute a public use. It is not necessary that the entire public shall enjoy the use, or even that it be capable thereof, but the use must be capable of enjoyment by all who may be within the neighborhood, and there must be within that neighborhood so great a number of the entire public as to destroy its character as a private use. *Lindsay Irr. Co. v. Mehrtens*, 32 Pac. 802, 803, 97 Cal. 676.

Under Const. c. 3, § 15, providing that all of the waters that are now appropriated, or may be appropriated hereafter, for any official use, and the right of way over the land of others, for all ditches, etc., be held to be public use, the use of waters to irrigate a tract of land or work a particular

mine, though such land or mine is owned by an individual, is a public use. *Ellinghouse v. Taylor*, 48 Pac. 757, 758, 19 Mont. 462.

#### Judicial or legislative question.

What constitutes a public use is a judicial question, about which there has been much conflict in decisions, but which, nevertheless, must be settled by the courts. If a Legislature should say that a certain taking was for a public use, that would not make it so; for such a rule would enable a Legislature to conclude the question of constitutionality by its own declaration. The true rule is that the statute will be held to apply only to public purposes unless it shows the contrary, and the court will then determine whether the particular taking is for a public purpose. In *re Rhode Island Suburban Ry. Co.*, 48 Atl. 590, 591, 22 R. I. 455.

Judge Cooley says: "The question what is a public use is always a question of law. Deference will be paid to the legislative judgment as expressed in enactments providing for the appropriation of property, but it will not be conclusive." *Lux v. Haggin*, 10 Pac. 674, 698, 69 Cal. 255 (citing *Cooley*, Const. Lim. 536).

It has been said that, if by any reasonable construction a designated use may be held to be public in a constitutional sense, the will of the Legislature should prevail over any mere doubt on the part of the court. *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 64 N. W. 343, 346, 45 Neb. 884.

Public use is a judicial question, and must be determined by the court. *Witcher v. Holland Waterworks Co.*, 20 N. Y. Supp. 560, 562, 66 Hun. 619; *Pocantico Waterworks Co. v. Bird*, 29 N. E. 246, 248, 130 N. Y. 249; *Tyler v. Beacher*, 44 Vt. 648, 651, 8 Am. Rep. 398; but whenever the use is public, the question whether there is a necessity for taking, and of the utility of exercising the power, is entirely legislative. *Tyler v. Beacher*, 44 Vt. 648, 651, 8 Am. Rep. 398.

If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the Legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose. *Lux v. Haggin*, 10 Pac. 674, 698, 69 Cal. 255 (citing 2 Kent's Comm. 340); *Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45, 22 Am. Dec. 679; *Stamford Water Co. v. Stanley* (N. Y.) 39 Hun. 424, 426.

The question of what is a "public use" within the meaning of the law of eminent domain is a judicial question, and not a legislative one. *Logan v. Stogsdale*, 123 Ind.

372, 24 N. E. 135, 8 L. R. A. 58. In determining whether a use is public, we must look not only to the character of the business to be done, but also as to the proposed mode of doing it. If the use is merely optional with the owners, or the public benefit merely incidental, it is not a public use authorizing the exercise of the power of eminent domain. There must be in general a right to the definite use of the property, a right which the law compels the owner to give to the general public. It is not enough that the general prosperity of the public is promoted; "public interest" and "public use" are not synonymous. In *re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429. The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or only by permission. *Great Western Natural Gas & Oil Co. v. Hawkins*, 66 N. E. 765, 768, 30 Ind. App. 557 (citing *Twelfth St. Market Co. v. Philadelphia & R. T. R. Co.*, 142 Pa. 580, 21 Atl. 902, 989).

#### Private or public agency.

The only test of the power of the state to condemn land for public use is that the particular object for which the land is condemned tends to promote the general interest in its relation to any legitimate object of government. In the promotion of this purpose the state selects its own agents and agencies, and whether that agency be a foreign or domestic corporation, a foreign government, or a member of the domestic government, is immaterial." *Gilmer v. Lime Point*, 18 Cal. 229, 252.

The question of public use is not affected by the agency employed, for it may be vested in private persons, who may be actuated solely by motives of private gain, though the use to be made thereof is for the benefit of the public. *Pocantico Waterworks Co. v. Bird*, 29 N. E. 246, 248, 130 N. Y. 249; *Witcher v. Holland Waterworks Co.*, 20 N. Y. Supp. 560, 562, 66 Hun. 619; *Stockton & V. R. Co. v. Common Council of City of Stockton*, 41 Cal. 147, 149; *Buffalo Bayou, B. & C. R. Co. v. Ferris*, 26 Tex. 588, 595; *Walther v. Warner*, 25 Mo. 277; *Bonaparte v. Camden & A. R. Co.* (U. S.) 3 Fed. Cas. 821, 829; *Ash v. Cummings*, 50 N. H. 591, 613; *Concord R. R. v. Greely*, 17 N. H. 47, 54; *Oury v. Goodwin* (Ariz.) 26 Pac. 376, 378.

It is by reason of the nature and character of the business, and not from the fact that it is carried on by an individual or corporation, that the laws hold the property or services of the owner to have been submitted to public use. *Ladd v. Southern Cotton Press & Mfg. Co.*, 53 Tex. 172.

The power of eminent domain has been employed for many objects. Not only the direct agents of the government, but individ-

uals and corporate bodies, have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals, of erecting and constructing wharves and basins, of establishing ferries, of draining swamps and marshes, and of bringing water to cities and villages. In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government or by individual enterprise. *Lux v. Haggin*, 10 Pac. 674, 698, 69 Cal. 255 (citing *Cooley*, Const. Lim. 532).

The condemnation of land by a water company is a taking for public use, within the meaning of the constitutional provision prohibiting the taking of property for public use without compensation. "In many instances and purposes a majority of municipalities are supplied with water from private enterprises, and it is no less an appropriation of private property for public use because the supply is procured from a corporation incorporated for that purpose than if by the municipality itself. The court, in reaching this conclusion, cites *Bloomfield & R. Natural Gas Light Co. v. Richardson*, 63 Barb. 437, in which a company incorporated for the purpose of utilizing natural gas was considered to have the right to condemn property to acquire a right of way for its mains by which the gas could be conveyed to the city. In *Bloodgood v. Mohawk & H. R. R. Co.*, 18 Wend. 9, 31 Am. Dec. 313, it was settled by the court of last resort that the power to exercise the right of eminent domain, where such right exists, may be conferred upon a corporation acting in its own interest and for the purpose of private property. *Stamford Water Co. v. Stanley* (N. Y.) 39 Hun, 424, 426.

#### **Public benefit synonymous.**

The term "public use," as used in the Constitution allowing condemnation of property for such purpose, is not equivalent to the term "public benefit," and such use must exist at the time of the taking. *Avery v. Vermont Electric Co.*, 54 Atl. 179, 75 Vt. 235, 59 L. R. A. 817.

What is a public use is incapable of exact definition. The expressions "public interest" and "public use" are not synonymous. The establishment of furnaces, mills, and manufactories, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings. In re *Niagara Falls & W. R. Co.*, 108 N. Y. 375, 15 N. E. 429. The character of the agencies em-

ployed in applying the property to the use of the public is wholly unimportant in determining whether or not the use is public or private. They may be municipal corporations, private corporations, or individuals. It is enough that the purpose is one of public necessity or great public convenience, and is made certainly and directly subservient to public use, and to such an extent that the use cannot be defeated, withdrawn, or withheld by the agency in whose hands it is thus placed. *Charleston Natural Gas Co. v. Lowe*, 44 S. E. 410, 412, 52 W. Va. 662.

#### **Public convenience distinguished.**

There is a distinction between a "public use" and a "public convenience" to authorize the taking of private property for public use. The use must be for the people at large, for travelers, for all, and must also be compulsory by them, and not optional with the corporators; it must be a right by the people, and not a favor; but where it is a public convenience, and not a necessity, the right to take private property does not exist. The incorporation of a hotel company in a city, with the right to construct lines of railroad from the hotel to the depot for the accommodation of the guests, would be a public convenience, but it would not authorize the Legislature to take private property of the citizens of the town whereon to erect the railroad. Churches and schoolhouses are public conveniences, but no one ever heard of private property being taken for such purposes. *Memphis Freight Co. v. City of Memphis*, 44 Tenn. (4 Cold.) 419, 425.

#### **Public interest in use distinguished.**

A distinction must be made between a public use and a use in which the public has an interest. In the former case the public may control, because it is a use within the function of government to establish and maintain. In the latter case it is a private enterprise that serves the public, and in which it is interested to the extent of its necessities and convenience. The former is clearly within the control of the Legislature, while the latter may not be. Many authorities, however, go to that extent. *State v. Edwards*, 29 Atl. 947, 948, 86 Me. 102, 25 L. R. A. 504, 41 Am. St. Rep. 528. See, also, Justice Brewer dissenting in *Budd v. People*, 12 Sup. Ct. 468, 478, 143 U. S. 517, 36 L. Ed. 247.

#### **Public utility synonymous.**

The words "public utility," as used in Code, § 45, relating to incorporated companies, and authorizing them to acquire the property of another in case the court is of the opinion that the purpose for which the property "is to be taken is of public utility," is synonymous with the words "public use." *Valley City Salt Co. v. Brown*, 7 W. Va. 191, 195.

**Regulation by government.**

The term "public use," *ex vi termini*, implies that the public is interested therein, and that in its sovereign organization and capacity the public retains the right of regulation and control, at least in a limited or qualified degree over the exercise of any corporate power or function granted in the accomplishment of such public use. *Lake Koen Navigation, Reservoir & Irrigation Co. v. Klein*, 65 Pac. 684, 687, 63 Kan. 484.

**Burial ground.**

A taking of land for the purpose of a burial place for different parties who might purchase lots, the title to which when purchased rested in the grantee and was the subject of alienation, was not a taking for public use. *In re Deansville Cemetery Ass'n*, 66 N. Y. 569, 571, 23 Am. Rep. 86.

Land used by cemetery associations is used for a public use, and the fact that they require varying sums for rights to bury in different localities in the cemeteries does not deprive the land of its character as a public use, and this is true although the cost of the right is the practical exclusion of some. *Evergreen Cemetery Ass'n v. Beecher*, 53 Conn. 551, 553, 5 Atl. 353.

**Canal.**

See "Canal."

**Coast survey.**

The term "public use," in a constitutional provision prohibiting the taking of private property for public use except for compensation, includes the use by the United States Coast Survey, and therefore property may be taken for such use. The purpose of such taking is a public one, as a safe highway upon the ocean is as much a public necessity as a safe highway upon the land. *Orr v. Quimby*, 54 N. H. 590, 593.

**Drainage.**

A taking of land for the construction of a ditch for the purpose of benefiting surrounding lands by making them more adaptable to agricultural purposes is a taking for a public use. *In re Tuthill*, 53 N. Y. Supp. 657, 662, 36 App. Div. 492.

The drainage of large areas of swamp lands is a public use, where the controlling object is the reclamation of land for the purposes of cultivation and habitation. *Tidewater Co. v. Coster*, 18 N. J. Eq. (3 C. E. Green) 518, 521, 90 Am. Dec. 634; *Talbot v. Hudson*, 82 Mass. (16 Gray) 417, 425; *Norfleet v. Cromwell*, 70 N. C. 634, 639, 16 Am. Rep. 787.

**Education.**

The term "public use" includes the taking of property for the use of a local school.

*Township Board of Education v. Hackmann*, 48 Mo. 243, 245.

Land condemned for the purpose of a company authorized to incorporate for the education of the public by exhibiting artistic, mechanical, agricultural, and horticultural products, and providing public instruction in the arts and sciences, was for a public use. *Appeal of Rees (Pa.)* 12 Atl. 427, 430.

**Ferry.**

See "Ferry."

**Fort.**

A fort is an object of public use, and a state may for its own purposes condemn land for a fort, or may authorize the land to be condemned for such purpose for and on behalf of the federal government. *Gilmer v. Lime Point*, 18 Cal. 229, 251.

**Highway.**

From time immemorial, a highway used for the public and controlled by the public has been considered a public use, and there is no necessity for legislative or judicial determination. *State v. Superior Court of Adams County*, 69 Pac. 366, 367, 29 Wash. 1.

**Irrigation.**

Irrigation is a public use, for the promotion of which the Legislature may authorize a private person or corporation to exercise the power of eminent domain. *Lake Koen Navigation, Reservoir & Irrigation Co. v. Klein*, 65 Pac. 684, 687, 63 Kan. 484; *Lux v. Haggin*, 10 Pac. 674, 698, 69 Cal. 255; *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 64 N. W. 343, 346, 45 Neb. 884, 29 L. R. A. 853, 50 Am. St. Rep. 585; *Oury v. Goodwin (Ariz.)* 26 Pac. 376, 378; *Ellinghouse v. Taylor*, 48 Pac. 757, 758, 19 Mont. 462.

The taking of private property within limited districts, organized as irrigation districts under a state law (*St. Cal.* 1887, p. 29), for the purpose of furnishing water to the landowners alone, and not for the general use, on equal terms, of all inhabitants of the district, is not such a public use as will justify the exercise of eminent domain. *Bradley v. Fallbrook Irr. Dist. (U. S.)* 68 Fed. 948, 957.

**Levee.**

The construction of a levee along the bank of a river is a public use authorizing condemnation of land for that purpose. *Missouri, K. & T. Ry. Co. v. Cambern*, 71 Pac. 809, 810, 66 Kan. 365.

**Mills and manufacturing.**

From the first settlement of the country gristmills operated by water power have been in some sense peculiar institutions, in-

vested with a general interest. Towns have procured them to be established and maintained. The state has regulated their tolls. In many instances they have been not merely a convenience, but almost a necessity in the community. The necessary flowage of land to maintain the water power to operate such a mill is therefore a public use. *Olmstead v. Camp*, 33 Conn. 532, 546, 552, 89 Am. Dec. 221.

It appears to be going a great length to say that land which is used for the purpose of overflowage by a milldam is appropriated to a "public use," in the proper and just sense of those words used in reference to compensation for land taken for public use. *Fisher v. Horicon Iron & Mfg. Co.*, 10 Wis. 351, 353.

The term "public use," in a constitutional provision prohibiting the taking of private property for a public use except for compensation, includes a taking for mills owned by a corporation, a private company, or an individual, if the mills are a public benefit, as they are none the less a public benefit by reason of being operated by such persons. *Ash v. Cummings*, 50 N. H. 591, 613; *Amoskeag Mfg. Co. v. Head*, 56 N. H. 886, 399.

The business of warehousing and compressing cotton is not an employment which the common law declares public. A cotton press and manufacturing company does not, by virtue of the legislative act incorporating it for the purpose of carrying on a warehousing and cotton compress business, submit its services and property to public use. *Ladd v. Southern Cotton Press & Mfg. Co.*, 53 Tex. 172.

#### **Mining.**

A statute authorizing the taking of lands by mining companies for their own purposes is a taking for a public use. *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147, 152.

#### **Monuments in battlefield.**

The purpose of preserving and marking on the site of the battle of Gettysburg the positions occupied by the different organizations at that battle is a public use or purpose, for which Congress may authorize the condemnation of land. *United States v. Gettysburg Electric R. Co.*, 16 Sup. Ct. 427, 429, 160 U. S. 668, 40 L. Ed. 576.

#### **Private turnpike or bridge.**

The taking of private property by a town for the purpose of a private road is not a taking for a public use. *Taylor v. Porter* (N. Y.) 4 Hill, 140, 146, 40 Am. Dec. 274.

The clause of the Constitution providing that private property shall not be taken for public use without just compensation, but that land may be taken for public highways,

as heretofore, until the Legislature shall direct compensation to be made, does not include a turnpike road or bridge owned by a private individual, and acquired by purchase or constructed for his private benefit. In re Public Highway in Bergen and Hudson Counties, 22 N. J. Law (2 Zab.) 293, 302.

#### **Railroad.**

It cannot be questioned that a railroad for general travel or the transportation of produce for the country at large is a public use, for the construction of which private property may be taken or applied upon adequate compensation for it being made. That the road for the construction of which the property, when taken, is to be applied, is a corporation of private individuals to whose benefit the profits of the road, when complete, will alone accrue, furnishes no valid objection to such appropriation of private property. One of the chief occasions for the exercise of eminent domain by the state is in creating the necessary facility for intercommunication for purposes of travel and commerce. In such cases the object of the legislative grant authorizing the application of private property is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the government, or through the medium of corporate bodies or of individual enterprise. *Buffalo Bayou, B. & C. R. Co. v. Ferris*, 26 Tex. 588, 598.

The term "public use," within the meaning of the constitutional provision prohibiting the taking of private property for public use without compensation, includes the building of a railroad by a private corporation, under the authority of the Legislature, for the accommodation of the public. *Walther v. Warner*, 25 Mo. 277; *Bonaparte v. Camden & A. R. Co.* (U. S.) 3 Fed. Cas. 821, 829; *Buffalo & N. Y. C. R. Co. v. Brainard*, 9 N. Y. 100, 108; *Mangan v. Texas Transp. Co.*, 44 S. W. 998, 1001, 18 Tex. Civ. App. 478; *Stockton & V. R. Co. v. Common Council of City of Stockton*, 41 Cal. 147, 149; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 41, 59, 42 Am. Dec. 716; *Kettle River R. Co. v. Eastern Ry. Co.*, 43 N. W. 469, 470, 41 Minn. 461, 6 L. R. A. 111; *Chicago B. & N. Co. v. Porter*, 46 N. W. 75, 76, 43 Minn. 527; *Concord R. R. v. Greely*, 17 N. H. 47, 54.

The term "public use," in Const. art. 2, § 21, providing that private property shall not be taken or damaged for public use without just compensation, does not include the use of an established street by constructing and operating a steam railroad therein, and therefore an abutting owner is not entitled to additional compensation on the theory that there is a new public use of the street. *Henry Gaus & Sons Mfg. Co. v. St. Louis K. & N. W. R. Co.*, 20 S. W. 658, 113 Mo. 308, 18 L. R. A. 339, 35 Am. St. Rep. 706.



**Telegraph or telephone.**

The term "public use," in a constitutional provision prohibiting the taking of private property for any but public purposes, may include a telegraph line. *New Orleans, M. & T. R. Co. v. Southern & A. Telegraph Co.*, 53 Ala. 211, 218.

A telegraph or telephone line designed for the service of the public, or subject to regulation by the Legislature, is a public use for which property may be taken. *American Telephone & Telegraph Co. v. Smith*, 18 Atl. 910, 914, 71 Md. 535, 7 L. R. A. 200.

A telephone is a public use, and the Legislature, by virtue of its power of control over the public roads and highways of the city, may grant to a telephone company the authority to erect its lines along or upon such roads and highways, or it may delegate that power to the municipal officers of the several municipalities. *Readfield Telephone & Telegraph Co. v. Cyr*, 49 Atl. 1047, 1048, 95 Me. 287.

**Water supply.**

The supplying of the inhabitants of a town with pure fresh water is for a public use. The use of water by each particular individual is private, but in a larger and broader sense it may be said that the use of it by all or a larger part of the residents in a populous village is for the public use and the public benefit. *Witcher v. Holland Waterworks Co.*, 20 N. Y. Supp. 560, 562, 66 Hun. 619. See, also, *Olmsted v. Proprietors of Morris Aqueduct*, 46 N. J. Law (17 Vroom) 495, 499; *Dalles Lumbering Co. v. Urquhart*, 19 Pac. 78, 80, 16 Or. 67; *In re New Rochelle Water Co.* (N. Y.) 46 Hun. 525, 526; *St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 639; *Inhabitants of Wayland v. Middlesex County Com'rs*, 70 Mass. (4 Gray) 500, 501; *Pocantico Waterworks Co. v. Bird*, 29 N. E. 246, 248, 130 N. Y. 249.

"Public use," as applied to public waters, means and includes the right to draw from them a supply of water for the ordinary use of cities in the vicinity of the stream. Such a right is one of the most important public rights, and is daily growing in proportion as population increases. *Minneapolis Mill Co. v. Board of Water Com'rs of City of St. Paul*, 58 N. W. 33, 34, 56 Minn. 485.

**PUBLIC USE (In Patent Law).**

"Public use" means a common and general use by the community. *American Hide & Leather Splitting & Dressing Machine Co. v. American Tool & Machine Co.* (U. S.) 1 Fed. Cas. 647, 653.

The public use or sale of an invention, in order to deprive the inventor of his right to a patent, must be a public use or sale with

his knowledge and consent and before the application for the patent. *Ryan v. Goodwin* (U. S.) 21 Fed. Cas. 110, 111; *McMillin v. Barclay* (U. S.) 16 Fed. Cas. 302, 305; *Bates v. Coe*, 98 U. S. 81, 46, 25 L. Ed. 68.

A public use, such as will bar the issuance of a patent, is a use in public. It does not mean a general adoption by the public, but a public, as distinguished from a secret, use. No patent can therefore issue where it appears that other persons have constructed machines on substantially the same principles as that of the applicant, and used them publicly for years before he made his application. *Hunt v. Howe* (U. S.) 12 Fed. Cas. 918, 922.

"Public use" means not only a use by the public, but a use in public; that is to say, one which is not secret, and therefore one from which, so far as the inventor is concerned, the public may, by any of the chances of life, acquire the knowledge. *Manning v. Cape Ann Isinglass & Glue Co.* (U. S.) 16 Fed. Cas. 643, 644.

Where an inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is with his consent put on sale for public use, then it is in "public use" within the meaning of the patent law. *Smith & Griggs Mfg. Co. v. Sprague*, 8 Sup. Ct. 122, 126, 123 U. S. 249, 31 L. Ed. 141.

"Public use," for more than two years, of an invention, which is sufficient to defeat an application for a patent, was said, in *Curtis on Patents*, § 53, to mean "use in public," and not use "by the public." So that under the act, if there has been a use in public by any person for more than two years with the consent of the patentee, the patent will be defeated. So, also, in section 297, by "public use" is meant use in public; that is to say, if the inventor himself makes and sells a thing to be used by others, or it is made by one other person only, with his knowledge and without objection, before his application for patent, a fortiori, if he suffers it to get into general use, it will have been in public use. The Supreme Court in *Shaw v. Cooper*, 32 U. S. (7 Pet.) 321, 322, 8 L. Ed. 689, remark that the strict construction of the act, as it regards the public use of an invention before it is patented, is not only required by its letter and spirit, but also by sound policy. *Blackinton v. Douglass* (U. S.) 3 Fed. Cas. 537, 538.

To constitute public use, it is not necessary that more than one person should have known of that use. *Walk. Pat.* § 94, and notes 7 and 8; *Worley v. Loker Tobacco Co.*, 104 U. S. 340, 26 L. Ed. 821. The use of a machine for profit, not experiment, and particularly where it is exposed to the view of persons other than the inventor, and his em-

ployés pledged or enjoined to secrecy, constitutes a "public use" within the meaning of the patent law. *Letteller v. Mann* (U. S.) 91 Fed. 917, 918.

The public use which prevents an invention from being considered a novelty, and hence from being patentable, means a use in public so as to come to the knowledge of others than the inventor, as contradistinguished by the use of it by himself in private, and does not mean a use by the public generally. *Carpenter v. Smith*, 9 Mees. & W. 300.

The experimental use of an invention by the inventor, or by persons under his direction, if made in good faith solely in order to test its qualities, is not a public use. *Harmon v. Struthers* (U. S.) 57 Fed. 637, 641; *Elizabeth v. American Nicholson Pavement Co.*, 97 U. S. 126, 135, 24 L. Ed. 1000; *Crown Cork & Seal Co. v. Aluminum Stopper Co.* (U. S.) 108 Fed. 845, 851, 48 C. C. A. 72; *Jennings v. Pierce* (U. S.) 13 Fed. Cas. 545; *Ryan v. Goodwin* (U. S.) 21 Fed. Cas. 110, 111; *American Hide & Leather Splitting & Dressing Machine Co. v. American Tool & Machine Co.* (U. S.) 1 Fed. Cas. 647, 653; *Smith & Griggs Mfg. Co. v. Sprague*, 8 Sup. Ct. 122, 126, 123 U. S. 249, 31 L. Ed. 141.

#### PUBLIC VEHICLE.

Tanks which are known as "sprinkling carts," mounted on wheels and driven through the streets, are "public vehicles" within a city ordinance imposing a license tax on all public vehicles using the streets of the city for trade or traffic or other purposes. *City of St. Louis v. Woodruff*, 71 Mo. 92, 93.

#### PUBLIC WAR.

A public war is a war in which the belligerent parties are independent nations. *Prize Cases*, 67 U. S. (2 Black) 635, 666, 17 L. Ed. 459.

To constitute a public war, at least two nations are essentially parties in their corporate capacities. According to Grotius, a public war is that which is made on each side by the authority of the civil power. *People v. McLeod* (N. Y.) 1 Hill, 377, 409, 410, 25 Wend. 483, 37 Am. Dec. 328 (citing Grot. bk. 1, c. 3, § 1).

#### PUBLIC WAREHOUSE.

Public warehouses are such warehouses or elevators or granaries as are open to the public, in which they may store their grain and receive warehouse receipts therefor; but warehouses in which the owners thereof store their own grain, or in which they lease to other persons bins in which to store grain, and preserve such grain separate from oth-

ers, and by whom no warehouse receipts are issued, are not "public warehouses" within the meaning of the act. *State ex rel. Wood v. Smith*, 21 S. W. 493, 496, 114 Mo. 180.

Const. 1870, art. 13, § 1, provides that all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses. *Hannah v. People*, 64 N. E. 776, 777, 198 Ill. 77. Public warehouses are those where the business of receiving grain or property in store for the public for a compensation is carried on. Where that business is not carried on, an isolated instance of a mill receiving wheat from a party for storage till the party was ready to sell would not convert the mill into a public warehouse. *Mayer v. Springer*, 61 N. E. 348, 350, 192 Ill. 270.

#### PUBLIC WAREHOUSEMAN.

Whoever advertises or offers to receive merchandise on storage for other parties is a public warehouseman for the purpose of the chapter relating to principals, factors, and agents. *Rev. St. Me.* 1883, p. 332, c. 31, § 8.

#### PUBLIC WATER SUPPLY.

"Public water supply," as used in the title to Act March 4, 1884 (P. L. 32), is not limited to water supply owned and controlled by a municipal corporation, but should be construed as meaning a supply of water, for public and domestic use, furnished or to be furnished from waterworks. *State v. Township Committee of Northampton*, 19 Atl. 975, 976, 52 N. J. Law (23 Vroom) 496.

#### PUBLIC WATERS.

The term "public waters" is sometimes used, in contradistinction to "private waters," to designate navigable waters, the term "private waters" being used to designate nonnavigable waters. *Lamprey v. Metcalf*, 53 N. W. 1139, 1143, 52 Minn. 181, 18 L. R. A. 670, 38 Am. St. Rep. 541.

Public waters are those where the tide ebbs and flows, and the proprietorship of which is in the sovereign. *Cobb v. Davenport*, 32 N. J. Law (3 Vroom) 369, 378.

Although in England, in the common-law sense of the term, those streams only are "navigable" in which the tide ebbs and flows, yet all rivers and streams above the ebb and flow of the tide which are of sufficient capacity for useful navigation are public rivers, and subject to the same general rights which the public exercises in highways by land, and which they possess in navigable waters. *Lorman v. Benson*, 8 Mich. 18, 22, 77 Am. Dec. 435.

**V. S. 4562**, defines "private preserve," "posted waters," and "public waters" as follows: "Private preserve: A natural pond, of not more than 20 acres, belonging to a common owner, or any artificial pond made solely for the purpose of fish culture. Posted waters: All waters on lands posted as provided in this chapter. Public waters: All waters of which the state has jurisdiction, except private preserves and posted waters." *State v. Theriault*, 70 Vt. 617, 619, 41 Atl. 1030, 1031, 43 L. R. A. 290, 67 Am. St. Rep. 695.

Laws 1887, relating to the catching of fish in certain waters of the state, defines "public waters" to embrace all lakes, ponds, rivers, creeks, bayous, and streams, except private artificial ponds, or ponds subject to the exclusive dominion of a single ownership. *West Point Water Power & Land Improvement Co. v. State*, 49 Neb. 223, 227, 68 N. W. 1707.

Any stream capable of being generally and commonly useful for some purpose of trade and the transportation of property, whether by steamers or sailing vessels, or oar boats or rafts, is a "public stream." Where the facts found by the referee show that a stream is naturally capable of floating logs at some times every year and to a considerable extent, and that it is reasonably and substantially useful to the public for that kind of navigation, it is a public highway. *Carter v. Thurston*, 58 N. H. 104, 107, 42 Am. Rep. 584.

## PUBLIC WAY.

Easement distinguished, see "Easement."

"Public ways," as applied to ways by land, are usually termed "highways" or "public roads," and are such ways as every citizen has a right to use. *Kripp v. Curtis*, 11 Pac. 879, 71 Cal. 62.

The true test of a public way is in the general use of it by the general public. *State v. Floyd*, 39 S. C. 23, 25, 17 S. E. 505.

The term "public way" is expressly defined by the Kentucky Statutes as meaning a public street, alley, sidewalk, lane, avenue, and highway or thoroughfare. *Council of City of Danville v. Boyle County Fiscal Court*, 21 Ky. Law Rep. 196, 197, 51 S. W. 157.

"Public way," as used in the act relating thereto, shall mean the public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares. Ky. St. 1903, § 2832.

The term "public way," as used in the chapters relating to railroads and street railways, means any way laid out by public authority. *Rev. Laws Mass. 1902*, p. 978, c. 11, § 1.

## PUBLIC WELFARE.

The expression "public welfare," as used in Const. art. 1, § 19, providing that private property shall never be held inviolate, except that it shall be subservient to the public welfare, means that which is a public necessity or for the convenience of the public. *Shaver v. Starrett*, 4 Ohio St. 494, 499. It includes both public health and convenience. *Sessions v. Crunkilton*, 20 Ohio St. 349, 356.

## PUBLIC WHARF.

A "public wharf," as used in a city charter authorizing the city to erect and regulate public wharves at the end of streets, etc., is a wharf belonging to the city, and to be used like any other wharf property. The term is applied as well to wharves on the city property away from streets, as to wharves at the end of streets. *Horn v. People*, 26 Mich. 221, 224.

## PUBLIC WORK.

The words "public work," in Laws 1899, c. 567, providing that the wages of all classes of laborers, workmen, and mechanics on public work shall not be less than the prevailing rate, "are not confined to work which is to be done for the state or for a municipal corporation by the contractor, but includes work done by the state or municipality itself. The statute has in view the nature of the work, and not the person who hires it to be done. The policy of the law is that laborers, mechanics, and workmen employed on public work shall receive the prevailing rate of wages paid in the locality where they are employed. That policy is just as important with respect to men who are employed by the city as it is with respect to men employed by a contractor on work for the city. In each case the intent is to insure those laborers the same amount of wages which it has been found necessary to pay to secure the services of other men at the same sort of work, and to insure the payment to public laborers of the same wages which other men in the same locality at similar work are accustomed to receive. The intention of the law is the thing to be sought, and that is to be ascertained from the cause of the statute, and the policy as indicated by prior statutes; and, where that is found, no mere form of words should prevent its adoption, unless the form forbids such a construction." *McAvoy v. City of New York*, 65 N. Y. Supp. 274, 278, 52 App. Div. 485.

The term "public works" is defined as "all fixed works contracted for public use, as railways, docks, canals, waterworks, roads, etc." (Cent. Dict.), and does not mean the same as a public department. *Ellis v. Com-*

Common Council of Grand Rapids, 82 N. W. 244, 245, 123 Mich. 567.

#### County building.

The location of a county seat within a city, and the erection of the necessary county buildings, are not public improvements or public works in aid of which cities are authorized by the Revised Statutes to donate money or bonds. *Schneck v. City of Jeffersonville*, 52 N. E. 212, 215, 152 Ind. 204.

#### Improvement of navigation.

Seamen upon a government vessel, when engaged in removing obstructions to navigation in rivers and harbors, are employed upon "public works of the United States," within the meaning of Act Aug. 1, 1892, c. 352, 27 Stat. 340 [U. S. Comp. St. 1901, p. 2521], prohibiting the employment of laborers engaged on any public works of the United States for more than eight hours in any one day. The time actually required in the care and repair of appliances necessary to carry on such work must be included within the eight hours, and is a part of the public work. *United States v. Jefferson* (U. S.) 60 Fed. 736.

#### Lighting streets.

Greater New York Charter, § 413, providing that any "public work or improvement" must be authorized and approved by resolution of the board of public improvements and an ordinance or resolution of the municipal assembly before its execution, relates to public works in the nature of betterments, and does not refer at all to such a matter as public lighting, which must constantly be provided for, from day to day and from month to month, in the administration of the affairs of the city. *Blank v. Kearny*, 61 N. Y. Supp. 79, 81, 44 App. Div. 592 (reversing 59 N. Y. Supp. 645, 28 Misc. Rep. 383).

#### Railroad.

Treating a railroad as a public easement, the works erected by the corporation as public works, intended for public use to a certain extent at least, are exempt from taxation as "public works." Such has been the uniform practice in regard to bridges, turnpikes, and highways, and their incidents, and also in regard to other public buildings and structures of a like kind, as statehouses, forts, and arsenals, courthouses, jails, churches, townhouses, schoolhouses, and, generally, houses appropriated specifically for public uses. Thus a railroad is not subject to be taxed for the land over which they are authorized to lay out their road, nor for buildings and structures erected thereon, if such buildings and structures are reasonably incident to the support of the road, or to its proper and convenient use for the carriage of passengers and property, such as houses

for the reception of passengers, engine houses, car houses, and depots for the convenient reception, preservation, and delivery of merchandise carried on the road. *Inhabitants of Worcester v. Western R. Corp.*, 45 Mass. (4 Metc.) 564, 566.

The term "public works," as employed in Const. art. 5, § 16, authorizing expenditures for public works, is held to include railroads, and it is said per *Randall, C. J.*, that "railroads or canals, or other works of internal improvement and general utility, whether operated and owned by the state or by a county or an individual, are not public works by reason of the christening received by means of the legislative enactment, but because of their peculiar character, their uses and purposes, and their general effect, all combined." *Opinion of Justices*, 13 Fla. 699, 720.

#### Sewer or street.

"Public work," as used in a city charter declaring that the council shall have no power directly to contract for any "public work," etc., includes both sewer and building and macadamizing of streets. *Seibert v. Cavender*, 8 Mo. App. 421, 426.

"Public work" means a work in which the public generally—that is, the state—is interested, and a sewer is not such a work, so as to shield the corporation from liability to persons whose property is damaged during the progress of the construction. *City of Denver v. Rhodes*, 13 Pac. 729, 733, 9 Colo. 554.

A public highway is not a public work owned by a city or town, within the provisions of St. 1892, c. 270, providing that a person to whom a debt is due for labor on such "public work" shall have a right of action therefor against the city. *McHugh v. City of Boston*, 53 N. E. 905, 173 Mass. 408.

A free gravel road, constructed under the act of 1885 relating to the construction of roads, is a public or county work. It is a road in which the public has an interest. *Lane v. State*, 43 N. E. 244, 245, 14 Ind. App. 573.

#### Waterworks.

"Public works" include all fixed works constructed for public use, as railways, docks, canals, waterworks, and roads; and hence any person injured by an alleged defect in a pumphouse and its appliances, which were a part of the defendant's system of waterworks, is injured by "public works," within the provisions of Laws 1897, c. 248, requiring notice of such injury to be given before action is commenced thereon. *Winters v. City of Duluth*, 84 N. W. 788, 789, 82 Minn. 127.

**PUBLIC WORSHIP.**

Property exclusively used for public worship, see "Exclusively Used."

"Public worship" may mean the worship of God, conducted and observed under public authority, or it may mean worship in an open or public place, without privacy or concealment, or it may mean the performance of religious exercises under the provision for an equal right in the whole public to participate in its benefits, or it may be used in contradistinction to worship in the family or the closet. In this country what is called "public worship" is commonly conducted by voluntary societies, constituted according to their own notions of ecclesiastical authority and ritual propriety, opening their places of worship, and admitting to their religious services such persons, and upon such terms and subject to such regulations, as they may choose to designate and establish. *Attorney General v. Merrimack Mfg. Co.*, 80 Mass. (14 Gray) 586, 602.

Laws 1883, exempting from taxation every building for public worship, etc., refers to the usual church services on the Sabbath, open freely to the public, and in which any one may join. *Young Men's Christian Ass'n v. City of New York*, 21 N. E. 86, 87, 113 N. Y. 187.

"House used for public worship," within a statute exempting the same from taxation, does not include a parsonage or rectory belonging to the church. The fact that it is occupied as a residence by a rector, pastor, or priest does not change its nature or sanctify its use. Such a house, therefore, is not used by the church to which it belongs exclusively for public worship. *St. Peter's Church v. Scott County Com'rs*, 12 Minn. 395, 397 (Gil. 280, 282); *Gerke v. Purcell*, 25 Ohio St. 229, 248; *People v. Collison*, 6 N. Y. Supp. 711, 712, 22 Abb. N. C. 52 (affirmed, *Same v. O'Brien*, 6 N. Y. Supp. 862, 53 Hun, 580).

The real estate of a colored orphan association for the object of providing a place for refuge of colored orphans, where they shall be boarded and suitably educated, is not exempt on the ground that one of its buildings is for public worship, where it appears that the only religious services held therein are provided for the benefit of the occupants, and the public are expressly excluded from such services, except under pressing and peculiar circumstances. The statute requires that a building, to be exempt as a place of public worship, must be exclusively used as such, and also be the property of a religious society. *Association for Benefit of Colored Orphans v. City of New York*, 12 N. E. 279, 280, 104 N. Y. 581.

Rev. St. (7th Ed.) p. 982, § 4, subd. 3, providing that every building for public

worship shall be exempt from taxation, means a building owned by a church society which would otherwise be compelled to pay taxes thereon, and property owned by a private person and occupied by a church building, which is not used for religious purposes, is not a building for public worship, and the lots whereon such buildings are situated are not within the statute. *Black v. City of Brooklyn*, 4 N. Y. Supp. 78, 79, 51 Hun, 581.

Any definition of "public worship," to be acceptable, must be sufficiently broad and comprehensive to include within the beneficial operation of the statute of exemptions the church property of all congregations, and every denomination or form of religious faith or worship. The term "public worship," as applicable to a church of the Protestant Episcopal Church of the United States of North America, which accepts the doctrine of the inspiration of the Old and New Testaments and the divinity of Jesus Christ, is the assembling together of the members of that church in a congregation, together with others who may choose to come, for the purpose of worshipping God in accordance with the rules and regulations and religious forms of that organization. "Public worship," as applied to that church, means congregational worship of Almighty God. In *re Walker*, 66 N. E. 144, 147, 200 Ill. 566.

**PUBLIC WRITING.**

A public writing is that which is made by a notary public in the presence of the parties who execute it, with the assistance of two witnesses; the parties in the interest signing it, or, at their request, either of the witnesses with the said notary. *Salazar v. Longwill*, 25 Pac. 927, 929, 5 N. M. 548 (citing *Escriche*, Dict. p. 637).

Public writings are (1) the written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country; (2) public records kept in this state of private writings. Code Civ. Proc. Cal. 1903, § 1888.

Public writings are the written acts or records of the acts of the sovereign authority of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country. All other writings are private. Ann. Codes & St. Or. 1901, §§ 727, 728.

**PUBLIC WRONG.**

Public wrongs are breaches and violations of public rights and duties which affect the community, considered as a whole. Hunt-

ington v. Attrill, 13 Sup. Ct. 224, 228, 146 U. S. 657, 36 L. Ed. 1123; Rhobidas v. City of Concord, 47 Atl. 82-87, 70 N. H. 90, 51 L. R. A. 381, 85 Am. St. Rep. 604.

Wrongs are divided into two sorts of wrongs—private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to the individuals, considered as individuals, and are thereupon frequently termed "civil injuries." The latter are a breach and violation of public rights and duties which affect the whole community, considered as a community, and are distinguished by the harsher appellation of "crimes and misdemeanors." Cullinan v. Burkhard, 84 N. Y. Supp. 825, 827, 41 Misc. Rep. 321.

#### Private wrong distinguished.

"The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of civil rights which belong to individuals; public wrongs or crimes and misdemeanors are a breach and violation of public rights and duties due to the whole community, considered as a community in its social, aggregate capacity. Iowa v. Chicago, B. & Q. R. Co. (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554 (citing 4 Bl. Comm. p. 5).

Private wrongs are an infringement merely of particular rights, concerning individuals only, and are called "civil injuries." Public wrongs, being a breach of public or general rights, affect the whole community. 1 Bl. Comm. p. 122. Where a city employed a man to work in the waterworks department, the contract created a situation which gave the plaintiff the common-law right to be furnished a reasonably safe place in which to work. This right was a particular right, concerning the individual only, and not one which affected the whole community. It was, in other words, such a right that a negligent violation of it would be a civil injury or private wrong. It in no way was dependent on the performance or non-performance by the defendant of any public duty. Rhobidas v. City of Concord, 47 Atl. 82, 87, 70 N. H. 90, 51 L. R. A. 381, 85 Am. St. Rep. 604.

#### PUBLICLY DECLARED.

Proposals to perform street work are publicly declared by the board of supervisors, as required by the street improvement act, where they are opened and read in open session. City Street Imp. Co. v. Laird, 70 Pac. 916, 917, 138 Cal. 27.

#### PUBLICLY TRAVELED ROAD.

See "Traveled Public Road."

## PUBLICATION.

See "Due Publication"; "Indecent Publications"; "Malicious Publication"; "Order of Publication"; "Place of Publication"; "Printed Publication"; "Private Publication"; "Privileged Publication."

In Worcester's Dictionary, "publication" is defined as the act of publishing or making public, etc. In Webster's Dictionary the same word is defined as the act of publishing or making known; notice to the public at large, either by words, writing, or printing. In Bouvier's Law Dictionary, "publication" is defined as the act by which a thing is made public. Le Roy v. Jamison (U. S.) 15 Fed. Cas. 373, 376; State v. Grey, 32 Pac. 190, 191, 21 Nev. 378, 19 L. R. A. 134.

"Publication," as used in a contract to take certain advertising space in a publication, reciting that within a certain time after publication a certain number of copies would be in use, is defined by Webster as "the act of offering a book to the public by sale or distribution"; by Worcester, as "putting forth; issuing to the public"; by the Standard Dictionary as "issuing; sending out; placing on sale." Mooney v. United States Industrial Pub. Co., 61 N. E. 607, 608, 27 Ind. App. 407.

A publication is a book or writing published—especially one offered for sale or to public notice; and "to publish" is defined: "To issue; to make known what before was private; to put into circulation; the idea of publicity, of circulation, of intended distribution." It seems to be inseparable from the term "publication." United States v. Williams (U. S.) 3 Fed. 484, 486.

"A publication is something, as a book or print, which has been published, made public or known to the word; and a writing, as well as a printing, may be published." United States v. Loftis (U. S.) 12 Fed. 671, 672.

A "publication" is defined as the act of publishing or making known; notifying or printing; proclamation; divulgence; promulgation; as the publication of the Gospel; the publication of statutes or edicts. State v. Grey, 32 Pac. 190, 191, 21 Nev. 378, 19 L. R. A. 134; United States v. Comerford (U. S.) 25 Fed. 902, 903; Sproul v. Pillsbury, 72 Me. 20, 21.

"Publication," as contained in a question to a witness in a libel suit, asking whether the defendant had anything to do with the publication of the alleged libelous article, was used in its ordinary and popular sense, as referring to the printing in the paper of the article, and not in its narrow, technical meaning, as embracing the entire means whereby libelous matter is made pub-

*McC. Wheaton v. Beecher*, 44 N. W. 927, 79 Mich. 443.

The term "publication," as used in the chapter relating to the collection of taxes, as applied to any notice, advertisement, or other instrument, the publication of which is required by law, shall mean the act of printing it for three successive weeks in a newspaper published in the city or town, if any—otherwise in the county—where the land or other property to which the notice or other instrument relates is situated. *Rev. Laws Mass.* 1902, p. 229, c. 13, § 1.

#### In copyright law.

See "Limited Publication."

A publication of a literary composition is an act which renders its contents in any mode or degree an addition to the store of human knowledge. Every communication of knowledge of such contents, or of any other primary result of mental development, unless confidential, is more or less a publication. A publication is of two kinds—limited and general; a limited publication being a communication to a select few upon condition expressly or impliedly precluding its rightful ulterior communication, except in restricted private intercourse. When they are called private, the publication which they affect is limited. When they are called public, it is designated as general. Recitations, lectures, and circulations as methods of communicating a knowledge of the contents are called private or public according to their intended specific purpose, rather than their tendency to cause a diffusion of the communicated knowledge beyond such purposes. The idea of this tendency always enters into the definition of a public communication, though it be a limited one. When the word publication is used without express qualification, a general publication is usually meant. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 198.

The word "publication," in the statute requiring a copy of a book intended to be copyrighted to be delivered to the clerk of the proper court within three months of its publication, as a part of the copyright proceedings, means publication in print. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 185.

The word "publish," in 4 Stat. 436, § 9, giving redress for an unauthorized printing or publishing of manuscripts, means publishing in print. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 185.

The word "publish," in the copyright laws, means to publish in print. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 193.

A print or copy inserted as an advertisement in a trade paper circulating among

all who choose to pay for it is published within the meaning of *Rev. St. §§ 4962, 4963* [U. S. Comp. St. 1901, pp. 3411, 3412]. *Rigney v. Dutton* (U. S.) 77 Fed. 176, 178.

A painting which is publicly exhibited is published, within the meaning of the copyright laws. *Pierce & Bushnell Mfg. Co. v. Werckmeister* (U. S.) 72 Fed. 54, 58, 18 C. C. A. 431.

Representation of a play upon the stage is not, at common law, a publication. *Crowe v. Aiken* (U. S.) 6 Fed. Cas. 904, 905.

The exhibition of a copyrighted photograph by the proprietor thereof to dealers for the purpose of enabling them to give orders is not a publication, within the meaning of the copyright laws. *Falk v. Gast Lithograph & Engraving Co.* (U. S.) 54 Fed. 890, 894, 4 C. C. A. 648.

Publication by an author is circulation before the public eye by printing or multiplied copies in writing. It is the same thing in kind whether by the author or recipient of a letter, so that a recipient of a letter may read it to a friend or deposit it for safe-keeping, without violating an author's right of publication. *Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480, 488, 92 Am. Dec. 509.

To constitute a publication, within the meaning of the term as used in the law of copyright, it is necessary that the work should be exposed for sale or offered gratuitously to the general public, so that any person may have an opportunity of enjoying that for which the copyright is intended to be secured. The leasing of a book for a year, or for a term of years, to any and all persons who would accept it on such terms, will constitute a publication. The issue of books of a mercantile agency containing information as to the business and credit of persons in trade, will constitute a publication, and the deposit of two copies of such book with the librarian of Congress constitutes a publication, whether a copyright is secured or not. *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 49 N. E. 872, 875, 155 N. Y. 241, 41 L. R. A. 846, 63 Am. St. Rep. 666; *Ladd v. Oxnard* (U. S.) 75 Fed. 703, 730.

To constitute a publication of a book, it is necessary that the work shall be exposed for sale, or gratuitously offered to the general public, so that the public, without discrimination, may have an opportunity to enjoy it. A book is not published merely by printing it and placing it in the hands of various persons under a contract restricting its use, and stipulating that it is not to be sold, and requiring its return to the owner. *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 32 N. Y. Supp. 41, 44, 84 Hun, 12.

**In patent law.****See "Anticipatory Publications."**

To anticipate an invention by a prior publication, it is necessary that there shall be (1) a description of the invention; (2) that it be contained in a work of a public character, and that the work was made accessible to the public by publication before the discovery of the invention by the patentee. *Reeves v. Keystone Bridge Co.* (U. S.) 20 Fed. Cas. 466, 471.

To make the defense of publication available in an action for the infringement of a patent, it must appear that the improvement which has been known in a foreign country has been so clearly and intelligently described that the invention could be made or constructed by a competent mechanic. A mere suggestion or imperfect description of an invention would not be sufficient to defeat the American patentee. *Judson v. Cope* (U. S.) 14 Fed. Cas. 10, 13.

Under the patent law, the placing of specifications and drawings in the custody of the Commissioner of Patents, not that they might thereby become known to the public, but for the special purpose of being examined and passed on by him, did not constitute a publication, within the meaning of the act of Congress. The essential quality of a publication is that the article should be designed for general circulation, and made accessible to the public generally. *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.* (U. S.) 18 Fed. Cas. 394, 398.

A trade magazine, published and copyrighted, in general circulation, and found in public free libraries as well as scientific libraries, is a publication, within the meaning of the patent laws. *Truman v. Carvill Mfg. Co.* (U. S.) 87 Fed. 470, 476.

The term "publication," in Rev. St. § 4886 [U. S. Comp. St. 1901, p. 3382], does not include business circulars which are sent only to persons engaged in a certain trade. *New Process Fermentation Co. v. Koch* (U. S.) 21 Fed. 580, 587.

In an action involving the novelty of the design of a patented lamp, a drawing of a lamp of the exact shape covered by the first claim of the patent, not accompanied by any printed description, contained in a pamphlet which appeared to be a mere trade circular, without any evidence that it was ever actually published, or intended for general use, or accessible to the public, was not a publication of the design; but a rough woodcut of a lamp of similar design printed, in a bound volume entitled "The Coachmaker's Monthly Magazine," was admissible in evidence, as a printed publication, to show the state of the art. *Britton v. White Mfg. Co.* (U. S.) 61 Fed. 93, 95.

A rejected publication for a patent is not such a description as to amount to a patent or publication. *Herring v. Nelson* (U. S.) 12 Fed. Cas. 47, 52.

**Of award.**

An award is published when the arbitrator gives the parties notice that it may be had on payment of his charges, whether they are reasonable or not. *MacArthur v. Campbell*, 5 Barn. & Adol. 518; *Musselbrook v. Dunkin*, 9 Bing. 605, 606; *Knowlton v. Homer*, 30 Me. (17 Shep.) 552, 556.

An award is said to be published when parties are notified that it is ready for delivery. The rule is more fully stated in the recent work of Mr. Russell on Arbitration (page 617): "An award is ordinarily said to be published as soon as it has been executed by the arbitrator, and announced as his final determination, so that he no longer retains any power of alteration." *Isaacs v. Beth Hamedash Soc.* (N. Y.) 1 Hill. 469, 474.

The publication of an award is not the publication of the award itself, but merely publication to the parties; that is, when they have notice of its contents, and are in a situation to move to set it aside. *Brooke v. Mitchell*, 6 Mees. & W. 473, 478.

The publication of an award is the final execution of the paper constituting the decision of the arbitrators, and the notification thereof to the person in whose favor the award is made. If the award is made in writing, under the hands and seals of the arbitrators, ready to be delivered to the party in whose favor the award is made, and who is entitled to it, and he is notified that it is so made, and of the contents thereof, it must be regarded as published, within the terms of the submission. *Morse v. Stoddard*, 28 Vt. (2 Williams) 445, 447.

A statute, in providing that an exception may be taken to an award before the last day of the next term after such arbitration, made and published to the parties, meant the reading and filing of the award in court. *Pancoast v. Curtis*, 6 N. J. Law (1 Halst.) 415.

A. and B. entered into an article on the 25th day of September, 1847, agreeing to submit certain matters of controversy between them to arbitrators; the article providing that the award should be made and published within 10 days from the date thereof. The award was made, written out, signed, and witnessed on the 4th day of October following. Held, that the award was published, within the meaning of the article. *McClure v. Shroyer*, 13 Mo. 104, 107.

**Of libel.**

A libel is published when it is communicated to some person, other than the plain-



tiff, who understands it, and not until then. In an action for a libel published in newspapers, plaintiff must show that some one read the libel, as there is no presumption of law that every newspaper and every part thereof is read. *Prescott v. Tousey*, 50 N. Y. Super. Ct. (18 Jones & S.) 12, 14.

Publishing, as applicable to slander or libel, presupposes public utterance. The word is defined to mean "making known," "divulging," "proclaiming." *Burton v. Burton* (Iowa) 3 G. Greene, 316, 318.

With respect to libel, any communication of language by one to another is a publication. *People v. Stark*, 12 N. Y. Supp. 688, 690, 59 Hun, 51.

To publish is to proclaim; to make known generally. No word more definitely conveys the idea requisite in law to support an action for speaking slanderous words. *Watts v. Greenlee*, 13 N. C. 115, 119.

The word "publish," in reference to libel, imports a communication to others, and a declaration alleging the publication of a libel is sufficient, without setting forth the manner of the publication. *Wilcox v. Moon*, 22 Atl. 80, 81, 63 Vt. 481.

A declaration that defendant published a libel, etc., means that he circulated it, or caused it to be circulated, among divers and sundry persons. *Sproul v. Pillsbury*, 72 Me. 20, 21.

As the term is used in the law relating to libel, publication is the communication of a libel or defamatory matter to a third person. *Staub v. Van Benthuyzen*, 36 La. Ann. 467, 468.

Publication of a libel consists in communicating the defamatory matter to the mind of another, whether it be privately to the party injured, alone, with intent to provoke him to a breach of the peace, or to others with intent to injure the individual in question, or to perpetrate more extensive mischief. *State v. Shaffner* (Del.) 44 Atl. 620, 621, 2 Pennewill, 171.

Addressing a letter to a wife, containing matter reflecting on her husband, is a publication. *Wenman v. Ash*, 13 O. B. 836, 844.

"Publication," as applicable either to slander or libel, is "the communication of the defamatory words to some third person." *Odgers, Lib. & Sland.* p. 150. "Publication," in the law of libel and slander, means the transmission of ideas and thoughts to the perception of a person other than the parties to the suit. The dictation of defamatory matter to a confidential stenographer constitutes a publication, and the stenographer's notes, typewritten copy, and letterpress copy of the letter dictated constitute the publica-

tion of the libel. *Gambrill v. Schooley*, 48 Atl. 730, 93 Md. 48, 52 L. R. A. 87, 86 Am. St. Rep. 414.

"Publication," as the term is used in reference to the publication of a libel, says Best, J., in *Rex v. Sir Francis Burdett*, is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands, his control over it is gone. He has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the locus penitentiae; his offense is complete; all that depends upon him is consummated; and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. Lord Coke says a libel may be published by delivery (5 Rep. 126a), and this definition is adopted by Chief Baron Comyn in his Digest, tit. "Publication," b. 1. *Giles v. State*, 6 Ga. 276, 282.

In an action for slander, the word "published," in the complaint, imports ex vi termini the uttering of words in the presence and hearing of somebody. *Duel v. Agan* (N. Y.) 1 Code Rep. 134.

The delivering, selling, reading, or otherwise communicating a libel, or causing the same to be delivered, sold, read, or otherwise communicated to one or more persons, or to the party libeled, is a publication thereof. *Shannon's Code Tenn.* 1896, § 6660.

To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself. *Pen. Code N. Y.* 1803, § 245.

Words spoken by a husband to a wife, not in the presence of any other person, do not constitute a publication, within the law of slander. *Sesler v. Montgomery*, 21 Pac. 185, 78 Cal. 486, 3 L. R. A. 653, 12 Am. St. Rep. 76.

As to libel, every sale and delivery of a written or printed copy of the libel is a fresh publication. *Street v. Johnson*, 50 N. W. 395, 396, 80 Wis. 455, 14 L. R. A. 203, 27 Am. St. Rep. 42.

#### Same—Single person.

As used with regard to a libel, "published" means the uttering of the libel, or making it known. Though in common parlance the word may be confined in its meaning to making the contents known to the public, yet the meaning is not so limited in its legal sense as applied to libel. The making it known to an individual only is in law a publishing. *Rex v. Burdett*, 4 Barn. & Ald. 95, 126, 127.

The writing of a letter, and depositing it in the post office for transportation to the party addressed, constitutes a publication of it, within the law of libel. Mr. Bishop says, "One publishes a libel who sends it to a single individual." *Mankins v. State*, 57 S. W. 950, 952, 41 Tex. Cr. R. 632.

There is no "publication," in the sense in which that term is used in the law of libel, in mailing a letter containing defamatory statements to the plaintiff if no third person has seen the letter. *Hodges v. State*, 24 Tenn. (5 Humph.) 112, 114.

The word "published," in reference to a libel, means to afford or cause to be afforded to another the contents of a libelous instrument, with intent to scandalize, though in fact the contents do not become known. *Haase v. State*, 20 Atl. 751, 752, 53 N. J. Law (24 Vroom) 34.

A publication of a libel is shown by evidence that it came to the hands of the person libeled, or to the hands of another, who read it. *Swindle v. State*, 10 Tenn. (2 Yerg.) 581, 582, 24 Am. Dec. 515.

A communication by a husband to his wife of slanderous words in regard to a woman is a publication. *Sesler v. Montgomery* (Cal.) 19 Pac. 686, 687.

#### Of newspaper.

"Published," as used in *Mansf. Dig. § 4366*, requiring a legal publication by advertisement to be published in a daily or weekly newspaper printed in the county where the proceeding is pending, which shall have been regularly published in such county for one month next before the date of the first publication of such advertisement, is synonymous with the word "printed." *Jackson v. Beatty*, 57 S. W. 799, 780, 68 Ark. 269.

"Published," as used in an affidavit of publication, stating that a notice was published in a newspaper of general circulation published in the county, will be construed as synonymous with "printed," so that the affidavit complies with the statute requiring the notice to be published in a newspaper printed in the county. *Nebraska Land, Stock Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*, 72 N. W. 357, 358, 52 Neb. 410.

"Published," as used in *Pub. St. c. 181, § 17*, requiring notices of mortgage foreclosure sales to be printed in a newspaper, if there be any published in the town wherein the mortgaged premises are situated, is not used in quite the same sense in which it might be used in libel, but refers to the home office of the paper. *Rose v. Fall River Five Cents Sav. Bank*, 43 N. E. 93, 94, 165 Mass. 273.

The publication of a slander or libel or of a will means something different from the

publication of a newspaper. When used with reference to a book, magazine, or newspaper, the common as well as the technical meaning of the word is to issue; to send forth to the public for sale or general distribution. *State v. Bass*, 54 Atl. 1113, 1115, 97 Me. 484.

#### Of obscene writing.

"Publication," as used in *Rev. St. § 3893* [U. S. Comp. St. 1901, p. 2658], providing that every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, is unmailable matter, does not necessarily refer to the paper published as a whole, but it may properly be applied to an article published in the paper. An indecent or obscene article is a publication when mailed as an integral part of the original paper. *United States v. Harman* (U. S.) 38 Fed. 827, 828.

The word "publication," in the federal statute prohibiting the mailing of any obscene book, pamphlet, picture, paper, writing, letter, print, or other publication, applies to the articles enumerated, and marks each with the common quality indicated. The term requires that the prohibited matter is in the nature of a publication, and therefore an obscene, private, sealed letter is not within the statute. *United States v. Warner* (U. S.) 59 Fed. 355, 356; *Same v. Loftis* (U. S.) 12 Fed. 671, 672; *Same v. Comerford* (U. S.) 25 Fed. 902, 903; *Same v. Clark* (U. S.) 43 Fed. 574, 575. Contra, see *Same v. Gaylord* (U. S.) 50 Fed. 410, 411.

#### Of statute.

The word "published," in the constitutional provision providing that all the laws of the state of Illinois, and all official writings, and the executive, legislative, and judicial proceedings, shall be conducted, preserved, and published in no other than the English language, is broad enough to include, and, in its ordinary and usual acceptation, does include, publications in newspapers. The constitutional provision in question contemplates publications in newspapers as well as publications in books and pamphlets. *City of Chicago v. McCoy*, 26 N. E. 863, 365, 136 Ill. 344.

"Publication," as used in *Const. art. 7, § 21*, directing the Legislature to provide for the speedy publication of all statute laws, and of such judicial decisions as may be deemed expedient, is not confined to the limited signification of mere printing, but comprehends the exercise of additional labor and skill—as, for instance, that the general laws which cannot be enforced until published shall be published in the public journals (that being the most speedy method), or in pamphlet form (that being the most convenient for many purposes), or even by proclamation at the door of the court-

house in each county, or that the whole body of the laws and the decisions of the Supreme Court shall be published in the more permanent form of a bound book. *Sholes v. State* (Wis.) 2 Pin. 499, 512, 2 Chaud. 182.

Where an appropriation is made by the Legislature for publishing the journals of the Senate and the House and the session laws, such act is intended only to provide compensation for the printing and binding thereof. *State v. Lewis*, 52 Pac. 163, 164, 6 Idaho, 51 (citing *State v. Liedtke*, 12 Neb. 171, 10 N. W. 703).

"Published," as used in Const. art. 16, § 1, requiring proposed amendments to the Constitution to be published for three months next preceding the time for the meeting of the Legislature which is to act thereon, is complied with by a printing of such proposed amendments in the statutes, though they are issued 16 to 18 months prior to the election. *State v. Grey*, 32 Pac. 190, 191, 21 Nev. 378, 19 L. R. A. 134.

#### Of will.

The term "publication," used with reference to a will, signifies that the testator has done some act from which it cannot be concluded that he intended the instrument to operate as his will. It is otherwise defined to be the declaration by the testator at the time of signing or acknowledging a signature that the instrument is his will. A publication is a requisite to the due execution of a will. A parol publication of a revoked will, if made in the presence of two witnesses, is valid. In re *Simpson* (N. Y.) 56 How. Prac. 125, 134.

The rule that a will must be published by testator in the presence of the witnesses thereto means to proclaim or make known in the presence of the witnesses the nature of the instrument then executed, and this principally that it may be manifest that the testator knows what he is executing. *Compton v. Mitton*, 12 N. J. Law (7 Halst.) 70, 71.

"Publication," as used in reference to a will, signifies the act of declaring or making

known to the witnesses that the testator understands and intends the instrument subscribed by him to be his last will and testament. *Lewis v. Lewis* (N. Y.) 13 Barb. 17, 23.

"Publication," as the term is used in the law of wills, is the act or acts of the party by which he manifests that it is his intention to give effect to the paper as his last will and testament. *Watson v. Pipes*, 32 Miss. 451, 466 (citing 2 Greenl. Ev. § 561).

Publication is a declaration or act of the party showing the instrument to be his will. *Love v. Johnston*, 34 N. C. 355, 363.

Any communication indicating to witnesses that the testator intends to give effect to a paper as his will, by word, sign, motion, or conduct, is sufficient in law to constitute a publication. In re *Clafin's Will*, 50 Atl. 815, 816, 73 Vt. 129, 87 Am. St. Rep. 693.

Publication of a will may be made by act or sign as well as by words. All that is required is that the testator shall make known clearly, in any way by which one mind can communicate with another, that the writing which he desires the subscribing witnesses to attest is his will. *Robbins v. Robbins*, 28 Atl. 673, 50 N. J. Eq. 742.

A signing and sealing in the presence of two persons is a sufficient publication of a will. *Vincent v. Bishop of Sodor and Man*, 8 C. B. 905, 923.

Delivery is equivalent to the publication of a will. *Curtels v. Kenrick*, 3 Mees. & W. 461, 472.

The words "published and declared," rather than "executed and delivered," are the appropriate words to be used to exercise a power of appointment by a last will; the words "executed and delivered" being more appropriate to the allegation of the exercise of a power of appointment inter vivos. *Wooster v. Cooper*, 45 Atl. 381, 387, 59 N. J. Eq. 204.

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